

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

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SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595
Appellate Case No. 2023-001371

Steven McCarson,
as Personal Representative of the Estate of Louie Arches,

Respondent,

v.

THI of South Carolina at Magnolia Manor–Inman, LLC
d/b/a Magnolia Manor–Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical And Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

Appellants.

RECORD ON APPEAL

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

² “THISC” refers to Defendant/Appellant THI of South Carolina, LLC.

³ “FAS” refers to Defendant/Appellant Fundamental Administrative Services, LLC.

⁴ “FCOS” refers to Defendant/Appellant Fundamental Clinical and Operational Services, LLC.

⁵ “HVH” refers to Defendant/Appellant Hunt Valley Holdings, LLC.

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⁶ “THIB” refers to Defendant THI of Baltimore, LLC.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	
	)	
	)	C.A. No.: 2022-CP-42-02595
Steven McC Carson, as Personal	)	
Representative of the Estate of Louie	)	
Arches,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER DENYING DEFENDANTS'
	)	MOTIONS TO DISMISS AND
	)	COMPEL ARBITRATION
	)	OR PARTICIPATE IN DISCOVERY
THI of South Carolina at Magnolia	)	
Manor- Inman, LLC d/b/a	)	
Magnolia Manor-Inman, THI of	)	
South Carolina at Inman, LLC, THI	)	
of South Carolina, LLC, Hunt	)	
Valley Holdings, LLC,	)	
Fundamental Administrative	)	
Services, LLC, Fundamental	)	
Clinical and Operational Services,	)	
LLC, THI of Baltimore, LLC, and	)	
James H. Mack,	)	
	)	
Defendant(s).	)	

This matter was before the Court on Thursday, June 1, 2023, at 9:30 a.m. upon the Defendants' Motion to Compel Arbitration and six Motions to Stay State Court proceedings filed with the Court on February 3, 2023. The Motions were made pursuant to the Federal Arbitration Act, and Rules 12(b)(1) and 12(b)(6) of the SCRCF. Present representing the Plaintiff was John E. "Jay" Parker, Jr., Esq. Russell G. Hines, Esq. was present representing the Defendants. The Court Reporter was Linda D. Moffitt. Having listened to oral arguments from Counsel and having reviewed the parties' legal memoranda with attached exhibits, the Court respectfully denies the Defendants' Motions as more fully explained herein.

Background

This matter arises out of two civil actions – a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Louie Arches, Decedent (hereinafter “Decedent”). Steven McCarson grandson of the Decedent (hereinafter “Grandson”) is the Plaintiff in the wrongful death and survival actions. Grandson commenced this action on July 14, 2022, alleging wrongful death and survival claims as a result of the care and treatment provided to Decedent while he was a resident at Defendants’ assisted living facility. Specifically, Decedent fell numerous times between May and December of 2019 after being assessed as a high fall risk by Defendants. Decedent passed away on May 18, 2020. On February 3, 2023, Defendants filed a Motion to Compel Arbitration, relying on an Arbitration Agreement that was signed individually by Grandson on May 6, 2019, and also based upon durable financial and health care powers of attorney that were signed by Decedent on April 24, 2019, designating Grandson as his agent for the purposes of financial and health care decisions. Grandson signed the Arbitration Agreement instead of Decedent due to Decedent’s documented history of Alzheimer’s disease and dementia and inability to communicate, understand and manage the ordinary affairs of life. The durable financial power of attorney was not recorded at the time Grandson signed the Arbitration Agreement. The health care power of attorney was never recorded.

Arguments

Counsel for Plaintiff argues as follows: that while a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement because Grandson did not have authority to execute the Arbitration Agreement at the time it was entered by the parties.

Further, that the presumption in favor of arbitration only applies to the scope of an arbitration agreement. He argues that neither of the executed powers of attorney were sufficient to authorize Grandson to enter into an arbitration agreement on behalf of Decedent or his Estate. Plaintiff argues that Grandson did not have authority to waive Decedent's and/or the Estate's right to a jury trial. The durable financial power of attorney was not effective when the Arbitration Agreement was signed. Additionally, the power of attorney must be recorded in the county where Decedent resided at the time of recordation to be effective. On July 29, 2019, when the power of attorney was recorded, Decedent was residing at Defendants' facility located at 63 Blackstock Road, Inman, South Carolina, in Spartanburg County. Decedent had been residing there since his admission on May 6, 2019. However, the durable financial power of attorney was recorded in Cherokee County. The health care power of attorney did not grant Grandson authority to make unnecessary decisions that were incidental to Decedent's medical care, such as entering the Arbitration Agreement. The Adult Health Care Consent Act grants authority to make health care decisions, and not the decision to waive Decedent's, and his Estate's, right to a jury trial. He further contends that, to the extent that Defendants may maintain that Grandson is equitably estopped from denying the validity of the Arbitration Agreement due to his execution of an Admission Agreement, there was no merger of the agreements, as the language of the Arbitration Agreement indicates it to be a separate agreement. Plaintiff argues additionally, there was no evidence that Grandson had actual or apparent authority to act on Decedent's behalf at the time he entered the Arbitration Agreement, as there was no evidence that Decedent ever consciously represented or implied to Defendants that Grandson was his agent for the purposes of entering an

arbitration agreement. The scope of the Arbitration Agreement does not cover wrongful death claims by Decedent's statutory beneficiaries. Additional discovery on the issue of authority is unnecessary and would violate S.C. Code Ann. § 15-48-20. Counsel for Plaintiff argues in conclusion that for these reasons, Defendants' motions should be denied.

Defendants argue that the FAA governs the arbitration agreement. The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina Law. The arbitration agreement is valid on its face. Plaintiff's claims against the facility are within the scope of the arbitration agreement. Plaintiff should be estopped to deny the enforceability of the arbitration agreement and the admission agreement. The arbitration agreement and the admission agreement merged and should be construed together as a single contract. Plaintiff should be estopped from denying the enforceability of the arbitration agreement. And alternatively, the parties should be permitted to conduct additional discovery.

Applicable Law

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate. Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of

Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,749 S.E.2d 139 (Ct. App. 2013). The courts, not arbitrators, are charged with deciding certain “gateway matters” including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008).

In the applicable caselaw of Coleman v. Mariner Health Care, Inc., 407 S.C. 346,755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43,784 S.E.2d 679 (Ct. App. 2016); Solesbee v. Fundamental Clinical and Operational Services, LLC, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), S.C. courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility whom did not have actual authority to do such. In all three cases, the Court found that no implied authority and that no estoppel applied. Further, the Court refused to apply the doctrine of merger to admission and arbitration agreements because language in the contracts recognized the separateness of the admission and arbitration agreements.

A general health care power of attorney grants the attorney -in-fact authority to take actions incidental to the principal’s health care if they are necessary and required for admission. Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021);

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914).

Wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

"Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages."

S. C. Code Ann. §15-51-10 (1977).

The wrongful death beneficiaries are as follows:

"Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

S. C. Code Ann. §15-51-20 (Supp. 2001).

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 387 S.E.2d. 713 (Ct. App. 1989).

The wrongful death claim is a separate claim than the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated “necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions.” Id.

While dealing with a separate arbitration issue in a nursing home case and finding the arbitration agreement to be unenforceable, the Court of Appeals in Hodge v. Uni-Health Post-Acute Care of Bamberg, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), recognized the separateness of the statutory beneficiaries/estate’s claims from those of the patient/resident.

In Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019) the South Carolina Supreme Court held the non-signatories could not be bound by the arbitration agreement. “Equitable estoppel is ultimately a theory designed to prevent injustice, and it should be used sparingly.”

S.C. Code Ann. § 15-48-20 permits a court to “summarily” proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested.

Conclusion

The Court acknowledges and appreciates the amount of research and preparation for the hearing by Counsel, as well as, the professionalism of Counsel in their presentations to the Court. Having considered oral arguments from Counsel, the Court’s review of the record and the parties’ legal memoranda with attached exhibits, and the

applicable law, the Court hereby respectfully denies Defendants' Motions to Compel Arbitration and Stay State Court Proceedings. Further, the Defendants are not entitled to conduct discovery as to the Arbitration issues.

IT IS SO ORDERED.

The Honorable Grace Gilchrist Knie
Court of Common Pleas, Spartanburg County

Date: July 7th, 2023
Spartanburg, South Carolina



Spartanburg Common Pleas

Case Caption: Steven Mccarson , plaintiff, et al VS Thi Of South Carolina At Magnolia Manor-Inman Llc , defendant, et al

Case Number: 2022CP4202595

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2023-07-07 17:23:31 page 9 of 9

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Steven McCarson, as Personal	)	
Representative of the Estate of	)	
Louie Arches,	)	
Plaintiff(s),	)	INITIAL
	)	ORDER REGARDING MOTION
-vs-	)	FOR RECONSIDERATION
	)	
THI of South Carolina at Magnolia	)	
Manor-Inman, LLC, et.al.,	)	Case No.: 2022CP4202595
Defendant(s).	)	

A Rule 59 (e) SCRCPP motion to reconsider and to alter or amend has been received from the Defendant/s filed with and served on the Court on July 20th, 2023. Pursuant to Rule 59(f), SCRCPP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court will decide the issue on written submissions. Written submissions are not required by the non-moving party, but will be considered. The moving party may rely upon what has been filed or may supplement.

The deadline to file written submissions regarding this motion is 4:00 P.M. on Wednesday, July 26th, 2023. A copy of any documents filed must be forwarded immediately to the undersigned judge and to opposing counsel/self-represented party. The copies to the judge shall be sent via US Postal Service to 180 Magnolia Street, Spartanburg, South Carolina 29306, and/or by electronic mail to gkniej@sccourts.org and gkniesc@sccourts.org.

AND IT IS SO ORDERED.



Grace Gilchrist Knie, Judge
Circuit Court, Seventh Judicial Circuit

July 21st, 2023

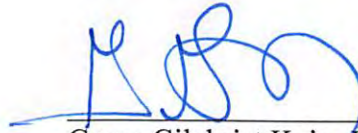
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
Steven McCarson, as Personal	)	
Representative of the Estate of	)	
Louie Arches,	)	
Plaintiff(s),	)	
	)	FINAL
-vs-	)	ORDER REGARDING MOTION
	)	FOR RECONSIDERATION
	)	
THI of South Carolina at Magnolia	)	
Manor-Inman, LLC, et.al.,	)	Case No.: 2022CP4202595
Defendant(s).	)	

A Rule 59 (e) SCRCPP motion to reconsider and to alter or amend has been received from the Defendants filed with and served on the Court on July 20th, 2023. The Motion to Reconsider was properly served on The Court per Rule 59(g) SCRCPP. As previously explained to Counsel, pursuant to Rule 59(f), SCRCPP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court indicated to the parties by prior order in the Initial Order Regarding Motion for Reconsideration that it would decide the issue on written submissions. Further, the Court informed the parties that written submissions were not required by the non-moving party, and that the moving party could rely upon its filings or supplement. The deadline to file written submissions regarding this motion has now passed.

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Defendants' Motion for Reconsideration made pursuant to Rule 59, SCRC, ¹ is respectfully DENIED.

AND IT IS SO ORDERED.



Grace Gilchrist Knie, Judge
Circuit Court, Seventh Judicial Circuit

July 26th, 2023

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRC.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	CIVIL ACTION NO.: 2022-CP-42-
	)	
STEVEN MCCARSON, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF LOUIE ARCHES.,	)	
	)	
	)	
	)	Summons
	)	(Jury Trial Requested)
	)	
v.	)	
	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-INMAN, LLC	)	
D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT	)	
INMAN, LLC, THI OF SOUTH	)	
CAROLINA, LLC, HUNT VALLEY	)	
HOLDINGS, LLC, FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC,	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC, THI	)	
OF BALTIMORE, LLC, AND JAMES H.	)	
MACK,	)	
	)	

TO THE ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at Post Office Box 487, Hampton, SC 29924, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

-Signature Page To Follow-

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ATTORNEYS FOR THE PLAINTIFF

July 14, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) CIVIL ACTION NO.: 2022-CP-42-

STEVEN MCCARSON, AS PERSONAL
REPRESENTATIVE OF THE ESTATE
OF LOUIE ARCHES.,

v.

THI OF SOUTH CAROLINA AT
MAGNOLIA MANOR-INMAN, LLC
D/B/A MAGNOLIA MANOR-INMAN,
THI OF SOUTH CAROLINA AT
INMAN, LLC, THI OF SOUTH
CAROLINA, LLC, HUNT VALLEY
HOLDINGS, LLC, FUNDAMENTAL
ADMINISTRATIVE SERVICES, LLC,
FUNDAMENTAL CLINICAL AND
OPERATIONAL SERVICES, LLC, THI
OF BALTIMORE, LLC, AND JAMES H.
MACK,

Complaint
(Jury Trial Requested)

COMES NOW the Plaintiff above named complaining of the Defendants alleges and says
as follows:

1. The Plaintiff, Steven McCarson, as Personal Representatives of the Estate of Louie Arches, seek a jury trial pursuant S.C. Code Ann. §15-51-10, the Wrongful Death Act, and other applicable statutory and/or common law other applicable statutory and/or common law and seek a jury trial pursuant to the Survival Action of South Carolina, S.C. Code Ann. §15-5-90 *et seq.* on behalf of the Estate for conscious pain and suffering of the deceased for all damages authorized by said statute.

2. That upon information and belief, Defendant THI of South Carolina at Magnolia Manor-Inman, LLC, d/b/a Magnolia Manor-Inman is a Delaware corporation with its principal

place of business in Spartanburg County, South Carolina. At the time of the acts complained of, Magnolia Mano-Inman was a skilled nursing home facility.

3. That upon information and belief, Defendant THI of South Carolina at Inman, LLC is a Delaware corporation with its principal place of business in Spartanburg County, South Carolina.

4. That upon information and belief, Defendant THI of South Carolina, LLC is a Delaware corporation with its principal place of business in Spartanburg County, South Carolina.

5. That upon information and belief Defendant Hunt Valley Holdings, LLC is a Delaware corporation with its principal place of business in Spartanburg County, South Carolina.

6. That upon information and belief, Defendant Fundamental Administrative Services, LLC is a Delaware corporation with its principal place of business in Spartanburg County, South Carolina.

7. That upon information and belief, Defendant Fundamental Clinical and Operational Services, LLC is a Delaware corporation with its principal place of business in Spartanburg County, South Carolina.

8. That upon information and belief, Defendant THI of Baltimore, LLC is a Delaware corporation with its principal place of business in Spartanburg County, South Carolina.

9. That upon information and belief, Defendant James H. Mack is a resident of Spartanburg County State of South Carolina and was the administrator of the Defendant Magnolia Manor-Inman.

10. On April 26, 2019, Mr. Arches was admitted to Magnolia Manor-Inman.

11. On admission Mr. Arches was assessed as being at high risk for falls.

12. On May 17, 2019, Mr. Arches was seen by the physician for a follow-up visit. In the notes it is documented that Mr. Arches had a fall last week. Mr. arches had bruising over his right eye.

13. On June 27, 2019, Mr. Arches tripped over the floor scale.

14. On August 28, 2019, Mr. Arches fell again.

15. On September 27, 2019 and September 28, 2019, Mr. Arches fell again.

16. On December 10, 2019, Mr. Arches fell again and suffered a contusion to his forehead above his right eye.

17. Mr. Arches passed away on May 18, 2020.

FOR A FIRST CAUSE OF ACTION
(Negligence/Gross Negligence)

18. While in the Defendants care, custody and control, Mr. Russell did suffer grave and severe injuries and humiliation at the facility as a direct and proximate result of the following negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, combining and concurring:

- a. In failing to provide oversight of Mr. Arches' safety and dignity;
- b. In failing to exercise due care, including without limitation, failing to care for Mr. Arches;
- c. In failing to provide appropriate administrative oversight and management to assure Mr. Arches was appropriately cared for;
- d. In failing to realize Mr. Arches needed a higher level of medical care;
- e. In failing to conduct an assessment of Mr. Arches' change in condition;
- f. In failing to communicate with appropriate staff to advise of a potential need of a higher level of care;

- g. In failing to exercise reasonable care for the safety and well-being of Mr. Arches under the circumstances;
- h. In failing to implement appropriate fall prevention measures;
- i. In failing to implement appropriate pressure sore preventions;
- j. In failing to have sufficient and properly trained staff to care for its residents;
- k. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mr. Arches;
- l. In failing to manage its revenue and income such that appropriate care may be rendered to Mr. Arches;
- m. In failing to implement an appropriate care plan;
- n. In failing to implement appropriate measures to prevent Mr. Arches from aspirating;
- o. In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; and
- p. In such other particulars as the evidence may establish.

19. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff's beneficiaries have suffered grief, sorrow, mental anguish and all of the damages which accompany the loss of a loved one; the beneficiaries have suffered pecuniary loss, all to the Plaintiff's actual and punitive damages.

20. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of the Defendants, the deceased Plaintiff suffered grave and severe injuries prior to his death; he was hospitalized; he incurred medical

expenses; he suffered conscious pain and suffering and mental anguish prior to his death; he suffered a loss of his dignity and individuality; he suffered a diminished quality of life prior to his death; his estate has incurred funeral expenses.

21. That by reason of the foregoing, the Plaintiff is informed and believes that he is entitled to judgment against the Defendants on behalf of the Estate of the deceased Plaintiff, for both actual and punitive damages; all of which damages were proximately caused by the Defendants' acts and/or omissions as are more fully set forth above, in an amount as may be set and determined by the trier of fact in this matter.

WHEREFORE, Plaintiff prays this Honorable Court for a Judgment against the Defendant for actual and punitive damages in an amount to be determined by a trier of fact, and any other and further relief as this Honorable Court deems just, proper, and equitable.

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AND

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ATTORNEYS FOR THE PLAINTIFF

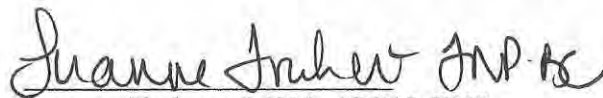
July 14, 2022.
Hampton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	CIVIL ACTION NO.: 2022-NI-42-
	)	
STEVEN MCCARSON, AS PERSONAL	)	
REPRESENTATIVE OF THE ESTATE	)	
OF LOIUS ARCHES.,	)	
	)	
	)	Affidavit of Merit
	)	Luanne Trahant, MSN, APRN, FNP-BC
	)	
v.	)	
	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-INMAN, LLC	)	
D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT	)	
INMAN, LLC, THI OF SOUTH	)	
CAROLINA, LLC, HUNT VALLEY	)	
HOLDINGS, LLC, FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC,	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC, THI	)	
OF BALTIMORE, LLC, AND JAMES H.	)	
MACK	)	

The Affiant, Luanne Trahant, MSN, APRN, FNP-BC, LNCC, having been duly sworn testifies as follows:

- 1) I am over 18, legally competent, and I make this affidavit based upon medical records provided to me as well as my background, education, training, and experience.
- 2) I am a registered nurse in Louisiana. I received my Bachelor of Science in Nursing from Northwestern State University in 1992 and a Master of Science in Nursing in 2005. I am a Board Certified Family Nurse Practitioner. I have practiced in the field of which I give this opinion for at least three out of the last five years.
- 3) I have been provided with the medical records from Oakridge Community Care, Magnolia Manor and Spartanburg Medical Center pertaining to Louis Arches.
- 4) A basic factual summary is as follows: Mr. Arches was admitted to Magnolia Manor on April 26, 2019. He was 81 years old at the time of admission. On admission Mr. Arches had short and long term memory loss, impaired decision making, unsteady gait with balance deficits and was incontinent of bowel and bladder.

- 5) On May 13, 2019, Mr. Arches was to have a psychiatric evaluation. The staff was to place a wander guard due to his behavior and declining mental status because of his dementia.
- 6) On May 17, 2019, Chrissie Middleton, DNP visited Mr. Arches for a nursing home follow-up visit and noted in her chart that he was sitting on the side of the bed with incomprehensible speech at times. She documented that the staff reported he had a fall in the "last week" and that Mr. Arches had bruising over his right eye.
- 7) The fall that Ms. Middleton referenced in her notes is not documented in the record and there are no assessments or evaluations found related to a fall that subsequently caused bruising to his eye.
- 8) On June 27, 2019, Mr. Arches tripped over the floor scale, but the record does not indicate any new interventions were indicated. Although there is no explanation of Mr. Arches actions at the time he tripped, previous notes do indicate that Mr. Arches was not able to safely ambulate without constant supervision.
- 9) The nursing notes indicate that Mr. Arches had a fall on August 28, 2019, but there are no entries in the record describing the circumstances of the fall or injuries.
- 10) Mr. Arches fell again on September 27, and 28, but again, there are no notes, evaluations, or assessments of how Mr. Arches fell, any injuries he may have sustained or any new interventions that were needed to keep him safe.
- 11) On December 10, 2019, the change in condition assessment for Mr. Arches notes that Mr. Arches had a fall with no injury. Further, the note indicates that Mr. Arches had fallen in his room behind his roommate's wheelchair and crawled around on the floor and pulled himself up. The nurse noted a swollen area to his forehead above his right eye and indicated that she started neurological checks.
- 12) Mr. Arches passed away on May 18, 2020.
- 13) The Defendants' employees failed to implement new interventions to prevent Mr. Arches from suffering multiple falls.
- 14) I reserve the right to alter, amend, add, or delete opinions as new information becomes available.


Luanne Trahant, MSN, APRN, FNP-BC

Sworn to and subscribed before me:



Notary Public

Date: 03/14/2022



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE
OF LOUIS ARCHES,

PLAINTIFF,

vs.

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI)
OF BALTIMORE, LLC AND JAMES H.)
MACK,

DEFENDANTS.

**DEFENDANT THI OF SOUTH
CAROLINA AT MAGNOLIA MANOR-
INMAN, LLC D/B/A MAGNOLIA
MANOR-INMAN'S ANSWER TO
PLAINTIFF'S COMPLAINT**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman (hereinafter this "Defendant" or "the facility"), *subject to and without waiving its right to compel this matter to arbitration*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. Responding to Paragraph 2 of Plaintiff's Complaint, this Defendant admits it is organized pursuant to the laws of the State of Delaware and operates the skilled nursing facility at issue in Plaintiff's Complaint located in Spartanburg County, South Carolina. Any allegations inconsistent with this response is denied and strict proof is demanded thereof.

4. The allegations set forth in Paragraphs 3, 4, 5, 6, 7, 8, and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

5. Responding to the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Arches' medical records for their contents and his death certificate for the date of death. This Defendant denies any and all allegations inconsistent with Mr. Arches' medical records and death certificate or which are intended to allege liability or damages against this Defendant. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Mr. Arches during his residency at the facility was at all times in compliance with the governing standard of care.

6. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. There was no negligence, recklessness, gross negligence or wantonness on the part of the Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

17. This Defendant asserts that it complied with the applicable standard of care at all times during the timeframe alleged in the Complaint and did not proximately cause damage to the Plaintiff.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. The care and treatment provided to Plaintiff's decedent provided by this Defendant was at all times in compliance with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

19. Plaintiff's claims in whole or in part are barred by the statute of limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on the following page]

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant THI of South Carolina

at Magnolia Manor-Inman, LLC d/b/a Magnolia

Manor-Inman

Charleston, South Carolina

Dated: August 22, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE
OF LOUIS ARCHES,

PLAINTIFF,

vs.

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI)
OF BALTIMORE, LLC AND JAMES H.)
MACK,

DEFENDANTS.

**DEFENDANT THI OF SOUTH
CAROLINA, LLC'S ANSWER TO
PLAINTIFF'S COMPLAINT**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

The Defendant THI of South Carolina, LLC (hereinafter this "Defendant") hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the

extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. The allegations set forth in Paragraphs 2 and 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to the allegations set forth in Paragraph 4 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 5, 6, 7, 8, and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

7. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This matter must be stayed against this Defendant pursuant to a valid arbitration agreement entered into at the time of Plaintiff's decedent's admission to the nursing facility at issue. Pursuant to Section 3 of the Federal Arbitration Act, as codified in 9 U.S.C. § 3, this Defendant hereby gives notice of its intent to file a Motion to Stay.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

19. This Defendant would assert that it owes no duty of care to the Plaintiff in either tort or contract. To the extent this Defendant did owe Plaintiff a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on the following page]

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant THI of South Carolina,
LLC

Charleston, South Carolina

Dated: August 22, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT FUNDAMENTAL
ADMINISTRATIVE SERVICES, LLC'S
ANSWER TO THE PLAINTIFF'S
COMPLAINT**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Fundamental Administrative Services, LLC (hereinafter this "Defendant"), hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the

extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. The allegations set forth in Paragraphs 2, 3, 4, and 5 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 7, 8, and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

7. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This matter must be stayed against this Defendant pursuant to a valid arbitration agreement entered into at the time of Plaintiff's decedent's admission to the nursing facility at issue. Pursuant to Section 3 of the Federal Arbitration Act, as codified in 9 U.S.C. § 3, this Defendant hereby gives notice of its intent to file a Motion to Stay.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

19. This Defendant would assert that it owes no duty of care to the Plaintiff in either tort or contract. To the extent this Defendant did owe Plaintiff a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on the following page]

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: August 24, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT FUNDAMENTAL
CLINICAL AND OPERATIONAL
SERVICES, LLC'S ANSWER TO THE
PLAINTIFF'S COMPLAINT**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Fundamental Clinical and Operational Services, LLC (hereinafter this "Defendant"), hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the

extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. The allegations set forth in Paragraphs 2, 3, 4, 5, and 6 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to the allegations set forth in Paragraph 7 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 8 and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

7. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This matter must be stayed against this Defendant pursuant to a valid arbitration agreement entered into at the time of Plaintiff's decedent's admission to the nursing facility at issue. Pursuant to Section 3 of the Federal Arbitration Act, as codified in 9 U.S.C. § 3, this Defendant hereby gives notice of its intent to file a Motion to Stay.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

19. This Defendant would assert that it owes no duty of care to the Plaintiff in either tort or contract. To the extent this Defendant did owe Plaintiff a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on the following page]

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

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Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC

Charleston, South Carolina

Dated: August 24, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT HUNT VALLEY
HOLDINGS, LLC'S ANSWER TO THE
PLAINTIFF'S COMPLAINT**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Hunt Valley Holdings, LLC (hereinafter this "Defendant"), *subject to and without waiving its right to have this matter dismissed for lack of personal jurisdiction*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the

extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. The allegations set forth in Paragraphs 2, 3, and 4 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraphs 6, 7, 8, and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

7. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed and Defendant hereby reserves the right to move to dismiss Plaintiff's Complaint on the stated basis.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This matter must be stayed against this Defendant pursuant to a valid arbitration agreement entered into at the time of Plaintiff's decedent's admission to the nursing facility at issue. Pursuant to Section 3 of the Federal Arbitration Act, as codified in 9 U.S.C. § 3, this Defendant hereby gives notice of its intent to file a Motion to Stay.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further

assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. This Defendant would assert that it owes no duty of care to the Plaintiff in either tort or contract. To the extent this Defendant did owe Plaintiff a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[Signature block on the following page]

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

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tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Hunt Valley Holdings,
LLC

Charleston, South Carolina

Dated: August 24, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEVEN MCCARSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS ARCHES,	)	CASE NO. 2022-CP-42-02595
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT INMAN, LLC, THI OF SOUTH CAROLINA, LLC, HUNT VALLEY HOLDINGS, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, THI, OF BALTIMORE, LLC, AND JAMES H. MACK,	)	
	)	
DEFENDANTS.	)	
	)	

DEFENDANT THI OF BALTIMORE, INC.'S ANSWER TO THE PLAINTIFF'S COMPLAINT

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

The Defendant THI of Baltimore, Inc., misidentified in Plaintiff's Complaint as "THI of Baltimore, LLC" LLC (hereinafter this "Defendant"), *subject to and without waiving its right to have this matter dismissed for lack of personal jurisdiction*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. The allegations set forth in Paragraphs 2, 3, 4, 5, 6, and 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to the allegations set forth in Paragraph 8 of Plaintiff's Complaint, this Defendant admits it is a corporation organized under the laws of the state of Delaware but denies the remaining allegations set forth in the above Paragraph.

5. The allegations set forth in Paragraph 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

6. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

7. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed and Defendant hereby reserves the right to move to dismiss Plaintiff's Complaint on the stated basis.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. This matter must be stayed against this Defendant pursuant to a valid arbitration agreement entered into at the time of Plaintiff's decedent's admission to the nursing facility at issue. Pursuant to Section 3 of the Federal Arbitration Act, as codified in 9 U.S.C. § 3, this Defendant hereby gives notice of its intent to file a Motion to Stay.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

13. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

14. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

20. This Defendant would assert that it owes no duty of care to the Plaintiff in either tort or contract. To the extent this Defendant did owe Plaintiff a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant THI of Baltimore, Inc.,
misidentified in Plaintiff's Complaint as "THI of
Baltimore, LLC"

Charleston, South Carolina

Dated: August 24, 2022

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI)
OF BALTIMORE, LLC AND JAMES H.)
MACK,)

DEFENDANTS.)

**ANSWER TO PLAINTIFF'S COMPLAINT
BY DEFENDANT JAMES H. MACK**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

Defendant James H. Mack (hereinafter this "Defendant"), *subject to and without waiving his right to compel this matter to arbitration*, hereby answers the Plaintiff's Complaint and alleges and states as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. The allegations set forth in Paragraph 1 of Plaintiff's Complaint are legal conclusions or non-factual allegations which require no response from this Defendant. To the

extent a response is required, those allegations are denied to the extent they assert or imply liability and/or damages as to this Defendant.

3. The allegations set forth in Paragraphs 2, 3, 4, 5, 6, 7, and 8 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

4. Responding to the allegations set forth in Paragraph 9 of the Plaintiff's Complaint, this Defendant admits he was the administrator of Magnolia Manor-Inman while Mr. Arches was a resident. The remainder of the allegations in the above Paragraph are denied and strict proof is demanded thereof.

5. Responding to the allegations set forth in Paragraphs 10, 11, 12, 13, 14, 15, 16, and 17 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Arches' medical records for their contents and his death certificate for the date of death. This Defendant denies any and all allegations inconsistent with Mr. Arches' medical records and death certificate or which are intended to allege liability or damages against this Defendant. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Mr. Arches during his residency at the facility was at all times in compliance with the governing standard of care.

6. This Defendant denies the allegations of Paragraphs 18, 19, 20, and 21 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

8. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant should be submitted to arbitration pursuant to a valid arbitration agreement entered

into between the parties to this litigation and therefore this matter should be dismissed pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure and compelled to arbitration.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

10. There was no negligence, recklessness, gross negligence or wantonness on the part of this Defendant which proximately caused or contributed to Plaintiff's alleged injuries.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

11. Plaintiff's claims for punitive damages and an award of punitive damages would violate those clauses of the Constitution of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. §15-32-510, §15-32-520, §15-32-530, and §15-32-540 *et. seq.*

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

12. The Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure Rule 12(b)(6).

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

17. Plaintiff's claims in whole or in part are barred by the statute of limitations.

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

18. This Defendant hereby gives notice that he intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend his Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by his Codefendants in this matter.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that he be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant James H. Mack

Charleston, South Carolina

Dated: August 24, 2022

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT
3
4 Steven McCarson, et al,)
5 Plaintiff,) TRANSCRIPT OF RECORD
6) 2022-CP-42-02595
7) -VS-
8 THI of South Carolina at)
9 Magnolia Manor-Inman, et al,)
10) June 1, 2023
11) Spartanburg, South Carolina
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B E F O R E:

HONORABLE GRACE GILCHRIST KNIE, JUDGE

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

JOHN E. PARKER, JR., ESQUIRE
Attorney for the Plaintiffs

RUSSELL GRAINGER HINES, ESQUIRE
Attorney for the Defendants

Linda D. Moffitt
Circuit Court Reporter

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INDEX

Motion -- page 3.
No sworn testimony.
No exhibits entered into evidence.

1 (Proceedings June 1, 2023)

2 THE COURT: Okay. Counsel, if you will, identify
3 yourselves for the record.

4 MR. PARKER: Jay Parker appearing on behalf of the
5 plaintiff.

6 THE COURT: Thank you.

7 MR. PARKER: Thank you.

8 MR. HINES: And Russ Hines appearing on behalf of --
9 well, everyone else, all the defendants.

10 In the -- in the caption there's one party that is
11 still in the caption that has been dismissed from the case,
12 which is THI of South Carolina at Inman, LLC, but every
13 other party we represent.

14 THE COURT: Okay. So, in that the defendants are the
15 moving parties, I will hear from counsel for defendants,
16 and then I will let Mr. Parker argue his position, and then
17 I will let Mr. Hines reply.

18 I am pulling this up. I see that the last filing was
19 on yesterday. And is everybody aware of that, a memo in
20 support by TH -- well, it's listed as by THI of South
21 Carolina, but of defendants?

22 MR. PARKER: Your Honor, we -- I believe we filed a
23 memo in opposition and some exhibits late yesterday. I
24 know we emailed to Mr. Hines' office.

25 MR. HINES: And we have those, those filings.

1 MR. PARKER: But I don't think that they've been --

2 THE COURT: I don't see them in the court's file. Did
3 you email them to us?

4 MR. PARKER: I do have copies of the exhibits with me
5 that I can hand up to you as well.

6 THE COURT: Let me just refresh. You know there's
7 always some, a little, delay in submitting and then it
8 making its way into the file.

9 It just showed up. Okay. So you don't need to hand
10 those up unless you want to. Okay.

11 MR. PARKER: I'll hand them up if you ask me to. How
12 about that? I've got them here. If there's something I'm
13 talking about that you want to have a hard copy in front of
14 you, I'll be happy to come up and give it to you.

15 THE COURT: Okay. I try to fight the urge. It's --
16 you know, it's just for those of us my age, I'm a lot older
17 than -- I appear to be a lot older than both of you, but
18 I'm just used to holding the paper and then it's just
19 stacked in my office, and then we scan everything, and
20 then we shred it.

21 So okay. So, Mr. Hines, happy to hear from you.

22 MR. HINES: Thank you, Your Honor. May it please the
23 Court. Again, Russ Hines for all of the moving parties.

24 Your Honor, I believe there are a total of seven
25 motions on your roster today, but really one of those

1 motions is the focus of today's hearing, and that is a
2 motion to compel arbitration. It is made by the defendant
3 THI of South Carolina at Magnolia Manor Inman, LLC, d/b/a
4 Magnolia Manor Inman, which is a skilled nursing facility.
5 I'll just call it the facility for shorthand.

6 All of the other moving parties have moved to stay the
7 litigation against them, and the way those motions are the
8 stay -- the two groups of motions, or one motion, the
9 motion to compel arbitration and the group of six motions to
10 stay -- the way they work together is that the motions to
11 stay ask the Court to stay the litigation pending the
12 results of the motion to compel arbitration and any
13 arbitration proceedings that arise therefrom.

14 So, and the basis I should say just at the outset, and
15 I think that will pretty much wrap up what needs to be said
16 about the motions to stay, is under rule -- excuse me --
17 Section 3 of the Federal Arbitration Act which provides for
18 a stay when an issue in a case is -- is referable to
19 arbitration. And we cite that in our memo, and also the
20 case. I think it's Stokes vs. Metro Life where the Court
21 of Appeals recognizes the clear language there providing
22 for a stay under Section 3 of the F.A.A.

23 So, with that I think basically that is all to say
24 that those six motions to stay tag along with and hinge
25 upon the outcome of the motion to compel arbitration, which

1 I'll get to now.

2 Your Honor, this is a wrongful death and survival
3 action, arises in the nursing-home context. Again, the
4 facility is -- well, it's a skilled nursing facility. The
5 nursing home resident involved is Loius Arches --
6 Mr. Arches.

7 He was admitted to the facility in May of 2019. At
8 the time of his admission he -- his grandson, Mr. McCarson,
9 who is now the plaintiff and his personal representative in
10 this case -- helped him with the admission process.

11 And in the course of doing that he executed an
12 admission agreement and an arbitration agreement on behalf
13 of Mr. Arches.

14 Now, Your Honor, there is a fairly good amount of
15 paperwork on this motion to include what was filed
16 yesterday by both sides. And-but where I want to focus the
17 Court's attention is on our merger and equitable estoppel
18 argument.

19 And there is some discussion in plaintiff's opposition
20 about our motion that argues against our motion on the
21 basis that there's no power of attorney that would provide
22 authorization.

23 I want to make clear that this argument that I'm
24 making, and this is the chief argument that I have, is
25 merger and equitable estoppel, and that argument exists

1 outside of any concern about power of attorney, or, for
2 that matter, any -- any agency or related concept. And
3 it's a two -- sort of a two-prong or one-two punch, you
4 might call it.

5 It's the first part is merger, and what the merger is
6 going to be merging the arbitration agreement and the
7 admission agreement. And then if the Court will go along
8 with me that far, the next part of it is estoppel,
9 equitable estoppel, on the basis of what's called direct
10 benefits estoppel. So that's a little bit of a road map of
11 where I'm headed.

12 Merger applies like this: we have South Carolina law,
13 and I guess the primary case to look at is a case called
14 Coleman vs. Mariner Health Care.

15 There are some other cases, and I understand I might
16 be a little bit of a broken record in front of Your Honor.
17 I have had the occasion to argue this a few times, so I
18 will try to speed it along. But Coleman. And there are
19 some cases that follow Coleman. A case called Thompson, a
20 called Hodge. They're cited in our brief. And then most
21 recently a case called Solesbee. And I'll at least briefly
22 touch on all of those cases.

23 But starting with Coleman, Coleman does recognize that
24 South Carolina law provides for the merger of -- we have
25 separate instruments, multiple instruments that are signed

1 by the same parties, the same time, the same purpose in the
2 course of the same transaction.

3 If all of those coincide the documents are presumed to
4 merge and to be treated as one contract unless there is
5 evidence of the contrary intentional.

6 Now, in the Coleman case, the Coleman court looked at
7 documents that were, in fact, quite, in the general
8 sense -- there are specifics factually that I need to
9 address and make our facts different. But in the general
10 sense you were talking in Coleman about an arbitration
11 agreement that was signed in conjunction with an admission
12 agreement to a nursing facility.

13 In that circumstance the Coleman court clearly
14 concluded that all of those four boxes I mentioned -- time,
15 parties, purpose, transaction -- they'd all been checked.

16 Where the Coleman court found against merger, it was
17 on the specific facts that it concluded or it determined
18 that the lower court had properly concluded against merger,
19 that there was an intention not to merge even with those
20 four boxes being checked, even with the coincidence of
21 those things. So, and those were in particular in Coleman.

22 The Coleman court looked at the admission agreement --
23 or excuse me -- the arbitration agreement. And it cited
24 language in the arbitration agreement that indicated to the
25 Coleman court that there was an intention expressed right

1 there on the face of the instruments involved to keep these
2 two documents separate, now, and it looking particular to
3 language in an entire agreement portion of the document.

4 Now, I make two points to distinguish our case from
5 that one.

6 Number one, there is no entire agreement provision in
7 our arbitration agreement, and the admission agreement
8 here, unlike in Coleman, it specifically contemplates or
9 expressly contemplates that it will not be made, what I
10 will call, a lack of separatedness.

11 The Coleman court in analyzing this referred to a
12 concept that it called the separatedness, which is an
13 intention to maintain a separate character between multiple
14 instruments.

15 And if the Court will indulge a slight different
16 reading -- and this is from the entire agreement provision
17 of our admission agreement, which is on page 12. This is a
18 Defendant's Exhibit 1 to the memo we filed yesterday.

19 "The undersigned" -- and in this case it's
20 Mr. McCarson -- "further acknowledges that he/she has
21 received and read the admission handbook and other
22 admissions materials and understands these documents are
23 made part of this agreement by reference herein."

24 So that is a -- a very much material difference
25 between the facts that drove the Coleman decision and the

1 facts here.

2 In Coleman, again, you had the entire agreement
3 language that the Court found to -- to evidence
4 separatedness between agreements.

5 This one we have the exact opposite. We have language
6 in the admission agreements, entire agreement clause, that
7 expressly contemplates other admissions materials being a
8 part of the agreement.

9 The language expressly contemplates a reaching out
10 beyond the bounds of this particular instrument
11 encompassing other instruments within the agreement.

12 And the question then becomes, well, you know, is the
13 arbitration agreement admissions material, and certainly it
14 is. That is stated -- we conclude an explanation of that
15 in the language in the affidavit of Katilia Brannon who is
16 the admissions representative who signed or countersigned
17 the admission agreement and the arbitration agreement in
18 this case, alongside Mr. McCarson.

19 They were signed again at the same time by the same
20 parties, the same purpose, and of course the same
21 transaction, and they're both signed without question in
22 conjunction with the admission.

23 There's no question that the arbitration agreement was
24 only signed in conjunction with the admission. And, in
25 fact, although I have to acknowledge that neither the Hodge

1 case or another case called Stott vs. White Oak Manor, that
2 the Court was not specifically -- it's attention was not
3 drawn specifically to the question of whether -- construing
4 the language, other admissions materials, but I've cited
5 this in our brief if the Court will just indulge me a
6 moment. I just would like to refer to the language that
7 the Court of Appeals used just in -- and it only seemed as
8 if of course the arbitration agreement is -- is what you
9 would consider it as part of the admissions process. It's
10 from the Stott case. This is cited in our memo on page 20.

11 "The same day as decedent's admission to White Oak,
12 Stott acting as decedent's authorized representative signed
13 White Oak's admission documentation, including the
14 arbitration agreement."

15 This is -- so, obviously, I'll say just -- again, that
16 was not in the context -- that was in the context of the
17 court's factual recitation, but that is indeed the court's
18 language.

19 So I don't want to overstate and say that the Court
20 was actually adjudicating the question of whether it was or
21 was not arbitration -- excuse me -- admissions
22 documentation, but in the way that the Court wrote about
23 the facts of that case, I would submit that it -- and it's
24 entirely consistent with what I think is just the only
25 logical interpretation. But of course these documents

1 signed in the course of the admissions process, which
2 include an arbitration agreement or admissions
3 documentation.

4 Similarly, in the case of Hodge -- this is the Court's
5 language here -- her husband executed various documents
6 related to her admission, including an arbitration
7 agreement and the admission agreement.

8 So with those ideas or that in mind, Your Honor,
9 that's where I go back to the idea that we do not have what
10 we had in Coleman, this idea of separatedness that was
11 expressed as the Coleman court found on the face of one of
12 the instruments involved.

13 But here we have the exact opposite. We have a
14 connectedness and a -- and a -- a relation there to other
15 admissions materials and we, again, for the reasons I've
16 stated, believe quite clearly that these other admissions
17 materials would include the arbitration agreement.

18 Now, it may be argued that the arbitration agreement
19 is not a mandatory agreement, which is true. It -- it was
20 not required for admission to the facility.

21 However, that is not actually probative of intent
22 relative to merger. All that means is that the arbitration
23 agreement didn't have to be signed for this admission. It
24 was voluntary. However, once it was signed, it then came
25 into existence, and it exists in conjunction with the

1 admissions process.

2 So, I believe to argue -- and this requires me to skip
3 just a moment ahead -- but in the Solesbee case one of the
4 reasons why the Court of Appeals affirmed the denial of the
5 arbitration, the motion to compel arbitration, was on the
6 basis of the voluntariness of the arbitration agreement and
7 that, according to the Solesbee court, found that --
8 reflected some evidence of the contrary intent to merger.

9 Respectfully, in that case Solesbee is still subject,
10 I would note, to -- to being reviewed by the Supreme Court.
11 The day to petition for rehearing is treated for service
12 and not gone.

13 But I would have to be clear that that case in
14 Solesbee, we do address this in a little more depth in our
15 briefing. But Solesbee involves identical form documents
16 in terms of the admission agreement and the arbitration
17 agreement.

18 So I -- I want to -- I believe I can distinguish
19 Solesbee based upon arguments that the Court of Appeals
20 either didn't address or, respectfully, that the Court may
21 have misapprehended. But I certainly don't want to fail to
22 alert the Court's attention to Solesbee and acknowledge
23 that the admission agreement and arbitration agreement in
24 Solesbee were indeed the same form documents that are
25 involved here.

1 So, if I can skip just a little bit back to Coleman,
2 that -- the Coleman court, again, found against merger on
3 facts as it was a factor -- but the key point for Coleman
4 to make my argument is that it did acknowledge the South
5 Carolina law of merger, which is the parties' time, purpose
6 and transaction. You check all of those boxes, you've got
7 yourself a presumptive merger.

8 Then and then I can -- I can -- Your Honor, this is in
9 our briefing, but I know you've heard me, you know, make
10 this argument before, and I don't want to try the Court's
11 patience.

12 So I might perhaps sort of, well, rely on our briefing
13 or any questions that the Court may have before getting too
14 deep into the weeds of merger, because I want to make sure
15 I've made the point. We have a legal basis to merge, which
16 comes from Coleman -- purpose, parties, transaction, time.
17 You check all of those boxes, which we have.

18 If you -- if you agree that we have a merger of
19 admission agreement and arbitration agreement, I submit
20 that it gets quite simple and straightforward to then find
21 that there -- that equitable estoppel would apply to estop
22 the plaintiff, who in this case is Mr. Arches' estate --
23 estop the plaintiff from denying the enforceability of the
24 arbitration agreement that is merged with the admission
25 agreement.

1 And that is because under the direct benefits theory
2 of estoppel the -- the idea here is that you sort of -- you
3 can have your cake and eat it too. You can't receive
4 direct benefits under certain provisions of the contract
5 and then deny the enforceability of other provisions of the
6 same contract.

7 And here if we have a merger -- and, again, I of
8 course would argue that we do -- of admission and
9 arbitration agreements, there is no question that there are
10 direct benefits that have been -- that were indeed received
11 by Mr. Arches by his admission -- room, board, various
12 care, treatments, other services.

13 Now, obviously, I realize here that we're in the
14 context of a lawsuit where the plaintiff is saying that
15 there was a problem with the care, that it was deficient
16 care, there was some fault here. And of course we -- we
17 deny that in terms of the liability.

18 My point here though is to say that all of that, all
19 of those disputed allegations, for one, they remain in
20 dispute. So it's not -- at this juncture it certainly
21 wouldn't be proper for the Court to decide that, yes, those
22 allegations are correct and therefore there was no benefit
23 to Mr. Arches.

24 But maybe, more importantly, the direct benefits
25 analysis, you know, it's not -- it does not -- whether or

1 not Mr. Arches received a benefit under the contract does
2 not hinge on whether or not he can prevail or his estate
3 prevails in this case.

4 The claims that are made in this case do not encompass
5 the entirety of his stay there. They don't encompass every
6 bit of care, every bit of treatment, every night's stay,
7 every meal. I mean, those are all benefits. Every one of
8 those is a benefit.

9 So, again, the idea here, Your Honor, is merge
10 admission and arbitration agreements. If they're one --
11 one -- one contract by way of merger, then you have
12 equitable estoppel that applies because, without question,
13 Mr. Arches would have received or did receive direct
14 benefits directly because of the admission agreement, which
15 is now a part and parcel of or a part of one contract with
16 the arbitration agreement, and you cannot accept direct
17 benefits under certain provisions of the contract and deny
18 the enforceability of other provisions. In this case those
19 other provisions would be the arbitration agreement.

20 And I guess the last thing I might note before I stop
21 this monologue and allow opposing counsel an opportunity to
22 reply and then, of course, answer any questions that Your
23 Honor may have, and is that there is an argument that the
24 plaintiff makes about that even if we are right about this
25 being able to -- and I'm certainly not putting words in

1 plaintiff's mouth. Plaintiff denies that we're -- denies
2 our motion outright that we should be able to compel
3 arbitration as to the wrongful death or the survival, but
4 as to both of them. But the plaintiff makes a particular
5 argument that wrongful death is not subject to arbitration.

6 And on that one it has to do with the idea that the
7 wrongful death claim is brought for the benefit of the
8 statutory beneficiaries who did not sign. And there's no
9 argument that they either signed an arbitration agreement
10 or had the arbitration agreement signed on their behalf or
11 that there's some equitable concept that applied directly
12 to them.

13 Your Honor, respectfully, that -- that argument is --
14 is without merit for a few reasons. Number one, there's a
15 case called Dean vs. Heritage Healthcare. In that case our
16 Supreme Court recognized that it would be wrong, it
17 would be -- it would violate the F.A.A., the Federal
18 Arbitration Act, to rule that wrongful death claims were
19 not subject to arbitration.

20 And the reason it would violate the F.A.A. is because
21 the F.A.A. requires that arbitration agreements be placed
22 on equal footing with all other contracts under the general
23 law of -- of the state of this general contract law.

24 Now, I pointed to the F.A.A. as it requires -- the
25 F.A.A. actually came about in response to concerns that the

1 Congress had about a reluctance on the part of the
2 judiciaries in the states to enforce arbitration
3 agreements. And so the F.A.A. says, yes, you can refuse to
4 enforce an arbitration agreement for the same reason that
5 you could refuse to enforce any contract but you cannot
6 make it more difficult to enforce an arbitration agreement.
7 That violates the F.A.A. You're not placing arbitration
8 agreements on equal footing.

9 And so the Dean court recognized that there's that
10 problem with the F.A.A. But pressing more fundamentally
11 that the -- the wrongful -- the question of the
12 enforceability of the arbitration agreement, and/or in this
13 case technically it's not the enforceability of the
14 arbitration agreement so much as it is the -- the plaintiff
15 being estopped to deny that it's enforceable, is that the
16 question there really hinges on whether or not those
17 arguments are valid against the plaintiff, not against a
18 wrongful death beneficiary.

19 The wrongful death beneficiary is only the beneficiary
20 of the claim anyway. So it doesn't -- it's not the
21 claimant themselves. The claim still belongs to the
22 estate, has to be pursued by the P.R. of the estate.

23 So, it's -- and so any defense that would be good, any
24 defense, avoidance anything that would be good against the
25 party bringing the case, which is the plaintiff, is good

1 regardless of the interest that the -- the wrongful death
2 beneficiaries would have in recovery.

3 For instance, let's just imagine, Your Honor, that
4 there was, oh, contributory -- excuse me -- a comparative
5 negligence defense, something like that that could be
6 argued.

7 well, that defense -- obviously, none of the -- the
8 wrongful death beneficiaries would -- would have been
9 comparative negligent -- comparatively negligent. That's
10 not what that would be about. It'd be about the conduct of
11 the decedent.

12 well, to the extent this is good and this arbitration
13 can be compelled as to the decedent's estate that covers
14 both the wrongful death and the survival claims with equal
15 force.

16 So I can answer, you know, any more questions that the
17 Court might have on that, but I just noticed that part of
18 the plaintiff's argument and I wanted to address it.

19 And, well, I realize it certainly feels like I've been
20 up here for quite a while. So, but, Your Honor, I'm happy
21 to rely on our brief for clearly maybe some of the -- some
22 details. I appreciate if Your Honor will allow me just a
23 moment to respond to what opposing counsel might say, and
24 of course I'm happy to address any -- any questions that
25 Your Honor may have.

1 THE COURT: Thank you.

2 I -- I just want to make sure. I've looked at the
3 admission agreement and the arbitration agreement, and I
4 see that both of the documents were signed on May the
5 6th of 2019 by the grandson, Mr. McCarson. And I also saw
6 the affidavit of the employee, Ms. -- is it Katilia
7 Brannon?

8 MR. HINES: I've been saying that myself. I'm not
9 certain about the pronunciation, but that's -- that's my
10 opinion.

11 THE COURT: And so I -- I understand that there was
12 not a valid power of attorney at the time of his admission
13 to the facility. Did he not have a valid power of attorney
14 of anyone at that time, and/but especially not
15 Mr. McCarson?

16 MR. HINES: Well, Your Honor, that gets a little
17 more nuance. I guess that's part of the reason as a
18 strategic matter that the argument that we want to present
19 to Your Honor operates outside of the bounds of that P.O.W.

20 But there -- my understanding is that a healthcare
21 power of attorney -- now, healthcare power of attorney,
22 despite what I might argue to the contrary, even because I
23 do believe has some language in it to argue this, but in a
24 case called Arredondo in recent years, our Supreme Court
25 has said the standard language of the South Carolina

1 Healthcare Power of Attorney doesn't -- it doesn't give
2 you -- the authority that it grants doesn't go so far as to
3 allow the attorney in fact to waive or to agree to
4 arbitration. There also is --

5 THE COURT: But Mr. McCarson did not -- he did not
6 have the power of attorney, any type of power of attorney,
7 at this time.

8 MR. HINES: Well, plaintiff's counsel -- I'd be happy
9 to let him address that because he actually might be able
10 to do it better than I do. He did have a healthcare power
11 of attorney at the time.

12 And I believe there is also a general -- a durable
13 power of attorney, but the plaintiffs have made an argument
14 about that one. One, they argue that it wouldn't provide
15 authorization anyways, and there's a question about the
16 capacity of Mr. Arches.

17 THE COURT: He had dementia.

18 MR. HINES: Yeah. And so -- and so that gets a little
19 more thorny. I would say though that does play in a little
20 bit to my -- my alternative or fallback issue as to the
21 extent that we're -- that those facts are to be delved
22 into. That would be a good -- if the Court --

23 THE COURT: Y'all haven't done any discovery, right, I
24 mean, because of the request to --

25 MR. HINES: That's right, Your Honor.

1 THE COURT: -- to stay everything and move it to
2 arbitration. And if you did start discovery you'd just --
3 cause a big problem for your own arguments, right. And
4 you're just basing what you all know on what you all have
5 filed and the documents that you have right now. But no
6 discovery has been conducted, right?

7 MR. HINES: That's correct, Your Honor.

8 And I think, as you were alluding to, the concern on
9 our part is, is that you find yourself in at least a bit of
10 a catch-22 situation if you are the proponent of
11 arbitration --

12 THE COURT: Right.

13 MR. HINES: -- because you have concern about -- about
14 being said to have waived your arbitration rights by using
15 the tools of litigation to pursue them.

16 And so that's why we do include in our motion an
17 alternative argument about the Court allowing us in a very
18 limited and tailored way certain discovery.

19 But that argument is -- I'll call it a fallback or an
20 alternative argument because, again, based upon the merger
21 equitable estoppel argument we think we have the -- we have
22 an argument that here and now is an argument that is
23 sufficient to -- to basically --

24 THE COURT: And I'm sorry. I might have -- I might
25 have misunderstood, but when you initially started your

1 presentation, I thought that you said that Mr. McCarson did
2 not have a power of attorney.

3 MR. HINES: Oh, you know, if I -- it's possible that
4 I -- that I miss -- well, what was going through my head
5 didn't make it out of my mouth, and so I might have
6 misstated that.

7 There -- there was -- Mr. McCarson and I believe, and
8 I would ask the plaintiff's counsel to kinda correct me on
9 this if I misstate it, but he did have a healthcare power
10 of attorney and also there was a general durable power of
11 attorney.

12 The reason that I'm not pushing those arguments to you
13 right this minute, Your Honor, in support is because,
14 number one, I think that merger and equitable estoppel is
15 the cleanest, clearest way to get us there. But -- but I
16 understand also that there are some thornier issues on
17 whether or not -- you know, there's the capacity issue that
18 plaintiffs have raised. There's also the question of the
19 interpretation of the language of those documents.

20 So maybe the most accurate way I can say now is that I
21 believe those documents were in existence. If I understand
22 plaintiff's argument, it's possible there could be an
23 argument that because of the lack of capacity, then maybe
24 they wouldn't -- it wouldn't be enforceable. I'm not --
25 but I guess I'll let the plaintiff's counsel clear that up

1 if he'd be so kind to do it, or at least to let the Court
2 know. If I misstated something, it certainly was
3 unintentional.

4 THE COURT: Okay. So I see. Thank you. And I'm
5 looking at the document that was filed that was put in the
6 court's file today from plaintiff, and it does say that
7 there was a durable financial and healthcare power of
8 attorney signed by Mr. Arches on April the 24th of 2019
9 designating his grandson as his agent.

10 Okay. All right. Sorry for the confusion.

11 MR. HINES: Thank you, Your Honor.

12 THE COURT: All right. Yes, sir. I'm happy to hear
13 from you.

14 MR. PARKER: Your Honor, so I'll start with that, may
15 it please the Court, because we are on that topic.

16 There was a financial power of attorney that was
17 signed and executed by Mr. Arches that's purporting to give
18 his grandson, obviously, certain grants of authority to act
19 on his behalf for financial purposes. Arguably, this could
20 give you authority to sign an arbitration agreement.

21 There is a section here that deals with legal claims.
22 I think the language under the statutory scheme for our
23 financial powers of attorney in South Carolina, which this
24 models or follows, says that you have a right to arbitrate.
25 Basically, the attorney-in-fact has the right to arbitrate

1 claims on behalf of the principal.

2 So if this were a valid power of attorney, I think we
3 would have a very different situation in front of us, but
4 the thing is that this power of attorney is not valid.

5 THE COURT: Can I see that?

6 MR. PARKER: Yes, Your Honor.

7 THE COURT: Thank you. And y'all pronounce the case
8 Arredondo?

9 MR. PARKER: That's how I say it in my head.

10 MR. HINES: I think either -- well, Arrdeondo or
11 Arredondo. Did you get the citation on that case, Your
12 Honor?

13 THE COURT: No. I'm looking. I just -- I know that
14 y'all have -- those of you who are so specialized in this
15 area probably can just recite citations by memory, and I
16 know there are just -- I mean, these -- there are four or
17 five cases that show up every time that we have one of
18 these motions. Arredondo. Okay. All right. Let me look
19 at this.

20 MR. PARKER: Your Honor, I don't want to disrupt your
21 thought, but I'll point out that this -- you note it was
22 signed in April of 2019?

23 THE COURT: Right.

24 MR. PARKER: April 24th of 2019. Date of admission to
25 the facility was May 6th of 2019. This was not recorded

1 until July 29th of 2019 if you look on the first page.

2 THE COURT: Right.

3 MR. PARKER: And the reason that's important is
4 because of Section 62-8-109(c). And this is part of the
5 code that governs uniform -- I think it's called the
6 Uniform Financial Power of Attorney or something like that
7 maybe, but usually the code sections that address these
8 types of powers of attorney.

9 62-8-109(c) says, "When power of attorney effective."
10 And that states, "After the principal's incapacity, an
11 agent may exercise the authority granted unto the agent
12 under the power of attorney -- power of attorney only if
13 the power of attorney has been recorded in the same manner
14 as a deed in the county where the principal resides at the
15 time the instrument is recorded."

16 Basically, what that's saying is say that the
17 principal has the capacity to execute a power of attorney,
18 they're good to go. If they become incapacitated that'd
19 mean that power of attorney then has to be recorded to be
20 effective.

21 This power of attorney was not recorded until after
22 the admission and arbitration agreements were signed by
23 Mr. McCarson, Mr. Arches' grandson.

24 So, at best this power of attorney after Mr. Arches'
25 incapacity would not have become effective until

1 July 29th of 2019, months after he was admitted to the
2 facility, months after this arbitration agreement was
3 signed.

4 Exhibit C that we attached to our memo in opposition
5 to this motion to compel arbitration, it documents. The
6 earliest that I got from our medical records when
7 Mr. Arches would have been indisputably incapacitated under
8 these code sections where then it was required for the
9 power of attorney to be recorded, and that's addressed by
10 Section 62-8-102(5).

11 Incapacity in the context of a financial power of
12 attorney is not the same as it is in the healthcare
13 context. And I'll read to you how the capacity is defined
14 under the South Carolina Uniform Power of Attorney Act
15 which governs these financial powers of attorney.

16 It says, "Incapacity means inability of an individual
17 to manage property or business affairs because the
18 individual has an impairment in the ability to receive and
19 evaluate information or make or communicate decisions."

20 And so Exhibit C, which we submitted to the Court --
21 and I don't know why the first, honestly, six pages of this
22 exhibit are in here. I don't think I wanted them in there.
23 But there is a document from Medicaid that was done as a
24 screening of Mr. Arches. This occurred on April 15th of
25 2019, which was a month before he was admitted to

1 defendant's facility.

2 And it documents that he could not describe the
3 difference between a fish and a dog. He could not add 12
4 and eight. He could not remember what he had for breakfast
5 or lunch. He was unable to answer cognitive behavior
6 questions, that he required other staff -- he required
7 staff in order to answer questions for him.

8 If we proceed to the next page, which is on the date
9 of Mr. Arches' admission to the facility -- I'm not going
10 to read through it specifically, but basically states he's
11 totally uncommunicate -- he is not able to communicate. He
12 has a vest Alzheimer's and dementia.

13 You know, I think -- and as set forth in these
14 definitions under the Uniform Power of Attorney Act, that's
15 all that's required to show incapacity, that he was
16 completely unable to communicate concerning any decisions
17 about his business affairs and that's -- I don't think
18 they're going to dispute that. And -- and this is from
19 their medical records.

20 I could represent to you that this financial power of
21 attorney, this is the one that exists.

22 Another additional issue with this power of attorney
23 is it was recorded in Cherokee County in July of 2019. At
24 that time Mr. Arches was a resident of Spartanburg County.
25 He was a resident of this facility, had been there for two

1 months, did not live in Cherokee County. It needed to be
2 recorded in Spartanburg County. And that's, again, under
3 Section 62-8-109(c).

4 It specifically states it must be recorded in the
5 county where the principal resides at the time it's
6 recorded.

7 So this financial power of attorney doesn't get them
8 there, and I think that's why he's relying so much on these
9 merger and estoppel arguments.

10 The healthcare final -- excuse me -- the healthcare
11 power of attorney, which we also filed as an exhibit, not
12 really that important. Case law is clear that these don't
13 bestow the agent with authority to -- to arbitrate or to
14 waive the right to a jury trial. It wasn't recorded
15 anyway.

16 And, again, these two powers of attorney were executed
17 on April 24th of 2019. Both of them. Again, those
18 documents that we submitted to you -- Exhibit C -- as part
19 of our memo in opposition, they show that prior to that
20 April 24th of 2019 day that Mr. Arches was not able to
21 communicate at all.

22 So there's no chance that on the date of admission
23 that he's making manifestations to the defendant that his
24 grandson is his agent, that his grandson is authorized to
25 act on his behalf. These powers of attorney are not valid.

1 THE COURT: I don't think the affidavit from the
2 admissions representative refers to any communication with
3 the decedent. I think her affidavit refers to
4 communications with the grandson.

5 MR. PARKER: That's correct, Your Honor, because he
6 couldn't talk. I mean, he couldn't --

7 THE COURT: Right.

8 MR. PARKER: How could he convey somehow to a
9 representative at the facility that his grandson has
10 authority to act on his behalf to waive his right to a jury
11 trial when he can't describe the difference between a fish
12 and a dog?

13 I mean, that's -- and this is kind of the reason I'm
14 going into this. There's not a need for more discovery
15 here. I'll represent to you I not only -- these are what
16 we have in our possession as attorneys for the plaintiff.

17 I also did a search for the register of deeds for any
18 other powers of attorney out there that can be relevant to
19 this lawsuit, and this is it, just these two. They're not
20 valid.

21 These are their medical records. This is what we're
22 going to rely on to show when Mr. Arches -- the timeline of
23 his mental state. They have that.

24 So there is no actual or apparent authority in this
25 case for Mr. McCarson to have been acting on -- on Mr.

1 Arches' behalf. And the case law is clear. They've got
2 this language in the admission agreement and arbitration
3 agreement that say by signing this I agree that I have
4 authority to act on behalf of the resident and I'm holding
5 that out to you. That doesn't matter. And they drafted
6 that language and put it in there.

7 That doesn't mean anything because it's not about the
8 manifestations of the agent. It's about the manifestations
9 of the principal.

10 That's, you know, common law agency principles that
11 you learn in law school that with apparent authority it
12 doesn't matter what the agent represents.

13 It matters what the principal represents because if it
14 mattered what the agent represented I could just go out
15 there and say, hey, I'm Judge Knie's agent, she authorized
16 me to come in here and buy a car with her credit card. And
17 then they could turn around and say, well, he said that he
18 was her agent. We just relied on what he said.

19 That's not how it works. The principal has to make
20 that manifestation. So, and that's impossible that
21 happened here because Mr. Arches can't talk.

22 And then to flip around to the merger thing, I'm not
23 going to really talk about that so much because you've
24 already ruled, I think, numerous times that this
25 arbitration agreement and this exact arbitration agreement

1 and this exact admission agreement do not merge. And your
2 ruling on that in the Solesbee case was affirmed by the
3 Court of Appeals.

4 So -- so really what Mr. Hines is doing is he's
5 arguing against precedent and he's trying to convince you
6 to rule against precedent because the precedent is this
7 exact same arbitration agreement and admission agreement do
8 not merge, and there's a lot of reasons why they don't.

9 I could go through both of them and point out the law
10 parts where the arbitration agreement says that it's
11 governed by the Federal Arbitration Act, whereas, the
12 admission agreement says it's governed by South Carolina
13 law and federal regulations that are applicable to that
14 admission agreement.

15 That's different. That's different types of law.
16 And, you know, I could point out to you that they're
17 separately paginated and all the things that these Court of
18 Appeals separately talked about. But here's what this
19 court decisions are getting to. And I think you've
20 probably seen this.

21 He talked about us wanting to have our cake and eat it
22 too, whatever, and, actually, that's not what we're doing.
23 We're not trying to enforce the admission agreement; we're
24 not trying to enforce the arbitration agreement.

25 There is no contractual obligation that we are trying

1 to enforce in our lawsuit. We basically brought a lawsuit
2 alleging breaches of common law duties.

3 We have not brought a lawsuit alleging breaches of
4 contractual obligations. We don't care -- if the admission
5 agreements were bad -- let's say that Mr. Arches doesn't
6 have a valid healthcare power of attorney he's executed for
7 his grandson. And let's say his grandson doesn't have
8 authority to act on his behalf under the adult Healthcare
9 Consent Act and that admission agreement is not valid, it
10 wasn't signed by someone with authority.

11 We would still have a lawsuit. We would still bring a
12 lawsuit. We're not trying to enforce either one of these
13 agreements and we're not trying to benefit from either one
14 of these agreements. We're bringing common law -- we're
15 alleging breaches of common law duties.

16 But the thing that they're trying to do is they are
17 trying to have it both ways. And what they do with these
18 arbitration agreements and admission agreements is they
19 want them to be the same when it suits their purposes and
20 they want it to be one complete document when it suits
21 their purposes, but then they want them to be separate
22 documents. And you have to look at it and say why did they
23 draft them this way, why did they make it an arbitration
24 agreement and admission agreement and then somehow try to
25 say at the end but once you sign it it magically all

1 becomes one agreement.

2 And the reason I think they do that is because if that
3 arbitration agreement was a mandatory provision of the
4 admission agreement, that would open the door to an
5 unconscionability argument, that I would be sitting here
6 today telling you that this is an adhesion contract, it was
7 a take-it-or-leave-it contract that when they went in to be
8 admitted to that facility they were required to sign this
9 document that had an arbitration agreement that they had to
10 take. And they don't want to open the door to that
11 unconscionability argument.

12 So what they do is they take the arbitration provision
13 out and they make it a separate agreement. But then,
14 because they want to argue merger on the back side when
15 they don't check to make sure that the person who signed it
16 had authority, now they want to say, okay, but they are the
17 same agreement, by signing this it suddenly becomes one in
18 the same agreement.

19 And I think that the Supreme Court in Coleman and the
20 Court of Appeals in all of these other cases, including the
21 Solesbee case, they recognized this. And they don't say.
22 And, in fact, none of this assumes, I don't think, outright
23 say, these are separate agreements or they're the same
24 agreement.

25 what they say is what y'all have done, what the

1 assisted-living-facility industry has done in creating
2 these arbitration agreements and these admission agreements
3 as separate documents is you created ambiguity, and you
4 want there to be ambiguity because in some instances it
5 allows you to argue one way and some instances it allows
6 them to argue another way.

7 They've intentionally created this ambiguity. And
8 what the case law is clear on is with merger if there's any
9 kind of ambiguity within the documents as to whether or not
10 they're a whole, one document, or separate standalone
11 documents, it has to be construed against the drafter,
12 i.e., the facility.

13 And that's what we have very clearly in Solesbee. It
14 speaks directly to these exact documents and says these do
15 not merge. Once you lose the merger, there is no equitable
16 estoppel. There's no direct evidence of the estoppel
17 argument that you can make because those theories hinge on
18 there being one unified document.

19 And I'll point out that he -- he said that the
20 admission agreement incorporates the arbitration agreement
21 into it and that's part of what merges these two documents
22 together.

23 If you read the entire agreement provision in the last
24 sentence of it, it says, "The undersigned further
25 acknowledges that he/she has received and read the

1 admission handbook and other admission materials," which
2 arguably would include the arbitration agreement, "and
3 understands that these documents are made part of this
4 agreement by reference herein."

5 Now, he wants to say that brings the arbitration
6 agreement into this agreement. If that's what they
7 purported to do, they would have stopped after this part
8 agreement. They would have said undersigned acknowledges
9 they have received and read the admission materials and
10 understand that these documents are made part of this
11 agreement, period.

12 They didn't do that. They said agreement by reference
13 herein. There is no reference herein to the arbitration
14 agreement.

15 The word arbitration does not appear in this admission
16 agreement one time, nor does the term arbitration agreement
17 appear in this one time. There is no reference herein to
18 the arbitration agreement. It's not been incorporated.

19 And this -- this ambiguity and clout they try to
20 create with these so that they can in some circumstances
21 argue it's not unconscionable, it's not an adhesion
22 contract, the arbitration agreement is standalone. It's
23 voluntary; it's optional. It's not part of this.

24 But when it serves their purpose and there's no
25 authority to sign the arbitration agreement, they want to

1 spin around and say, oh, but they are the same agreement,
2 they merged, they're the same thing.

3 And that's what Coleman and Hodges, Thompson and
4 Solesbee and Arredondo, all of those decisions are looking
5 at that and saying you have purposefully created an
6 ambiguous stat and ambiguous agreement and we can't tell if
7 it merges or not. And because you do that it's construed
8 against you, the drafter. We're going to say these are
9 separate agreements.

10 And then the last thing I would add is that these two
11 agreements are very clearly agreements that could stand
12 alone and survive on their own. And they're brief. They
13 make a little bit of reference to the idea that the
14 arbitration agreement is solely dependent on the admission
15 agreement and that without the admission agreement there
16 the arbitration agreement would just collapse and not
17 exist. Therefore, they're one in the same.

18 And that's simply not the case. The arbitration
19 agreement purports that it will survive the admission
20 agreement. And if you think about it if there was some
21 kind of circumstance where there was a valid financial
22 power of attorney that what have enabled Mr. McCarson to
23 sign this arbitration agreement, but he didn't have
24 authority under the Adult Healthcare Consent Act and he
25 didn't have a valid healthcare power of attorney, the

1 admission agreement would not be valid but the arbitration
2 agreement would be.

3 And so if we went into this lawsuit in that scenario
4 and we sued them for breaching these common law duties
5 under negligence theories, they would have jumped up and
6 down and say we've got an arbitration agreement.

7 The admission agreement, who cares if that's good or
8 not? And it wouldn't be good in that scenario. The
9 admission agreement would not be valid. But they would say
10 we have this arbitration agreement and look what it says.

11 It says, "It is further understood in the event of any
12 controversy or dispute between the parties arising out of
13 or relating to the facility's admission agreement or
14 relating in any way to resident's stay at facility."

15 This arbitration agreement does not depend upon the
16 admission agreement to survive, to exist, to have purpose.
17 This arbitration agreement purports to apply to things that
18 have nothing to do with that admission agreement.

19 So this arbitration agreement can most certainly stand
20 alone from the -- obviously, if it needs to -- as the
21 admission agreement can do from the arbitration agreement.

22 You know, I've over-spoken, and I hate to think that
23 in some way I may have snatched defeat from the jaws of
24 victory where I should have been quiet, because I think I
25 know what your track record has been in looking at this

1 exact same agreement.

2 But the main issue is that Solesbee from the Court of
3 Appeals says these do not merge. They looked at these --
4 this arbitration agreement, this admission agreement that
5 you have in front of you -- and said these do not merge and
6 you are right when you determined this before.

7 I think that's dispositive of the issue on merger, and
8 there's no need for any more discovery because there's
9 nothing else to discover.

10 You know, Mr. Arches is no longer with us. I can't
11 bring him in front of the court and show you that he can't
12 tell the difference between a dog and a fish but -- or
13 swear him in and see that. But thank you, Your Honor.

14 THE COURT: Okay. Thank you.

15 Anything in reply?

16 MR. HINES: I'll try to be very quick, Your Honor.

17 And I've just been jotting down some notes, so this
18 might not be in any particular order.

19 But the first thing. Opposing counsel -- well, if I
20 quoted it correctly, he spoke of these decisions of
21 Coleman, Thompson, Hodge, Solesbee of indicating that the
22 appellate courts were founding some purposeful creation of
23 ambiguity in these documents.

24 Most respectfully, I don't think that that is
25 certainly not expressly stated in those opinions. I -- I

1 don't believe that there is any reasonable interpretation
2 in those opinions that would -- that would say that as far
3 as the purposeful creation of ambiguity.

4 The Court didn't mention, as mentioned in those
5 cases -- I know in Coleman and -- forgive me. I can't
6 remember if it was both in Hodge and Thompson, but it was
7 at least in one of them about the idea of ambiguity being
8 construed against the drafter, and we've addressed that in
9 our brief as to how, number one, there is no ambiguity.

10 Number two, that principle -- and the Court's never
11 explained this -- doesn't really make sense in this context
12 because when you have ambiguity to be construed against the
13 drafter, it's not usually set against the counter failing a
14 legal proposition that we know from Coleman is correct,
15 which is that you have the presumption of merger when you
16 have these four things in place -- time, parties, purpose,
17 transaction.

18 So the idea of something that doesn't even rise to the
19 level beyond the level of ambiguity but upset a legal
20 presumption, I've never understood that to make any sense.
21 I've never seen where the court has explained that, that
22 tension. And so that gets me to -- or any of these courts
23 have addressed that tension between those -- those two
24 points.

25 And so, and I hope I made this clear. There's no

1 question that I have, you know, an ethical obligation, and
2 to make sure that the Court is aware of Solesbee, and I'm
3 quite sure the Court is.

4 That's why I did want to acknowledge the documents
5 involved in that case are form documents, the same as the
6 documents here. And in large measure, I mean, the
7 arguments are the same.

8 However, I am arguing that the Solesbee court, the
9 decision, is -- is erroneous. But I'm also arguing -- and
10 I think these are points where the Court would not have
11 to -- the Court would not have to find against precedent,
12 because to me the idea for the Court to rule against
13 precedent, at least as I understand it, would be for the
14 Court to have to acknowledge that there's a case and a
15 proposition and swim directly upstream against some point
16 that's been addressed in a higher court, a Court of
17 Appeals.

18 Here, I'm suggesting there are points that the Court
19 of Appeals, in addition to the ones where I would argue
20 that they -- the Court's decision is erroneous -- where the
21 Court's decision just does not account for it, for the
22 Court's.

23 And so I think there's room there for the Court to
24 find something distinguishing from the standpoint that the
25 Court on the basis of an argument that the Court of Appeals

1 doesn't directly take on in that case.

2 But, in any event, whether that's an argument against
3 precedent or an argument for distinguishing the cases the
4 point is for me to try and do either of them and going
5 forth, an hour in this litigation, I have to raise it in
6 the first instance here.

7 So, but the other couple of points I wanted to make
8 though as far as this idea about us wanting our cake and
9 eating it too, these documents, I -- I submit that I don't
10 follow the logic of that argument.

11 For one, we don't have any situation where we want to
12 sometimes argue our agreements are -- are not
13 unconscionable. We always maintain they are not
14 unconscionable.

15 So, and, number two, the fact that these are separate
16 documents, they're separate instruments, it's not us saying
17 that they're the same. It's the law of merger saying that,
18 that the law of merger exists, and these documents, again,
19 that's the legal -- so we don't create the law, obviously.

20 The Coleman court, for instance, recognized that
21 principle. It's actually represented that principle is, I
22 don't think, first articulated in Coleman. It was a case
23 called Klutts that Coleman cited. And I haven't actually
24 traced its origin all the way back. But the point being
25 that that's the argument, I believe, that's a little bit

1 of -- it's a little bit -- well, it's misplaced, you know.

2 we're arguing our facts up against the legal standard.

3 we, obviously, are not trading a legal standard. we're not

4 the ones who are saying, you know, it's our courts, it's

5 our law, that it provides for what merger is.

6 Now, the -- oh, and as far as these benefits, the idea

7 about not suing to enforce a benefit, that -- that is to

8 misapprehend, most respectfully in our argument. The

9 benefits have already been received. That was the benefits

10 at admission -- of room, of board, of care, of treatment,

11 of various services. Those benefits have already happened,

12 and they were direct benefits. So it's not -- we're not --

13 it doesn't matter that they are not suing to claim a

14 benefit, or, I mean, that's -- that's not material to the

15 analysis.

16 The benefits, again, have already been received. And

17 if you think about it just from a plain and equitable

18 standpoint, that's why it strikes one as inequitable. To

19 receive the benefits, and then of one provision under the

20 contract, and not -- and then dispute the other provision

21 that you don't like, to take what you like and not take

22 what you don't, that's where the inequity comes from.

23 If it were as plaintiff's counsel suggested, you could

24 take what you -- what you like and simply not take what you

25 don't like by, you know -- in this case, obviously, there

1 are -- there are common law claims, claims that aren't --
2 they don't require a contract in the sense they're not
3 breach of contract claims. But/and I don't think it's
4 being able to a point about -- about this -- this idea
5 about whether or not the agreement, the arbitration
6 agreement, is a standalone. Of course it couldn't stand
7 alone.

8 The arbitration agreement -- just was -- you know,
9 it's not forbidden for us to just be -- use common sense
10 here.

11 The arbitration agreement exists to provide for if it
12 is -- if it is, again, voluntary. If it is opted for, it
13 provides for its alternative form of dispute resolution,
14 for claims that arise out of the admission.

15 If a person is never admitted or never -- has never --
16 and, again, the -- I understood plaintiff's counsel to make
17 an argument about how could have, and, again, this would
18 all be looking after the fact. You would have an
19 admission. You would have an admissions agreement that was
20 signed, but there would be an argument that it was -- that
21 it was signed without authority. But that's really -- I
22 respectfully think it's beside the point.

23 You would have a situation there where the person who
24 had been allowed to come into the facility and receive and
25 be a resident there and receive care and treatment, that's

1 all that whole relationship, is the only reason for the
2 arbitration agreement, because what -- what counsel is
3 suggesting if I understand would be almost to say we would
4 just an arbitration agreement, although we will have
5 nothing to do with one another, no reason for us to ever
6 have a dispute.

7 Obviously, the whole reason for the arbitration
8 agreement is because of the relationship that flows through
9 the admission agreement so there actually is some contact
10 between those two, some reason a dispute may arise.

11 So, I do respectfully disagree with the idea that the
12 arbitration agreement could in any reasonable way just
13 stand on its own two feet as if there was never going to be
14 this resident being at the facility.

15 And the argument also about the idea of having just
16 the enforceable arbitration agreement and not an
17 enforceable admission agreement, I don't believe that works
18 either because at least under the idea of -- of the same
19 argument of merger and equitable estoppel for the same
20 reasons I'm arguing now, you have merger and you would have
21 the benefits under the -- the merged agreement, which would
22 include benefits of residency, room, board, care, treatment
23 and those various services. So I don't think that works.

24 The thing about -- about -- about -- oh, another thing
25 about this, about the governing law. I think this is

1 interesting, and it needs to be borne in mind.

2 An arbitration -- we have a standalone arbitration
3 agreement here. In fact, if anything, it draws more
4 attention to the arbitration agreement. It's a separate
5 document. It's sort of a separate instrument. It's a
6 one-page. It's not some sort of long read.

7 And on that point where counsel mentioned the line in
8 here by his or her signature below the executing party
9 represents that he/she has the authority to sign on
10 respondent's behalf so it's to bind the resident as well as
11 -- excuse me -- on the resident's behalf so as to bind the
12 resident as well as the representative.

13 You know, the law in South Carolina is -- and there's
14 certainly no question about Mr. McCarson's competency --
15 that a person who signs an agreement is presumed to have
16 read, understood and agreed to it.

17 So, yes, that language is there, but our law presumes
18 that he read it, understood it and agreed to it.

19 So, and -- oh, that even if you just have one
20 instrument that included an arbitration clause, it would
21 still be governed by the F.A.A. even if everything else in
22 the document was governed by South Carolina law because
23 that's the nature of arbitration clauses. When they're --
24 if it involves interstate commerce the F.A.A. applies.

25 So, this idea of the governing law being different --

1 and we argue this in the -- in the brief but the -- the --
2 essentially, what we have here is both of these documents.

3 I mean, for instance, this is what the admission
4 agreement says. And I will just -- I'll wrap up with this
5 point, because I certainly can make some others, but I
6 think we have them covered in our brief. But this is from
7 Solesbee.

8 The Solesbee court says -- and I'll quote here -- "The
9 admission agreement provides it is governed by South
10 Carolina law and the arbitration agreement provides it is
11 governed by federal law."

12 So what the court, the Solesbee court, said just
13 black-and-white there, the admission agreement says it's
14 provided by -- governed by South Carolina. The arbitration
15 agreement by the federal law.

16 well, that's simply not true. This is what the
17 admission agreement actually says. "This agreement will be
18 governed by and construed in accordance with applicable
19 federal regulations and those are the laws of the state in
20 which the facility is located."

21 well, the net effect of that is to say it's governed
22 by federal law where it applies, you know, and where unless
23 it's -- I mean, it's governed by state law except where
24 it's displaced by federal law.

25 You know, it simply just says to read the Solesbee

1 court's take on it, you would think that it said nothing of
2 the federal regulations.

3 Meanwhile, you have this sort of other interesting
4 aspect of it. Even if the F.A.A. applies to the
5 enforcement of the arbitration agreement, the state law,
6 the state -- the general South Carolina law of contracts
7 applies to the question of enforceability.

8 So, you know, I just don't see where this governing
9 law has -- I don't see where the Solesbee court has
10 correctly understood our points on that or correctly
11 analyzed them, and I don't see how it provides any basis to
12 find an intention contrary to merger.

13 Similarly with the survival of the arbitration
14 agreement. The arbitration agreement survives because
15 that's what arbitration agreements do.

16 The arbitration is a case we cite called Hooters of
17 America vs. Phillips, and in that case under South Carolina
18 arbitration law the duty to arbitrate under an arbitration
19 clause and the contract survives termination of the
20 contract. Of course it does.

21 Otherwise, you would have -- a dispute would have to
22 arise during the -- you know, in this case while the
23 person -- it would all have to happen while -- during the
24 person's residency. And of course we have, you know, a
25 three-year statute of limitations, for instance.

1 So the arbitration clause has to provide for a tale so
2 that the arbitration is still required. If it's not in
3 effect, then we wouldn't have an argument to -- to require
4 arbitration.

5 But, you know, that doesn't suggest any sort of --
6 that doesn't suggest any more separation between the
7 arbitration and admission agreements here than it would
8 between a single instrument that had an arbitration clause
9 included in it. That's the same law applies both ways.

10 The arbitration clause would outlive the agreement in
11 which it's in, and, you know, you -- it'd be hard to say
12 that -- you know, our point is to say even when it's the
13 same instrument involved, that's the way the arbitration
14 part would work.

15 So, I don't believe how that could possibly give rise
16 to an intention or evidence of intention contrary to
17 merger.

18 And, goodness, Your Honor. You've been most patient.
19 You know, if the Court has any questions, I'll be happy to
20 answer them. I do think our brief, you know, gets into
21 these probably in a little more hopefully articularly, and
22 I might have here at the end. But other than that, thank
23 Your Honor very much for your -- your indulgence and, you
24 know, respectfully ask the Court to grant our motion.

25 THE COURT: Thank you.

1 Anything else?

2 MR. PARKER: Just a couple.

3 THE COURT: I'm afraid to ask.

4 MR. PARKER: I know. I promise I am not going to -- I
5 am not going to do -- probably unnecessarily.

6 I'll say this. If -- if I asked his client if I can
7 prove that that admission agreement was signed by Mr.
8 McCarson when he did not have authority to enter that
9 admission agreement, will they agree to forgo arbitration.
10 They're going to say no. They're going to say we have an
11 arbitration agreement that applies regardless of whether
12 that admission agreement exists.

13 He's saying the relationship between Mr. Arches, the
14 resident, and the defendant doesn't exist without that
15 admission agreement. That's not true.

16 He was staying there for a long period of time. If
17 you retroactively find out that that admission agreement
18 was signed by someone without authority, there never was an
19 agreement. There never was a contract.

20 That doesn't mean there wasn't a relationship. That
21 doesn't mean they weren't paying the defendant for services
22 and the service for rendering -- the defendant was
23 rendering services to the plaintiff. There is a
24 relationship there. It's just not a contractual
25 relationship that derives from the admission agreement.

1 That's the point I'm trying to make. These are two
2 separate standalone agreements, each of which can survive
3 on their own. They don't merge. Solesbee says they don't
4 merge. That's binding. It's not even worth the amount of
5 air that we've put into the room over it.

6 So, and the only last thing I will say is this theory
7 of direct benefits estoppel, which is kinda what I'm trying
8 to say. We're not trying to assert any rights for the
9 admission agreement. You know, we could care less about
10 the admission agreement. We're asserting common law,
11 breaches of common law duties, which is independent of that
12 admission agreement.

13 This is what Wilson vs. Willis, which is the Supreme
14 Court's decision that mostly addresses this theory of
15 direct benefits estoppel.

16 It says, "When the substance of a claim arises from
17 general obligations imposed by state law, including
18 statutes, torts and other common-law duties, direct
19 benefits estoppel is not implicated even if the claim
20 refers to or relates to a contract."

21 That's what I'm trying to say. Of course our claim
22 has some kind of indirect relationship with the admission
23 agreement, because they cite it there. We're not trying to
24 enforce something from that. That's what direct benefits
25 estoppel is made to stop you from doing.

1 We are asserting breaches of common-law duties that
2 arise independently from the admission agreement. That's
3 our whole entire lawsuit. So I think the decision itself
4 speaks directly to that. So this isn't where this is
5 supposed to work and operate. Thank you, Your Honor.

6 THE COURT: Okay.

7 MR. HINES: Your Honor, I think I'll stand on my
8 brief. I get into that -- into that in the estoppel
9 section of it where this idea about what -- where the
10 Wilson court gets to the heart of the matter in determining
11 direct versus indirect benefits. I think that's what the
12 Court is talking about.

13 Again, just the basic idea of estoppel is that you
14 can't have the benefits under what provisions you like and
15 then don't accept the provisions that you don't like.

16 That applies no matter whether -- you know, that
17 principle remains intact whether they're pursuing a claim
18 for breach of contract or a contract basically claiming
19 benefits directly under the same agreement, which is
20 announced by virtue of merger if the Court will accept
21 that -- that position on merger.

22 The same agreement is an arbitration agreement and
23 admission agreement. And as Your Honor can probably tell
24 and you've already heard, I could go on if the Court had
25 some burning questions or wanted to hear from me further,

1 but as to that I will -- I will rest and thank the Court
2 for your time. And just, again, you stand on what -- what
3 we've written in addition to what I have argued.

4 THE COURT: Okay. Thank you. And I do appreciate
5 having the documents to be able to review. I know that in
6 some cases we don't have them, and it's always helpful to
7 review the documents as well. So, I will review the
8 submissions and -- and is that it? Y'all don't have
9 anything else you want me to consider, do you?

10 MR. HINES: No, Your Honor. And, again, to just put a
11 bow on it or to be out of an abundance of caution, all of
12 those motions to stay, they do tag along with it, what
13 we've been talking about.

14 THE COURT: Right. I understand. I do.

15 Okay. And, so, any objection to counsel not arguing
16 all seven or six motions to stay? Thank you.

17 MR. PARKER: That's fine with me. I think we
18 understand.

19 THE COURT: I do -- I do. But is there anything else
20 that y'all need to submit, or is this it?

21 MR. PARKER: That's all from us, Your Honor.

22 THE COURT: Okay. All right.

23 MR. HINES: That's all from us also.

24 THE COURT: Thank you.

25 I will issue a decision as quickly as I can. I will

1 review everything again, and I'll give back the hard copy
2 of Exhibit A, which was the durable power of attorney.

3 (Whereupon, a recess was taken.)

4 (The following takes place after counsel left the
5 courtroom.)

6 THE COURT: This is with regard to the matter of
7 McCarson vs. THI of South Carolina, 22-CP-42-2595.

8 We had a motion, a motion hearing, today on this
9 matter, and arguing for the moving party was Russ Hines.
10 Arguing for the responsive party, the plaintiff, was Jay
11 Parker. And Jay Parker is an attorney with the Parker
12 Firm, and Ronnie Crosby is also a member of that firm.

13 My husband currently has a case that he is working on
14 in association with Mr. Crosby, and they are withdrawing
15 from the case, but it is still a case that they have worked
16 on in the past.

17 And so I neglected to put that on the record at the
18 beginning of the hearing.

19 We have now called the lawyers. They say they have
20 absolutely no objection to me ruling on this matter and
21 have no objection to me having heard the matter.

22 Mr. Hines even volunteered to put something in writing
23 to that effect, and I told him I didn't think that was
24 necessary, that I would put this on the record.

25 And Jay said that he did not object.

1 And we got their cell phone numbers and they were
2 called by my administrative assistant, Mrs. Searcy, and the
3 calls were merged. And then they talked to me on speaker
4 phone.

5 END OF REQUESTED TRANSCRIPT OF RECORD
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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Spartanburg County, South Carolina, on the 1st day of June 2023.

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

November 11, 2023

s/Linda D. Moffitt

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE
OF LOUIS ARCHES,

)
PLAINTIFF,)
)

)
vs.)
)

)
THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)
)

)
DEFENDANTS.)
)

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE AS TO THI OF
SOUTH CAROLINA AT INMAN, LLC**

The Plaintiff Steven McCarson, as Personal Representative of the Estate of Louis Arches and Defendant THI of South Carolina at Inman, LLC, having agreed to end the above matter without prejudice as to THI of South Carolina at Inman, LLC only,

IT IS STIPULATED, pursuant to SCRCP 41(a)(1)(B), Lee D. Cope and Jamie Walters, attorneys for the Plaintiff, and D. Jay Davis, Jr. and James D. Gandy, III, and Gaillard T. Dotterer, III, attorneys for the Defendants, that the above case be ended without prejudice as to Defendant THI of South Carolina at Inman, LLC.

The causes of action against the remaining defendants are not ended and are in no way affected by this Stipulation.

WE SO STIPULATE:

PARKER LAW GROUP, LLP

By: /s/ Lee D. Cope

Lee D. Cope
SC Bar # 14361
P.O. Box 487
Hampton, SC 29924
(803) 903-1781

AND

Koon Cook & Walters, LLC
Jamie Walters, Esq.
SC Bar # 76956
2016 Gadsden St.
Columbia, SC 29201

Attorneys for the Plaintiff

WE SO STIPULATE:

CLEMENT RIVERS, LLP

By: D. Jay Davis, Jr.

D. Jay Davis, Jr.
S.C. Bar ID No.: 12084
James D. Gandy, III
S.C. Bar ID No.: 11925
Gaillard T. Dotterer, III
S.C. Bar ID No.: 103620
25 Calhoun Street, P.O. Box 993
Charleston, SC 29402
(843) 577-4000
Attorneys for the Defendants

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT THI OF SOUTH
CAROLINA AT MAGNOLIA MANOR-
INMAN, LLC D/B/A MAGNOLIA
MANOR-INMAN'S MOTION TO
COMPEL ARBITRATION**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman (hereinafter referred to as “this Defendant” or the “Facility”), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying or dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Louis Arches’ admission to the

Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on the Plaintiff and this Defendant and requires that Plaintiffs' claims against this Defendant be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

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

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT THI OF SOUTH
CAROLINA, LLC'S MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that THI of South Carolina, LLC (hereinafter "this Defendant"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into at the time of Louis Arches' admission to the Facility.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

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

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT FUNDAMENTAL
ADMINISTRATIVE SERVICES, LLC'S
MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Fundamental Administrative Services, LLC (hereinafter "this Defendant"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into at the time of Louis Arches' admission to the Facility.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant Fundamental

Administrative Services, LLC

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

**DEFENDANT FUNDAMENTAL
CLINICAL AND OPERATIONAL
SERVICES, LLC’S MOTION TO STAY**

DEFENDANTS.)

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Fundamental Clinical and Operational Services, LLC (hereinafter “this Defendant”), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman (“Facility Defendant”) has filed a Motion in this case to compel Plaintiff’s claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into at the time of Louis Arches’ admission to the Facility.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

*Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC*

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT HUNT VALLEY
HOLDINGS, LLC'S MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Hunt Valley Holdings, LLC (hereinafter "this Defendant"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into at the time of Louis Arches' admission to the Facility.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

*Attorneys for the Defendant Hunt Valley Holdings,
LLC*

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEVEN MCCARSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS ARCHES,	)	CASE NO. 2022-CP-42-02595
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT INMAN, LLC, THI OF SOUTH CAROLINA, LLC, HUNT VALLEY HOLDINGS, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, THI, OF BALTIMORE, LLC, AND JAMES H. MACK,	)	DEFENDANT THI OF BALTIMORE, INC.'S MOTION TO STAY
	)	
DEFENDANTS.	)	
	)	

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of Baltimore, Inc., incorrectly named "THI of Baltimore, LLC" (hereinafter "this Defendant"), by and through its undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into at the time of Louis Arches' admission to the Facility.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

*Attorneys for the Defendant THI of Baltimore, Inc.,
incorrectly named "THI of Baltimore, LLC"*

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEVEN MCCARSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOUIS ARCHES,	)	CASE NO. 2022-CP-42-02595
	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT INMAN, LLC, THI OF SOUTH CAROLINA, LLC, HUNT VALLEY HOLDINGS, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, THI, OF BALTIMORE, LLC, AND JAMES H. MACK,	)	DEFENDANT JAMES H. MACK'S MOTION TO STAY
	)	
DEFENDANTS.	)	
	)	

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant James H. Mack., by and through his undersigned counsel, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into at the time of Louis Arches' admission to the Facility.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

SC State Bar ID No.: 12084

James D. Gandy, III

SC State Bar ID No.: 11925

Gaillard T. Dotterer, III

SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402

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

tgandy@ycrlaw.com, gdotterer@ycrlaw.com

Attorneys for the Defendant James H. Mack

Charleston, South Carolina

Dated: February 3, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA, LLC,)
HUNT VALLEY HOLDINGS, LLC,)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC, FUNDAMENTAL)
CLINICAL AND OPERATIONAL)
SERVICES, LLC, THI, OF)
BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT THI OF SOUTH
CAROLINA, LLC'S MEMORANDUM IN
SUPPORT OF MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

COMES NOW, Defendant THI of South Carolina, LLC (hereinafter "this Defendant"),
by and through its undersigned attorneys and submits this Memorandum in Support of its Motion
to Stay.

BACKGROUND FACTS

In this nursing home malpractice case, Defendant THI of South Carolina at Magnolia
Manor Inman, LLC (hereinafter "Facility Defendant") has filed a motion to compel Plaintiff's
claims against it to arbitration. *See Exhibit 1.* Per the statutory mandate of the FAA and this
Court's inherent power to manage its own docket, this Defendant respectfully requests that this

matter must be stayed as to this Defendant until such time as the Facility Defendant's motion to compel arbitration is finally determined and any arbitration proceedings are finally concluded, to include the final determination/conclusion of any and all appellate proceedings relating thereto. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,** providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002); *see also Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See* S.C. Code Ann. § 15-48-20(d) ("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section..." (emphasis added))

prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”).

Moreover, this Court possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor-Inman, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Arches’ residency at Magnolia Manor-Inman. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and the Facility Defendant. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Magnolia Manor-Inman, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and the Facility Defendant. Rather, Plaintiff repeatedly lumps this Defendant in with others referring to them collectively as the “Defendants” throughout the Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against the Facility Defendant could become redundant and meaningless because of the substantial overlap

in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor-Inman. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of the Facility Defendant would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000) (Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

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Russell G. Hines

SC State Bar ID No.: 72100

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

Charleston, South Carolina

Dated: March 24, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA, LLC,)
HUNT VALLEY HOLDINGS, LLC,)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC, FUNDAMENTAL)
CLINICAL AND OPERATIONAL)
SERVICES, LLC, THI, OF)
BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT FUNDAMENTAL
ADMINISTRATIVE SERVICES, LLC'S
MEMORANDUM IN SUPPORT OF
MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

COMES NOW, Defendant Fundamental Administrative Services, LLC (hereinafter “this Defendant”), by and through its undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

BACKGROUND FACTS

In this nursing home malpractice case, Defendant THI of South Carolina at Magnolia Manor Inman, LLC (hereinafter “Facility Defendant”) has filed a motion to compel Plaintiff’s claims against it to arbitration. *See Exhibit 1.* Per the statutory mandate of the FAA and this Court’s inherent power to manage its own docket, this Defendant respectfully requests that this

matter must be stayed as to this Defendant until such time as the Facility Defendant's motion to compel arbitration is finally determined and any arbitration proceedings are finally concluded, to include the final determination/conclusion of any and all appellate proceedings relating thereto. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

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Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and the Facility Defendant. Rather, Plaintiff repeatedly lumps this Defendant in with others referring to them collectively as the “Defendants” throughout the Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against the Facility Defendant could become redundant and meaningless because of the substantial overlap

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CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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gdotterer@ycrlaw.com

*Attorneys for the Defendant Fundamental
Administrative Services, LLC*

Charleston, South Carolina

Dated: March 24, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

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REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA, LLC,)
HUNT VALLEY HOLDINGS, LLC,)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC, FUNDAMENTAL)
CLINICAL AND OPERATIONAL)
SERVICES, LLC, THI, OF)
BALTIMORE, LLC, AND JAMES H.)
MACK,)

**DEFENDANT FUNDAMENTAL
CLINICAL AND OPERATIONAL
SERVICES, LLC'S MEMORANDUM IN
SUPPORT OF MOTION TO STAY**

DEFENDANTS.)

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

COMES NOW, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

BACKGROUND FACTS

In this nursing home malpractice case, Defendant THI of South Carolina at Magnolia Manor Inman, LLC (hereinafter "Facility Defendant") has filed a motion to compel Plaintiff's claims against it to arbitration. *See Exhibit 1.* Per the statutory mandate of the FAA and this Court's inherent power to manage its own docket, this Defendant respectfully requests that this

matter must be stayed as to this Defendant until such time as the Facility Defendant's motion to compel arbitration is finally determined and any arbitration proceedings are finally concluded, to include the final determination/conclusion of any and all appellate proceedings relating thereto. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

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prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”).

Moreover, this Court possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor-Inman, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Arches’ residency at Magnolia Manor-Inman. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and the Facility Defendant. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Magnolia Manor-Inman, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and the Facility Defendant. Rather, Plaintiff repeatedly lumps this Defendant in with others referring to them collectively as the “Defendants” throughout the Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against the Facility Defendant could become redundant and meaningless because of the substantial overlap

in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor-Inman. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of the Facility Defendant would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000) (Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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*Attorneys for the Defendant Fundamental Clinical
and Operational Services, LLC*

Charleston, South Carolina

Dated: March 24, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

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REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

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D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA, LLC,)
HUNT VALLEY HOLDINGS, LLC,)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC, FUNDAMENTAL)
CLINICAL AND OPERATIONAL)
SERVICES, LLC, THI, OF)
BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT HUNT VALLEY
HOLDINGS, LLC'S MEMORANDUM IN
SUPPORT OF MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

COMES NOW, Defendant Hunt Valley Holdings, LLC (hereinafter "this Defendant"),
by and through its undersigned attorneys and submits this Memorandum in Support of its Motion
to Stay.

BACKGROUND FACTS

In this nursing home malpractice case, Defendant THI of South Carolina at Magnolia
Manor Inman, LLC (hereinafter "Facility Defendant") has filed a motion to compel Plaintiff's
claims against it to arbitration. *See Exhibit 1.* Per the statutory mandate of the FAA and this
Court's inherent power to manage its own docket, this Defendant respectfully requests that this

matter must be stayed as to this Defendant until such time as the Facility Defendant's motion to compel arbitration is finally determined and any arbitration proceedings are finally concluded, to include the final determination/conclusion of any and all appellate proceedings relating thereto. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

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(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002); *see also Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not

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prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”).

Moreover, this Court possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor-Inman, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Arches’ residency at Magnolia Manor-Inman. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and the Facility Defendant. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Magnolia Manor-Inman, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and the Facility Defendant. Rather, Plaintiff repeatedly lumps this Defendant in with others referring to them collectively as the “Defendants” throughout the Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against the Facility Defendant could become redundant and meaningless because of the substantial overlap

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For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Attorneys for the Defendant Hunt Valley Holdings, LLC

Charleston, South Carolina

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CLINICAL AND OPERATIONAL)
SERVICES, LLC, THI, OF)
BALTIMORE, LLC, AND JAMES H.)
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DEFENDANTS.)

**DEFENDANT THI OF BALTIMORE,
INC.'S MEMORANDUM IN SUPPORT OF
MOTION TO STAY**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

COMES NOW, Defendant THI of Baltimore, Inc., incorrectly identified as “THI of Baltimore, LLC” (hereinafter “this Defendant”), by and through its undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

BACKGROUND FACTS

In this nursing home malpractice case, Defendant THI of South Carolina at Magnolia Manor Inman, LLC (hereinafter “Facility Defendant”) has filed a motion to compel Plaintiff’s claims against it to arbitration. *See Exhibit 1.* Per the statutory mandate of the FAA and this Court’s inherent power to manage its own docket, this Defendant respectfully requests that this

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James D. Gandy, III

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Attorneys for the Defendant THI of Baltimore, Inc.

Charleston, South Carolina

Dated: March 24, 2023

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

STEVEN MCCARSON, AS PERSONAL) CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE)
OF LOUIS ARCHES,)

PLAINTIFF,)

vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA, LLC,)
HUNT VALLEY HOLDINGS, LLC,)
FUNDAMENTAL ADMINISTRATIVE)
SERVICES, LLC, FUNDAMENTAL)
CLINICAL AND OPERATIONAL)
SERVICES, LLC, THI, OF)
BALTIMORE, LLC, AND JAMES H.)
MACK,)

**DEFENDANT JAMES H. MACK'S
MEMORANDUM IN SUPPORT OF
MOTION TO STAY**

DEFENDANTS.)

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF:

COMES NOW, Defendant James H. Mack (hereinafter “this Defendant”), by and through his undersigned attorneys and submits this Memorandum in Support of its Motion to Stay.

BACKGROUND FACTS

In this nursing home malpractice case, Defendant THI of South Carolina at Magnolia Manor Inman, LLC (hereinafter “Facility Defendant”) has filed a motion to compel Plaintiff’s claims against it to arbitration. *See Exhibit 1.* Per the statutory mandate of the FAA and this Court’s inherent power to manage its own docket, this Defendant respectfully requests that this

matter must be stayed as to this Defendant until such time as the Facility Defendant's motion to compel arbitration is finally determined and any arbitration proceedings are finally concluded, to include the final determination/conclusion of any and all appellate proceedings relating thereto. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, a stay would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,** providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)¹

Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002); *see also Episcopal Housing Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) ("The fact that Federal is not a party to an arbitration agreement does not

¹ The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See* S.C. Code Ann. § 15-48-20(d) ("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section..." (emphasis added))

prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”).

Moreover, this Court possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court’s discretion. *Id.* See also *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.”).

In the instant matter, the Plaintiff’s claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Manor-Inman, a party to the Arbitration Agreement. To be sure, the claims against both this Defendant and the Facility Defendant are solely concerned with Mr. Arches’ residency at Magnolia Manor-Inman. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and the Facility Defendant. Without the issuance of a stay, disposition of the Plaintiff’s claims against this Defendant may affect the disposition of the matter against Magnolia Manor-Inman, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff’s allegations of liability in the Complaint make very little distinction between this Defendant and the Facility Defendant. Rather, Plaintiff repeatedly lumps this Defendant in with others referring to them collectively as the “Defendants” throughout the Complaint. If this Defendant is forced to continue with this litigation, the arbitration proceedings against the Facility Defendant could become redundant and meaningless because of the substantial overlap

in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor-Inman. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of the Facility Defendant would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000) (Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

CLEMENT RIVERS, LLP

By: /s/ D. Jay Davis, Jr.

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Attorneys for the Defendant James H. Mack

Charleston, South Carolina

Dated: March 24, 2023

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vs.)

THI OF SOUTH CAROLINA AT)
MAGNOLIA MANOR-INMAN, LLC)
D/B/A MAGNOLIA MANOR-INMAN,)
THI OF SOUTH CAROLINA AT)
INMAN, LLC, THI OF SOUTH)
CAROLINA, LLC, HUNT VALLEY)
HOLDINGS, LLC, FUNDAMENTAL)
ADMINISTRATIVE SERVICES, LLC,)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, THI,)
OF BALTIMORE, LLC, AND JAMES H.)
MACK,)

DEFENDANTS.)

**DEFENDANT THI OF SOUTH
CAROLINA AT MAGNOLIA MANOR-
INMAN’S MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL
ARBITRATION**

TO: LEE D. COPE, ATTORNEY FOR THE PLAINTIFF

Defendant THI of South Carolina at Magnolia Manor Inman, LLC (this “Defendant” or the “Facility”) submits this following memo in support of its Motion to Compel Arbitration.

Plaintiff, Steven McCarson, as personal representative of the estate of Louis Arches has sued the Defendants based on care/treatment provided to Mr. Arches while he was a resident at the Facility. In conjunction with Mr. Arches’ admission to the Facility, his grandson, Steven McCarson, on behalf of Mr. Arches, executed an Arbitration Agreement that is enforceable—or, alternatively, that Plaintiff should be estopped to deny the enforceability of—that covers the entirety of Plaintiff’s claims against the Facility. As such, this Defendant respectfully requests

that this Honorable Court stay the pending action and compel Plaintiff's claims against it to arbitration.

BACKGROUND

With the help of his grandson (Mr. McCarson), Mr. Arches, age 74, was admitted to the Facility in May of 2019 for skilled nursing care. Mr. McCarson handled the paperwork in conjunction with his grandfather's admission, and in so doing, Mr. McCarson executed an Admission Agreement and an Arbitration Agreement on Mr. Arches' behalf, both of which were duly countersigned by the Facility's representative Katilia Brannon. (See **Exhibits 1** and **2**, respectively, attached hereto; see also Affidavit of Katilia Brannon, attached hereto as **Exhibit 3**).

Based on the Admission Agreement and pursuant to the terms thereof, Mr. Arches was admitted to the Facility and received skilled nursing care and treatment. During his stay at the Facility, Mr. Arches received and accepted the benefits of the Admission Agreement, which included the Facility furnishing Mr. Arches a room, providing routine meals, and rendering nursing, personal, and custodial care.

Upon Mr. Arches' admission, Mr. McCarson explicitly represented that he was authorized to admit Mr. Arches to the Facility and execute the documents he executed on his behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, including Mr. McCarson's authority to bind Mr. Arches (See **Ex. 1**). Mr. McCarson signed the Admission Agreement on behalf of Mr. Arches as his responsible party and representative.

The Arbitration Agreement provides:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal

injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules. (See **Ex. 2**).

The Arbitration Agreement further provides:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act (Title 9 of the United States Code), notwithstanding any contrary provision of this Agreement or contrary state law. (See **Ex. 2**).

Regarding Mr. McCarson's authority to sign on behalf of his grandfather, the Arbitration Agreement states:

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

(See **Ex. 2**).

Because the acts complained of by Plaintiff fall within the scope of the Arbitration Agreement, the Court should stay this lawsuit and compel Plaintiff's claims against it to arbitration, pursuant to § 3 of the FAA.¹ 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."); *see also Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any

¹ The "FAA" is the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”).

ARGUMENT

I. THE FAA GOVERNS THE ARBITRATION AGREEMENT.

The Arbitration Agreement, by its terms and by law, is governed by the FAA. For one reason, the Arbitration Agreement expressly states that the FAA applies:

The parties acknowledge and agree that, because the services and reimbursement thereof effects a transaction that involves interstate commerce, the enforcement of this Arbitration Agreement is not subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

(*See Ex. 2.*) This must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed the subject contract involved interstate commerce)).

Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause). Our Supreme Court has expressly held that skilled nursing facility admission agreements

implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

II. THE FAA REQUIRES ARBITRATION AGREEMENTS TO BE PLACED ON EQUAL FOOTING WITH ALL OTHER CONTRACTS UNDER SOUTH CAROLINA LAW.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”² and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). To that end, the FAA provides that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. “By its terms, the [FAA] leaves no place for the exercise of discretion by a . . . court, but instead *mandates* that . . . courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 (“The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.*”) (emphasis added).

While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, “courts *must* place arbitration

² *Allied–Bruce*, 513 U.S. at 270.

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

III. THE ARBITRATION AGREEMENT IS VALID ON ITS FACE.

The Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that calls its validity into question. It bears Mr. McCarson’s signature on behalf of Mr. Arches, along with Mr. McCarson’s express representation that he is authorized to sign for Mr. Arches.³ Additionally, the Agreement lists Mr. Arches as a party. It is countersigned by Ms. Brannon for the Facility. It is duly supported by consideration and sets forth all necessary terms, containing, as it does, the parties’ mutual promises to submit a certain defined scope of disputes to binding arbitration⁴ before an arbitrator who is either agreed upon by the

³ By virtue of his signature, Mr. McCarson is “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement, *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”), including, of course, the express representation therein of his authority to act on Mr. Arches’ behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract, *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) (“There exists in every contract an implied covenant of good faith and fair dealing.”), and Mr. Arches is no less bound by this covenant than the Facility.

⁴ The parties’ mutual promises to arbitrate constitute sufficient consideration. *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (“A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.”) (citing *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996) (“[T]he exchange of promises qualified as

parties themselves or selected by the Court, in a proceeding to be conducted pursuant to the South Carolina ADR Rules, which will result in a decision that is enforceable in a court of competent jurisdiction. To require more just because an arbitration agreement is in issue would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion*, 563 U.S. at 339.

Moreover, the Arbitration Agreement is not unconscionable. For an agreement to be deemed unconscionable, there must be both (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that are so oppressive no reasonable person would make them and no fair and honest person would accept them. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). Neither is the case here.

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); accord *Marzulli v. Tenet S.C., Inc.*, No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this case, Plaintiff bears that burden. "Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. "Meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care

consideration."); see also *Evatt v. Campbell*, 234 S.C. 1, 8, 106 S.E.2d 447, 451 (1959) ("Mutual promises also constitute a good consideration.").

providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

(See Ex. 2, ¶ 2.) Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: “**I understand and agree that I am giving up and waiving my right to a jury trial.**” See Ex. 2, ¶ 6.

By signing the Arbitration Agreement and Admission Agreement, Mr. McCarson, acting on behalf of Mr. Arches, represented that he understood and assented to their terms. Indeed, he was given the option of entering into the Arbitration Agreement – *or not* – and he freely and voluntarily made the decision to proceed. The Arbitration Agreement by its plain language was not a precondition of admission to the Facility and simply could not have been an adhesion or “take it or leave it” contract. Mr. McCarson had the option not to enter into the Arbitration Agreement on behalf of his grandfather, yet he voluntarily did so, voluntarily did not retract his agreement thereto, and his grandfather stayed at the Facility and received skilled nursing care after admission.

Defendant gave Mr. Arches the option of entering into the Arbitration Agreement and his authorized agent made the decision to proceed. Mr. McCarson did not have to accept this offer nor has there been any allegation or evidence that he was coerced into signing anything. Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the “terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on “whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker.” *Id.* at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select

a third party arbitrator *jointly* “from a panel having experience and knowledge of the health care industry.” *See Ex. 2*. If the parties are unable to agree upon such an arbitrator, the agreement vests the Court with authority to make a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is “binding on all parties.” As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration. And there is nothing about the Arbitration Agreement—which, again, calls for arbitration conducted pursuant to the South Carolina ADR Rules—that would suggest it is not geared towards achieving an unbiased decision by a neutral decision-maker. Indeed, Rule 1 of the South Carolina ADR Rules expressly states, “These rules shall be construed to secure the just, speedy, inexpensive and collaborative resolution in every action to which they apply.”

Lastly, the United States District Court for the District of South Carolina and trial courts around South Carolina have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon, supra*, at *3; *THI of S.C. at Columbia, LLC v. Wiggins, C/A* No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson, supra*. Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA, which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any

argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and must be rejected.

IV. PLAINTIFF’S CLAIMS AGAINST THE FACILITY ARE WITHIN THE SCOPE OF THE ARBITRATION AGREEMENT.

Without question, Plaintiff’s claims against the Facility are within the scope of the Arbitration Agreement. In pertinent part, the Arbitration Agreement reads as follows:

It is . . . understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively “Disputes”), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

This plain language clearly embraces the subject matter of Plaintiff’s claims. And even if there were “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 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.”).

V. PLAINTIFF SHOULD BE ESTOPPED TO DENY THE ENFORCEABILITY OF THE ARBITRATION AGREEMENT—AND, FOR THAT MATTER, THE ADMISSION AGREEMENT. THE ARBITRATION AGREEMENT AND THE ADMISSION AGREEMENT MERGED (I.E., SHOULD BE CONSTRUED TOGETHER AS A SINGLE CONTRACT), AND PLAINTIFF SHOULD BE ESTOPPED FROM DENYING THE ENFORCEABILITY OF THE ARBITRATION AGREEMENT.

The core question here is this: Is the Arbitration Agreement (which Mr. McCarson signed for Mr. Arches) enforceable against Mr. Arches—or, more precisely, against his estate (Plaintiff)—even though it was not signed by Mr. Arches himself? The answer is yes. The Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

To be clear, the Facility’s merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mr. McCarson or otherwise on the existence of any valid agreement per se. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’ equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability.*”) (emphasis added).

Conceptually, the Facility's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Mr. Arches, and, in turn, Plaintiff (his estate), to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Arches having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in his shoes as his estate) is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility's argument in favor of direct benefits estoppel is based on the direct benefits Mr. Arches received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff, i.e., Mr. Arches' estate, from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility's merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement's supposed lack of validity—e.g., that Mr. McCarson lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Mr. Arches under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), and/or because Mr. McCarson lacked power of attorney over Mr. Arches—is beside the point and unavailing to refute the Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Admission Agreement/Arbitration Agreement is enforceable *per se* but whether Mr. Arches, and, in turn, Plaintiff (his estate), is estopped to deny its enforceability.

A. Merger

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

Indeed, in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the particular facts of the case, it nonetheless confirmed the validity of the general proposition of law on which the *Coleman* appellants based their merger/equitable estoppel argument in the very context of nursing home admission agreements and arbitration agreements. 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (“Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. . . . Here, the documents were executed at

the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.”).

The Admission Agreement and the Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.⁵ They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

B. Equitable Estoppel of Merged Agreement

“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.” *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019). “Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int’l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); see also *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.*

⁵ To be clear, *Coleman* unequivocally answers the question of whether the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

to reverse the circuit court’s denial of a motion to compel arbitration); *Wilson*, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (favorably discussing the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which the Facility contends Plaintiff is estopped to deny the enforceability of the Arbitration Agreement here, where Mr. Arches received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged); *see also id.* at 340, 827 S.E.2d at 175 n. 6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

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

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone*

Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

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

....

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

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (citing in part *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted)).⁶

The key to determining when direct benefits estoppel may be applied is whether the contractual benefits flowing to the nonsignatory, i.e., the party to be estopped, are direct or indirect. See *Wilson*, 426 S.C. at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In

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

contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause while at the same time denying that the arbitration clause is enforceable.

Here, Mr. Arches embraced all aspects of the Admission Agreement with the Facility. Indeed, his receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Mr. Arches received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility). To deny him receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency: every night’s stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—Plaintiff’s complaint does not go nearly so far as that. (*See generally* Compl.)

It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admission Agreement when it works to his advantage and repudiating the Arbitration Agreement when it works to his disadvantage.

As described, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against the

Facility based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Pursuant to numerous orders of this Court and numerous other courts on essentially identical facts and concerning identical arbitration agreements, where a non-signatory receives the benefits of the contract, which Mr. Arches certainly did here, he must be prevented from refusing to comply with the Arbitration Agreement merely because he did not sign it.

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

To the extent Plaintiff may argue the Admission Agreement and Arbitration Agreement are not merged pursuant to *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), such reliance is misplaced.⁷

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

⁷ To the extent Plaintiff may argue the Admission Agreement and Arbitration Agreement are not merged pursuant to the recent case of *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), such reliance is also misplaced, as addressed separately below.

their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” *Id.*

Similarly, in *Hodge*, the admission agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating “[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement.” *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.* In *Thompson*, the arbitration agreement also contained a disclaimer provision but the admission agreement did not.

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge* (and for that matter *Solesbee*) the Arbitration Agreement and Admission Agreement in the case at bar should not be considered “separate” for purposes of denying merger. Unlike *Coleman*, *Thompson*, and *Hodge* (and for that matter *Solesbee*), the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Further, it did not have to be agreed to as a precondition to admission to the Facility.

Instead, in the present case, the agreements were effectively executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).⁸ Specifically, the Admission and Arbitration

⁸ To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants’ based their merger argument, i.e., the

Agreements were signed by Mr. McCarson, on his grandfather's behalf, on May 6, 2019 and were both countersigned by the Facility the same day. The documents were signed by the exact same people: Mr. McCarson as representative for his grandfather and by Katilia Brannon for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Arches' residency at the skilled nursing facility.

While the Admission Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court⁹), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." And without question, the Arbitration Agreement is among these other admissions materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's admission documentation—including the Arbitration Agreement.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission*

Coleman Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements—though that is not the case in regard to the material facts bearing on the question of merger), "the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

⁹ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike in the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

Agreement.”) (emphasis added)). And any notion that there is ambiguity in this regard is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Mr. Arches’ residency at the Facility. But all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to [the] Facility’s Admission Agreement, or breach thereof, or relating in any way to [Mr. Arches’] stay at [the] Facility, or to the provisions of care or services

to [Mr. Arches]”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Arches’ relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* Admission Agreement (setting forth the terms of Mr. Arches’ admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Arches’ admission in the Facility).)

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

Similarly, the termination provisions provide no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement—the only point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still *connected* to the Admission Agreement even after the termination of the Admission Agreement. This is simply how agreements to arbitrate work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹⁰ there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. It does not even make sense that the

¹⁰ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

parties would not have intended the Admission Agreement and the Arbitration Agreement to merge.

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

And—besides the fact that there is indeed no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Merger is *presumed* upon the occurrence of a particular set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger

presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

For the Court to find against merger here, it would have to rely on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should find that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Arches’ admission to the Facility and would not have been done at all but for his admission to the Facility.

D. *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, is also distinguishable—and, most respectfully, erroneous.

During the pendency of this case, the Court of Appeals decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility’s here—although, to be clear, the Court of Appeals overlooked and/or misapprehended a number of material points with respect to the argument. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court of Appeals likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility’s equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 (“Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility’s] equitable estoppel argument was properly denied.”).¹¹ Most respectfully, the *Solesbee* Court’s merger analysis is itself erroneous, and *Solesbee* should not control the disposition of the Underlying Motions.¹²

First, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.” 438 S.C. at 648, 885 S.E.2d at 149. It is

¹¹ To be clear, the Court of Appeals’ decision in *Solesbee* turned on its affirmance of the circuit court’s ruling against *merger* of the Arbitration Agreement and the Admission Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/estoppel argument.

¹² In this regard, the Facility would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

simply not true that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.”

Regarding governing law, what the Admission Agreement actually states is this: “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located.” (Admission Agreement p. 10.) And what the Arbitration Agreement actually states is this:

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

(Arbitration Agreement.)

Without question, the FAA applies to the Arbitration Agreement. Again, the FAA applies whenever an arbitration agreement involves interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA “create[d] a body of federal substantive law,” which is “applicable in state and federal courts.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to

enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

Again, essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any “Entire Agreement” provision. Rather, the “Entire Agreement” provision of the Admission Agreement expressly states, “other Admissions materials . . . are made a part of this Agreement by reference.” (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these “other Admissions materials.” Moreover, that the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement” just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even

if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

Third, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, ‘Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a “revocation” provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of “revocation” and “termination.” A “revocation” is an annulment (i.e., making something a nullity),¹³ whereas “termination” is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement and Arbitration Agreement were separately paginated and had their own

¹³ *Black’s Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment (“The act of nullifying or making void.”).

signature pages.” 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they were intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary (*see* No. 3 above), this fact provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mr. McCarson on Mr. Arches' behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

Again, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement

providing for arbitration of disputes arising out of the admission. (*Compare* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

VI. ALTERNATIVELY, THE PARTIES SHOULD BE PERMITTED TO CONDUCT ADDITIONAL DISCOVERY.

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein, and in particular, the nature of Mr. Arches' agency relationship with his grandson and the circumstances surrounding the admissions process.

At a minimum, the Court should allow the Facility to engage in some appropriately limited discovery to investigate fairly the Arbitration Agreement's enforceability under principles relating to the law of agency.^{14 15 16} This would entail, at the least, allowing the

¹⁴ A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

¹⁵ "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

¹⁶ Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837

Facility to depose Mr. McCarson and to follow up on any pertinent evidentiary leads revealed by his deposition. Otherwise, the Facility is in a Catch-22: vulnerable on the one hand to the argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable based on Mr. McCarson's agency (or related principles, such as agency by estoppel or ratification), which is a fact-intensive question, while at the same time vulnerable on the other hand to the argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It must be remembered that the Arbitration Agreement is valid on its face, bearing, as it does, Mr. McCarson's express representation of authority to bind Mr. Arches. (Arbitration Agreement ("By his . . . signature below, the executing party [(i.e., Mr. McCarson)] represents that he . . . has the authority to sign on [Mr. Arches'] behalf so as to bind [Mr. Arches] as well as [himself].").¹⁷ It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial

(1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

¹⁷ The Facility would note here again that, having signed the Arbitration Agreement, Mr. McCarson "is presumed to have, read, understood, and assented to its terms." *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."); *see also Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings.

Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where it cannot conduct relevant discovery to vindicate its arbitration rights without risking a waiver of those rights by the very act of attempting to vindicate them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts*"); *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.") (citing *Concepcion*, 563 U.S. at 339); *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted)).

Principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Motion to Compel Arbitration and, in turn, the Motions to Stay by the other Defendants.¹⁸ Their application is fact dependent, and the allowance of discovery—without the threat of waiver—into Mr. Arches and Mr. McCarson’s course of dealing and the potential creation of an agency relationship between them (or other potential bases for enforcement of the Arbitration Agreement under related principles) is only reasonable.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order dismissing or staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motions on any of the grounds asserted above, this Defendant requests that the parties be permitted to conduct additional discovery. This Defendant also requests permission to be heard after such discovery is conducted and requests that they be permitted to submit supplemental memoranda along with any additional evidence procured.

<SIGNED ON THE FOLLOWING PAGE>

¹⁸ The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the grant of the Motion to Compel Arbitration dictates the grant of the Motions to Stay—and, conversely, the denial of the Motion to Compel Arbitration dictates the denial (as moot) of the Motions to Stay. Accordingly, to show why the Court should grant the Motion to Compel Arbitration is, in turn, to show why it should grant the Motions to Stay.

CLEMENT RIVERS, LLP

By: /s/ Russell G. Hines

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*Attorneys for the Defendant THI of South Carolina
at Magnolia Manor-Inman, LLC*

Charleston, South Carolina

May 31, 2023

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

Howie Arches

RESIDENT NUMBER:

302084-1

DATE OF ADMISSION:

5-6-19

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

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

I. GENERAL CONDITIONS

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

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

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

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

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

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

Original: Business File • Photocopy: Resident/Representative

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

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.
2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.
3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative have the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.
5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.
6. Provide and be responsible for personal items of clothing and property.
7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.
8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.
9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

Original: Business File • Photocopy: Resident/Representative

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.
11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.
12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.
13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.
14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.
15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.
16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.
17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.
18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.
19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

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

III. FINANCIAL AGREEMENT

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

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☐-semi-private) accommodations, for a basic fee of \$_____ per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.
 - a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
 - b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
 - c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.
2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.
3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

Original: Business File • Photocopy: Resident/Representative

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

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

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

IV. TERMINATION

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

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

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

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

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

V. MEDICAID BENEFICIARIES

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

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

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

3. **Non-Covered Services.**

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

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

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

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

VI. MEDICARE BENEFICIARIES

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

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

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

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

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

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

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

VII. PRIVATE PAY/INSURANCE

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

Original: Business File • Photocopy: Resident/Representative

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

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

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

5. **Application/ Appeals.** Resident and/or Representative authorize Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but n

6. Not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remain responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

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

. SC 0

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

. SC 0

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

IX. GOVERNING LAW

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

X. SEVERABILITY

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

XI. CAPTIONS

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

XII. MODIFICATIONS

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

XIII. WAIVER

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

XIV. RESIDENT

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

XV. ASSIGNABILITY

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

Original: Business File • Photocopy: Resident/Representative

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days' notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.
2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.
3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.
4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.
2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.
3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.
4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, and durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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

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

XVIII. ENTIRE AGREEMENT

I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.

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

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

Signature of Resident Date

Printed Name of Resident

Social Security Number

Witness Signature Date

Printed Name of Witness

OR
Steven Meceben *05/06/19*
Signature of Representative, if any Date

Printed Name of Representative

Witness Signature Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Katilia Brannon
Signature of Facility Official

Katilia Brannon MR
Printed Name of Facility Official & Title

5-6-19
Date

Original: Business File • Photocopy: Resident/Representative

PLEASE READ CAREFULLY**FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT**

This Agreement is made between MAGNOLIA MANOR INMAN ("Facility") its agents, employees and servants, and Dear Sir or Madam, ("Resident") or _____ ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

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

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Asteria McCauley 05/06/19
Resident/Representative Signature Date

Printed Name of Resident/Representative

Katilia Brannon 5-6-19
Authorized Agent of Facility Date

Katilia Brannon MR
Printed Name & Title

STATE OF SOUTH CAROLINA,	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
	)	
STEVEN MCCARSON, AS PERSONAL	)	CASE NO. 2022-CP-42-02595
REPRESENTATIVE OF THE ESTATE	)	
OF LOUIS ARCHES,	)	
	)	
PLAINTIFF,	)	
	)	
vs.	)	
	)	
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-INMAN, LLC	)	
D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT	)	AFFIDAVIT OF KATILIA BRANNON
INMAN, LLC, THI OF SOUTH	)	
CAROLINA, LLC, HUNT VALLEY	)	
HOLDINGS, LLC, FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC,	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC, THI,	)	
OF BALTIMORE, LLC, AND JAMES H.	)	
MACK,	)	
	)	
DEFENDANTS.	)	

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

I, Katilia Brannon, respectfully submit this Affidavit in support of Defendant THI of South Carolina at Magnolia Manor-Inman, LLC's ("Magnolia Manor" or the "Facility") Motion to Compel Arbitration in the above-captioned case. The facts contained in this Affidavit are within my own personal knowledge.

1. I am over the age of eighteen, am otherwise competent, and am a resident of Inman, South Carolina.
2. I was an employee of Magnolia Manor during the time period at issue in the Plaintiff's Complaint.

**DEFENDANT'S
EXHIBIT**

3. I personally conducted the admissions process for Louis Arches during his admission to the Facility in May of 2019.
4. As part of the admissions process, each admitting resident, or their representative on the resident's behalf, reviews an Admissions Agreement and various other documents that must be completed by the resident or their representative for admission to the facility.
5. The admitting resident and their representative also receive a written copy of the Facility's Handbook, a written copy of the resident's rights under applicable state laws, a written copy of the facility's policy on Advance Directives, a written explanation of the charges for services provided by facility, a separate listing of local and government resources furnished by the state Ombudsman and other state/local advocacy groups, a separate listing of all medical professionals available to provide on-site services, and a written copy of the facility's policy on the use of physical/chemical restraints, in addition to other administrative documents. The admitting resident, or the resident's representative on behalf of the resident, initials an Acknowledgement Form as part of this admissions process, acknowledging that he or she has received and reviewed these respective items.
6. The admitting resident, or the resident's representative on behalf of the resident, also has the option to enter into an Arbitration Agreement with the facility during the admissions process, whereby any future claims based on the admitting resident's residency at the facility must be submitted to mandatory arbitration. As the Arbitration Agreement states, completion of the Arbitration Agreement is not a condition for admission to the facility.
7. The admissions process normally takes approximately one hour, depending on the admitting resident, but can take longer depending on certain variables, including whether the resident's family members are present for the admission process, whether the resident or family members have any questions about the admissions documents, and what the resident's medical condition is during the admissions process. During the admission process, I offer to answer any questions. I also stop halfway through the process to make sure no one has any questions. At the end of the admission process, I again ask the resident, or their representative, or both if they had any questions and answer any questions I can. I also offer to get an answer for any questions I cannot answer at the time.

8. During the admissions process on May 6, 2019, I personally reviewed and explained each of the admissions documents, described above, to the resident's representative, Steven McCarson, to ensure he reviewed, was comfortable with, and understood each and every document, including the Admission Agreement and Arbitration Agreement.
9. During the admissions process, Mr. McCarson was talkative, alert, and oriented. I did not have any reasons to suspect Mr. McCarson was suffering from any mental or cognitive inabilities at the time.
10. It appeared Mr. McCarson was listening to me and understood me as I explained each of the admissions documents during the admissions process, and Mr. McCarson did not voice any objections as to any of the admissions documents, including the Arbitration Agreement.
11. Mr. McCarson signed various admissions documents, including the Admissions Agreement and Arbitration Agreement.
12. I believed Mr. McCarson had permission to execute the various admissions documents, including the Admission Agreement and Arbitration Agreement on behalf of Mr. Arches and no one informed me otherwise.

FURTHER AFFIANT SAYETH NOT.

Katilia Brannon

Katilia Brannon

SWORN TO AND SUBSCRIBED BEFORE ME this, the 22 day of March, 2023.

Mystress T. S. Miller
NOTARY PUBLIC

My Commission Expires: October 26, 2026



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	CIVIL ACTION NO.: 2022-CP-42-02595
	)	
Steven McCarson, as Personal	)	
Representative of the Estate of Louis	)	
Arches,	)	
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN OPPOSITION TO
	)	MOTION TO COMPEL ARBITRATION
THI of South Carolina at Magnolia	)	
Manor-Inman, LLC d/b/a Magnolia	)	
Manor-Inman, THI of South Carolina	)	
at Inman, LLC, THI of South	)	
Carolina, LLC, Hunt Valley	)	
Holdings, LLC, Fundamental	)	
Administrative Services, LLC,	)	
Fundamental Clinical and	)	
Operational Services, LLC, THI of	)	
Baltimore, LLC, and James H. Mack,	)	
	)	
Defendants.	)	

Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, has moved to dismiss this action and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. The basis of Defendant's Motion is that a valid and enforceable arbitration agreement exists between the parties. Defendant relies on a slew of unreported Circuit Court orders to support its arguments.¹ In doing so, Defendant attempts to minimize and distract from statutory law and four precedential decisions of the Supreme Court of South

¹ Plaintiff has attached unreported Circuit Court orders supporting her arguments as Exhibit A.

Carolina and the Court of Appeals which are nearly identical to the case at hand and define the current law of South Carolina pertaining to arbitration agreements within the health care facility context: *Arredondo*, *Coleman*, *Thompson*, and *Hodge*.

The Arbitration Agreement relied upon by Defendant was signed by Plaintiff, who is the grandson of the decedent, at a time when he did not have authority under a valid power of attorney to enter any such agreement on the decedent's behalf. Further, the Arbitration Agreement was separate from and does not merge with the Admission Agreement, so Plaintiff is not equitably estopped from denying the Arbitration Agreement's enforceability. Lastly, there is no evidence that Plaintiff had actual or apparent authority under common law principles to enter the Arbitration Agreement on behalf of the decedent, and South Carolina law is clear that only the representations and conduct of the principal himself, and not the actions of the agent, can create the agency relationship. Therefore, Defendant's Motion should be denied by the Court.

FACTUAL BACKGROUND

The Plaintiff in this wrongful death and survival action is Steven McCarson, grandson of the decedent, Mr. Louis Arches. Plaintiff commenced this action on July 14, 2022, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Arches while he was a resident at Defendant's assisted living facility. (*See generally* Compl.). Specifically, Mr. Arches fell numerous times between May and December of 2019 after being assessed as a high fall risk by Defendant. (Compl. ¶¶ 10-16). Mr. Arches passed on May 18, 2020. (*Id.* at ¶ 17). On

February 3, 2023, Defendant filed a Motion to Compel Arbitration, relying on an Arbitration Agreement that was signed individually by Plaintiff on May 6, 2019 and a durable financial and health care powers of attorney that were signed by Mr. Arches on April 24, 2019, designating Plaintiff as his agent for the purposes of financial and health care decisions. (Mot. Compel Arbitration; Ex. A, Financial POA; Ex. B, Health Care POA). Plaintiff signed the Agreement instead of Mr. Arches due to Mr. Arches' documented history of Alzheimer's disease and dementia and inability to communicate, understand and manage the ordinary affairs of life. (Ex. C, Medical Statements). The durable financial power of attorney was not recorded at the time Plaintiff entered the Arbitration Agreement, and the health care power of attorney was never recorded.

ARGUMENT

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that Plaintiff did not have authority to execute the Arbitration Agreement at the time it was entered by the parties. While there is a presumption in favor of arbitration, it only applies to the scope of an arbitration agreement; "it does not apply to the existence of such an agreement or to the identity of the parties who may be bound to such an agreement." *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). Neither of the executed powers of attorney were sufficient to authorize Plaintiff to enter an arbitration agreement on behalf of Mr. Arches or his Estate.

To the extent that Defendant may maintain that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement due to his execution of an Admission Agreement, there was no merger of the agreements, as the language of the Arbitration Agreement indicates that Defendant considered it to be a separate agreement. Additionally, there is no evidence that Plaintiff had actual or apparent authority to act on Mr. Arches' behalf at the time he entered the Arbitration Agreement, as there is no evidence that Mr. Arches ever consciously represented or implied to Defendant that Plaintiff was his agent for the purposes of entering an arbitration agreement. For these and the following reasons, Defendant's motion should be denied.

I. Plaintiff arguably may have had authority to make health care decisions for Mr. Arches, as well as any financial decisions necessitated by those decisions, but he did not have authority to waive Mr. Arches and/or the Estate's right to a jury trial.

"It is essential that the parties to a contract have the capacity to contract Furthermore, a capacity to contract relates to the status of the person rather than to the circumstances surrounding the transaction." 17 C.J.S. Contracts § 45. At the time Mr. Arches was admitted to Defendant's facility, he had executed a health care power of attorney granting Plaintiff authority to take actions **necessary** to assuring implementation of his health care, including granting a release from liability **required** by any health care provider. However, even if the power of attorney was effective, it only grants authority to make ancillary decisions related to Mr. Arches' health care if they are **necessary**, and the subject Arbitration Agreement was optional. Plaintiff concedes that Mr. Arches did not have the capacity to consent or

enter Defendant's Admission Agreement on the date of his admission to its facility. Therefore, any authority that Plaintiff had to act on his behalf must have derived from the durable financial power of attorney, the Adult Health Care Consent Act or common law agency principles.

Additionally, the durable financial power of attorney was also ineffective on the date the Arbitration Agreement was entered. A durable financial power of attorney is only effective after the principal becomes incapacitated if the power of attorney has been recorded in the county where the principal resides at the time the instrument is recorded. Here, Mr. Arches was incapacitated at the time of his admission to Defendant's facility, as previously documented by a physician and a registered nurse. However, not only was the financial power of attorney not recorded at the time of his admission, but it was also not recorded in Spartanburg County, where Mr. Arches resided. Since the durable financial power of attorney did not meet the statutory requirements and was not effective, Plaintiff was not empowered by it to initiate legal proceedings on Mr. Arches' behalf or waive his rights.

A. The durable financial power of attorney was not effective when the Arbitration Agreement was signed.

As an initial matter, it is doubtful that Mr. Arches had the capacity to sign either of the executed powers of attorney. A person must possess contractual capacity to execute a valid power of attorney. *In re Thames*, 344 S.C. 564, 571, 544 S.E.2d 854, 857 (Ct. App. 2001). South Carolina has defined contractual capacity as a person's ability to understand, at the time the contract is executed, the nature of

the contract and its effect. *In re Nightingale's Estate*, 182 S.C. 527, 542, 189 S.E. 890, 896 (1937). As will be discussed below, Mr. Arches' medical records indicate that prior to his execution of the powers of attorney and admission to Defendant's facility, he could not describe the difference between a fish and a dog, could not understand simple questions or communicate, and could not understand the ordinary affairs of life. (Ex. C). These observations were documented by a physician and are the result of Mr. Arches' history of Alzheimer's disease and dementia. Defendant has offered no evidence that Mr. Arches had sufficient contractual capacity to execute either of the powers of attorney. Since Mr. Arches more likely than not did not possess contractual capacity, the executed powers of attorney are void and would be ineffective in granting authority to Plaintiff to enter an Arbitration Agreement.

Regardless, the durable financial power of attorney signed by Mr. Arches is also governed by the South Carolina Uniform Power of Attorney Act. *See* S.C. Code Ann. § 62-8-103. The durable financial power of attorney purports to grant to Plaintiff authority to exercise powers on Mr. Arches' behalf related to banking, lending or borrowing, taxes, and real and personal property. (Ex. A). It also states that Plaintiff may "obtain and pay for legal advice" and "initiate or defend legal and administrative proceedings" for Mr. Arches. If valid, the durable financial power of attorney could arguably have granted Plaintiff the power to waive the Estate's right to a jury trial. However, even if Mr. Arches had executed the power of attorney prior to his documented incapacity, the subject financial power of attorney does not meet

the requirements of the Act and was therefore not effective at the time that Plaintiff signed the Arbitration Agreement.

Under the Act, a durable financial power of attorney is not effective after the principal's incapacity unless "the power of attorney has been recorded in the same manner as a deed in the county where the principal resides at the time the instrument is recorded After the principal's incapacity and before recordation, the agent's authority cannot be exercised." S.C. Code Ann. § 62-8-109(c). The Arbitration Agreement was entered on May 6, 2019 but the durable financial power of attorney was not recorded until July 29, 2019. Therefore, if Mr. Arches was incapacitated at the time the Arbitration Agreement was signed by Plaintiff, Plaintiff did not have the authority to enter the Agreement on Mr. Arches' behalf.

Incapacity under the South Carolina Uniform Power of Attorney Act is a broader term than its usage under the South Carolina Health Care Power of Attorney Act and South Carolina Health Care Consent Act. S.C. Code Ann. § 62-8-102(5) provides that incapacity means "inability of an individual to manage property or business affairs because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions" Under the Uniform Power of Attorney Act, incapacity may be demonstrated by a "writing or other record" by a physician setting forth that the principal is incapacitated within the meaning of section 62-8-102(5).

A Medicaid preadmission screening and resident review of Mr. Arches performed on April 15, 2019 documents that Mr. Arches was unable to remember

what he had for breakfast or lunch, could not perform simple addition, and could not describe the difference between a fish and a dog. (Ex. C). The screening also documents that Mr. Arches was unable to answer the cognitive behavior questions. A previous physician's statement of February 8, 2019, documented Mr. Arches' inability to manage his benefits, stating that Mr. Arches was not capable of managing or directing the management of his benefits in his own best interest, that he was not able to understand and act on the ordinary affairs of life, such as providing for himself, and that he was not able to manage his funds or direct others how to manage them. The statement also documents that he had a history of Alzheimer's disease and dementia. This statement was signed by a physician and clearly sets forth that Mr. Arches was incapable of managing his own property and business affairs due to an impairment in his ability to communicate.

Additionally, S.C. Code Ann. § 62-8-109(c) states that the power of attorney was only effective if it was recorded in the county where Mr. Arches resided at the time of recordation. On July 29, 2019, when the power of attorney was recorded, Mr. Arches was residing at Defendant's facility located at 63 Blackstock Road, Inman, South Carolina. (Ex. D, Defendant Records). Mr. Arches had been residing there since his admission on May 6, 2019. However, the durable financial power of attorney was recorded in Cherokee County, and not Spartanburg County. Since it was not recorded in the county where Mr. Arches resided, the power of attorney was not effective and Plaintiff was not permitted to exercise any authority granted by the power of attorney under section 62-9-109(c). Regardless, since the Arbitration

Agreement was signed by Plaintiff after Mr. Arches' incapacity but before recordation of the durable financial power of attorney, the power of attorney was not effective, and could not have been a source of authority for Plaintiff to enter the Arbitration Agreement.

B. Under *Arredondo*, the health care power of attorney did not grant Plaintiff authority to make unnecessary decisions that were incidental to Mr. Arches' medical care, such as entering the Arbitration Agreement.

The subject health care power of attorney only grants the attorney-in-fact authority to take actions incidental to Mr. Arches' health care if they are "necessary." (Ex. B, pg. 4). Here, as in most nursing home cases, the Arbitration Agreement was optional. While the relevant provision of the health care power of attorney authorizes Plaintiff to pursue legal action and to grant waivers required by health care providers, in *Arredondo* the Supreme Court of South Carolina analyzed its language under identical circumstances and determined that the exact language contained in the subject power of attorney does not grant authority to an attorney-in-fact to make decisions regarding arbitration unless they are necessary and required for admission. *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69, 80-85, 856 S.E.2d 550, 556-59 (2021).

The health care power of attorney in *Arredondo* had identical language to the subject power of attorney in this action concerning the agent's powers to pursue legal action and grant waivers. *Id.* at 80-81, 856 S.E.2d at 556-57. The Court noted that the first sentence of the clause only permitted the agent to exercise the authority described therein if the action taken was **necessary** to "making,

documenting, and assuring implementation” of a decision concerning the principal’s health care. *Id.* at 81, 856 S.E.2d at 557. After determining that the signing of the arbitration agreement was not necessary to the principal’s admission, and that it was a voluntary, standalone agreement, the Court determined that its waiver of the principal’s right to a jury trial was not “required”, and that the agent did not have authority to grant the waiver. *Id.* at 81-83, 856 S.E.2d at 557-58.

Lastly, the Court held that the provision’s grant of authority to pursue legal action also did not authorize the agent to enter the arbitration agreement, as it only authorized the agent to pursue legal action to “force compliance with [the principal’s] wishes as determined by [the principal’s] agent, or to seek actual or punitive damages for the failure to comply”, and therefore had no significance to the facts before the Court. *Id.* at 84-85, 856 S.E.2d at 558-59. Since the same facts and language are presented to the Court in this action, under *Arredondo*, the subject health care power of attorney did not grant Plaintiff the authority to enter the Arbitration Agreement on Mr. Arches’ behalf. Thus, the only remaining avenues of authority available for Plaintiff to have entered the Arbitration Agreement are under the Adult Health Care Consent Act or common law agency principles.

C. **The Adult Health Care Consent Act only grants authority to make health care decisions, and not the decision to waive Mr. Arches’ (and his Estate’s) right to a jury trial.**

The Adult Health Care Consent Act pertains to adults who are “unable to appreciate the nature and implications of [their] condition and proposed health care, to make a reasoned decision concerning the proposed health care, or to

communicate that decision in an unambiguous manner.” S.C. Code Ann. § 44-66-20(8). Under the Act, health care is defined as

[A] procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care.

S.C. Code Ann. § 44-66-20(1). In contrast, arbitration is a means of resolving a legal dispute outside of the typical civil litigation process – a definition unrelated to physical or mental condition. *See Black’s Law Dictionary*, 125 (10th ed. 2014).

Therefore, independently of any valid and effective power of attorney, the Act gave Plaintiff authority to consent on behalf of Mr. Arches to the provision of medical care, including placement in Defendant’s facility, as well as authority to make certain financial decisions on behalf of Mr. Arches which he would be obligated to pay. This authority “extends primarily to traditional health care decisions, and only secondarily to the financial decisions necessitated by those decisions.” *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353, 755 S.E.2d 450, 454 (2014). Most jurisdictions, including South Carolina, have ruled execution of an arbitration agreement is not a health care decision. *See Johnson v. Kindred Healthcare, Inc.*, 466 Mass. 779, 789-90, 2 N.E.3d 849, 857-58 (Mass. 2014) (collecting cases).

Consequently, even though Plaintiff could have authority to make health care decisions on Mr. Arches’ behalf under the Act, he did not have authority to sign an arbitration agreement waiving his right to a jury trial such that he would later be

bound to the agreement as the Personal Representative of his Mr. Arches' Estate. Upon seeking the admission of Mr. Arches to Defendant's facility, Plaintiff was presented with two documents, an Admission Agreement and an Arbitration Agreement. The Arbitration Agreement is separate from the Admission Agreement and contains no provision for medical, nursing, or health care services to be provided to Mr. Arches, nor does it require any financial commitment to pay for such services.²

The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. Further, the Arbitration Agreement by its very language distinguishes between itself and the Admission Agreement, stating that the Arbitration Agreement will survive any "breach of this Agreement or the Admission Agreement." While the Admission Agreement purports to incorporate admissions materials into itself "by reference herein", when viewed alongside the other details of the agreements, it creates an ambiguity as to merger when taken in context of the totality of the circumstances, and "the law is clear that any ambiguity in such a clause is construed against the drafter", i.e., Defendant. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person, or that person's estate, to arbitration.

² The Arbitration Agreement was presumptively optional under federal law. *See* 42 C.F.R. § 483.70(n). There is no language within the Arbitration Agreement indicating that it was a prerequisite to admission, and Defendant has represented that the Arbitration Agreement was optional.

In *Coleman*, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the arbitration and admission agreements lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Health Care Consent Act gave the sister authority to make “healthcare decisions” on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. *Coleman*, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act only extends authority to surrogates to make traditional health care decisions and financial decisions that arise out of those decisions. Extending this reasoning to the present circumstances, since Plaintiff lacked legal authority under the executed powers of attorney and the Act to enter into a contract not necessary to Mr. Arches’ health care, the Arbitration Agreement is void and unenforceable unless there is some other source of authority supporting its enforcement.

II. Plaintiff is not equitably estopped from denying the validity of the Arbitration Agreement because the Admission Agreement and Arbitration Agreement do not merge.

Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration Agreement by his signing of the Admission Agreement. “Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements.” *Kelly v. Logan, Jolley & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that **the party to be estopped** (1) acted in a way amounting to a false representation; (2) intended

that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. *Id.* Defendant cannot demonstrate that Mr. Arches' estate made any false representations as far as the subject power of attorney is concerned because Plaintiff was acting in his individual capacity at the time he signed the Arbitration Agreement.

Since Plaintiff did not have authority to sign the Arbitration Agreement under the executed powers of attorney or the Adult Health Care Consent Act, the fact that Plaintiff signed the Arbitration Agreement in his individual capacity and is now a party to this action as a nonsignatory in his capacity as Personal Representative of the Estate does not bind the estate to the Arbitration Agreement, at least as far as equitable estoppel is concerned. The Court of Appeals addressed this concept in *Thompson v. Pruitt Corp.*:

Respondent is attempting to use equitable estoppel against [the patient's] estate based on actions that [patient's daughter] took *in her individual capacity*. The fact that [the patient's daughter] is *now the personal representative for [the patient's] estate* is of no moment; we will not hold this circumstance against [the patient's] estate. Simply put, [the patient's] estate is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] estate, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Thompson, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016).

Equitable estoppel arguments within the health care facility context are frequently premised on the contention that admission agreements and arbitration agreements merge. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977). Any ambiguity as to merger is to be construed against the drafter. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 129 n.4, 713 S.E.2d 799, 805 n.4 (Ct. App. 2011).

Here, the Admission Agreement and Arbitration Agreement are separate contracts that do not merge. *See Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 561-63, 813 S.E.2d 292, 308 (Ct. App. 2018); *Thompson v. Pruitt Corp*, 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016); *Coleman*, 407 S.C. at 352, 755 S.E.2d at 450. *Coleman* refused to apply the doctrine of merger to admission and arbitration agreements because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455. *Thompson* and *Hodge* applied *Coleman* and provided further examples of factors demonstrating “separateness and preventing merger.” *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684; *Hodge*, 422 S.C. at 563, 813 S.E.2d at 302. It is important to note that arbitration agreements and

admission agreements for assisted living facilities serve two wholly distinct purposes.

Defendant's assertion that Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement seems to hinge on a direct benefits theory of estoppel, i.e., that since Mr. Arches benefited from the terms of an Admission Agreement that Plaintiff signed in his individual capacity, Plaintiff should be estopped as the Personal Representative of Mr. Arches' Estate from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019). Virtually all of the Circuit Court orders filed by Defendant in support of its Motion rely in some form or another on this theory.

However, as the Supreme Court explained in *Wilson*, to successfully assert direct benefits estoppel, the arbitration agreement must be a clause within the larger admissions agreement, and the plaintiff must be seeking to assert causes of action that arise from and are created by the entire contract. *Id.* "Under direct benefits estoppel, a nonsignatory is estopped from refusing to comply with an arbitration clause **when it receives a direct benefit from a contract containing an arbitration clause.**" *Id.* (punctuation omitted) (emphasis added). Here, as explained above and below, the subject Admission Agreement and optional Arbitration Agreement are separate documents that did not merge. Second, Plaintiff does not assert breach of contract, or a violation of contractual duties, and instead has brought her lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176. If anything, Plaintiff's claims are

indirectly related to the Arbitration Agreement, as it was optional, ancillary to, and separate from the Admission Agreement. *See id.* (stating that under direct benefits estoppel a claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

As discussed above briefly, in this case there were two separate agreements and they did not merge. As in *Hodge*, the separate contracts here have separate signature pages and separate pagination. The Arbitration Agreement is a separate document designated as “Page 1 of 1”. As in *Thompson*, the arbitration agreement announces its independence with its “Arbitration Agreement” title. The text of the Arbitration Agreement refers to Defendant’s Admission Agreement as a separate, standalone document (“This Agreement . . . shall survive any termination or breach of **this Agreement or the Admission Agreement.**”). This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and Court of Appeals found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

The court then explained the evidence of the parties’ intent to keep the two agreements separate by highlighting the admission agreement’s recognition of the arbitration agreement as a separate document, i.e., “This Agreement, including all Exhibits hereto, and the Arbitration Agreement”

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled “Arbitration Agreement” at the top of its first page, these factors further indicate the parties’

intent for the Arbitration Agreement to stand by itself as an independent contract. *Thompson*, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n.1; *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Arbitration Agreement was not a precondition to admission.

Defendant will likely argue that such details are “superficial things” and that they cannot be relied on by Plaintiff as proof that the two separate agreements never merged. However, to do so flies in the face of binding precedent from our Supreme Court indicating that such details are exactly what should be looked to by courts in determining whether merger exists. *See Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302 (“Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission.”); *Thompson*, 416 S.C. at 52, 784 S.E.2d at 684 (noting that evidence of parties’ intent to keep two agreements separate includes language from agreements recognizing and referring to agreements as separate documents). The details of Defendant’s Admission Agreement and Arbitration Agreement are nearly identical to those addressed by our Supreme Court in *Coleman*, *Hodges*, and *Thompson*. Defendant cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit, and any equitable estoppel argument should therefore be denied by the Court.

III. Plaintiff did not have actual or apparent authority to enter the Arbitration Agreement.

The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. *Charleston Registry v. Young Clement*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). It is the

duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. *Frasier v. Palmetto Homes of Florence*, 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). South Carolina law requires that to prove apparent authority, the defendant must show: (1) **that the purported principal consciously or impliedly represented another to be his agent**; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment.” *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005).

The basis of apparent authority is representations **made by the principal to the third party** and reliance by the third party on those representations. *Young v. S.C. Dep’t of Disabilities and Special Needs*, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that **between the principal and the third party**. *Vereen v. Liberty Life Ins. Co.*, 306 S.C. 423, 428, 412 S.E.2d 425, 428 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. *Id.*

Defendant has not produced any evidence indicating that Plaintiff had authority to enter the Arbitration Agreement on Mr. Arches’ behalf or to waive Mr. Arches’ right to a jury trial. For the reasons mentioned above, neither the executed powers of attorney nor the Adult Health Care Consent Act bestowed Plaintiff with the authority to enter the Arbitration Agreement. The simple fact that Plaintiff signed the agreements so that his grandfather could be admitted to Defendant’s

facility and receive health care in no way indicates a manifestation of authority by Mr. Arches to waive his right to a jury trial or agree to arbitration. There is no evidence that Mr. Arches ever manifested any form of assent establishing Plaintiff as his agent beyond the limited authority bestowed by the health care power of attorney, which only purported to give Plaintiff authority to enter agreements necessary to Mr. Arches' health care. Defendant will likely point to language in the Arbitration Agreement indicating that the executing party of the agreement had authority to sign on the resident's behalf. However, this language is not a representation made by Mr. Arches to Defendant that his grandson had authority to act on his behalf. Instead, it is a representation made by Plaintiff in his individual capacity to Defendant and fails to meet the requirement of a manifestation from the principal.

In fact, Defendant's position has been directly addressed and disagreed with by the Supreme Court in *Hodge*. In *Hodge*, the facility argued that a husband had taken over his wife's medical affairs and had authority to enter an arbitration agreement on her behalf. The court described the apparent authority as follows:

Apparent authority to do an act is created as to a third person **by written or spoken words or any other conduct of the *principal*** which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief.

Hodge, 422 S.C. at 572, 813 S.E.2d at 307. (emphasis added) (citations and punctuation omitted). The court then went on to disagree with the exact arguments

advanced in this case by Defendant, stating that merely because a family member signs an arbitration agreement, admissions agreement, and other forms does not make them an agent, especially when there is no valid power of attorney and there is no evidence that the principal represented the family member was their agent for the purpose of signing an arbitration agreement. *Id.* at 573-74, 813 S.E.2d at 308.

Apparent authority must be established based upon manifestations by the principal, **not the agent**. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party.

Id. at 577, 813 S.E.2d at 310.

In *Thompson*, other circumstances similar to the instant facts were addressed by the Supreme Court and found not to constitute evidence of apparent or actual authority. In *Thompson*, the facility asserted that the resident “allowed, passively or otherwise” a family member to sign her admissions agreement and arbitration agreement, and to handle other financial affairs for her, as evidence of apparent or actual authority. *Thompson*, 426 S.C. at 55, 784 S.E.2d at 686. The court did not take the same view of the circumstances:

While the evidence indicates Son handled Mother’s finances in the years leading up to her admission to UniHealth, the evidence also indicates Mother had dementia prior to being admitted to UniHealth. Therefore, her incapacity prevented her from “consciously or impliedly” representing another to be her agent. **Further, the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration**, thereby waiving the principal’s right of access to the courts and to a jury trial. Based on the foregoing, the evidence does not show that Son had either actual or apparent authority to execute the AA on Mother’s behalf.

Thompson, 416 S.C. at 55-56, 784 S.E.2d at 686 (citations omitted) (emphasis added). In other words, “an agency may not be established solely by the declarations and conduct of an alleged agent.” *Id.* (citation omitted).

Defendant’s assertion that Plaintiff held “inherent agency powers” to act on behalf of Mr. Arches is unsupported by South Carolina law. First, the theory proposed by Defendant has no supporting South Carolina authorities outside of a passing mention of the term in an abrogated case. *See Smith v. Fitton and Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (abrogated by *Dorrell v. S.C. Dep’t of Transp.*, 361 S.C. 312, 605 S.E.2d 12 (2004)). If anything, *Smith* makes clear that the inherent agency powers theory finds no support in South Carolina law. *Id.* (“[A]ppellant has offered no authority, and we have found none, that [individual] would have inherent agency power”). Second, South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their family members. *Hinson v. Roof*, 128 S.C. 470, 475, 122 S.E. 488, 490 (1924) (“The marriage relation of the parties . . . is not necessarily enough to establish the fact that the one is the agent of the other. There must be other proof.”); S.C. Jur. *Agency* § 6 (1994) (“No presumption arises from the fact of the marital relationship, without more, that [a spouse] is the agent of [the other spouse].”) (footnote omitted).

Regardless of whether Plaintiff held himself out as an agent for his grandfather, there is no evidence that at any point Mr. Arches himself made representations, or voluntarily placed Plaintiff in a position, which would indicate a

conscious or implied representation that he was specifically authorized to enter arbitration agreements on Mr. Arches' behalf. Plaintiff's position and sole authority, if he had any, would have been derived from the executed health care power of attorney or the Adult Health Care Consent Act, a statutory construct, neither of which bestowed authority to enter arbitration agreements for the reasons described above. Despite Defendant's contentions, Mr. Arches never consciously and personally held Plaintiff out or represented to Defendant that Plaintiff was authorized to act on Mr. Arches' behalf in connection with arbitration, and Defendant has produced no evidence supporting its argument, making the Arbitration Agreement invalid and unenforceable. There is zero evidence that Plaintiff had actual or apparent authority to enter the Arbitration Agreement.

IV. Plaintiff as personal representative of Mr. Arches' estate is not a third-party beneficiary to the Arbitration Agreement.

"A third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "However, there can be no third-party beneficiary unless a valid contract exists." *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687. Since Plaintiff in his individual capacity was not authorized to execute the Arbitration Agreement on Mr. Arches' behalf, there was no valid contract concerning arbitration, and neither Plaintiff in his capacity as attorney-in-fact or Personal Representative of Mr. Arches' Estate, nor the Estate itself, could be the third-party beneficiary of the Arbitration Agreement between Plaintiff and Defendant.

Additionally, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784 S.E.2d at 687. Plaintiff is not attempting to enforce the Arbitration Agreement on his own behalf or on behalf of the Estate; instead, he is asserting tort claims arising from common law duties independent of the Arbitration Agreement and Admission Agreement. Therefore, Plaintiff in his capacity as Personal Representative was not a third-party beneficiary to the Arbitration Agreement signed individually by Plaintiff, and it cannot be enforced against him independently of any authority he did not have to enter the Agreement.

V. The scope of the Arbitration Agreement does not cover wrongful death claims by Mr. Arches' statutory beneficiaries.

Even if Plaintiff had authority to sign the Arbitration Agreement and it was valid, the wrongful death claims of Mr. Arches' statutory beneficiaries would not be subject to arbitration, as they are not within the scope of the Arbitration Agreement. South Carolina law is clear that wrongful death claims belong to the statutory beneficiaries and are distinct and separate from survival claims belonging to the estate. *Bennett v. Spartanburg Ry. Gas and Elec. Co.*, 97 S.C. 27, 81 S.E. 189 (1914). Wrongful death actions are brought by the personal representative of the decedent directly for the benefit of the statutory beneficiaries and include pecuniary loss, mental shock and suffering, grief and sorrow, and loss of companionship. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). Survival actions, on the other hand, are separate claims for

separate injuries, and belong to the estate, not the statutory beneficiaries. *See Bennett*, 97 S.C. at 27, 81 S.E. at 189-90.

The statutory beneficiaries are nonsignatories to the Arbitration and Admission Agreements, regardless of whether the Arbitration Agreement purports to include “any alleged tort, personal injury, negligence, or other claim” “arising out of or relating to Facility’s Admission Agreement.” Therefore, if the Arbitration Agreement were valid, which it is not, the wrongful death beneficiaries would only be bound to its terms as third-party beneficiaries. As explained above, a third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement. Here, the Arbitration Agreement is a standalone document not contained within the Admission Agreement, and the wrongful death beneficiaries are not attempting to enforce the Admission Agreement or Arbitration Agreement.

Instead, they are seeking to recover under the wrongful death scheme for Defendant’s breach of common law duties arising from its care for Mr. Arches. Thus, even if the Arbitration Agreement is valid and enforceable, it would only reach the survival claim of the Estate, and not any wrongful death claims brought on behalf of the statutory beneficiaries. This conclusion comports with the law of other state jurisdictions. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 and n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014);

Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc., 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc’y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011).

Furthermore, Defendant cannot meet the requirements to show that the wrongful death beneficiaries qualify as third-party beneficiaries to the Arbitration Agreement. Defendant must show the Arbitration Agreement was “made for the benefit of” the family members and the Arbitration Agreement’s terms were intended to provide a “direct, rather than an incidental or consequential” benefit to them. *Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (quoting *Windsor Green Owners Ass’n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004)). The only supposed benefit Defendant could argue the statutory beneficiaries received is the promise that its legal claims will also be subject to arbitration. But Defendant has not identified any legal claims it could ever have against the statutory beneficiaries. Any legal claims Defendant had against Mr. Ramsey at his death could only be asserted against his Estate, not the statutory

beneficiaries for his wrongful death claim. S.C. Code Ann. § 15-5-90 (providing that, at a person's death, legal claims "survive both to and against" the decedent's personal representative). Since there is not even the possibility of a legal claim by Defendant against the wrongful death beneficiaries, there is no "direct benefit" to support a third-party beneficiary argument.

Additionally, the South Carolina Supreme Court has been ambivalent at best as to whether a third-party beneficiary theory can ever be used to force arbitration on unconsenting non-parties. *Wilson*, 426 S.C. at 338 n. 7, 827 S.E.2d at 174 n. 7 (citing *Comer v. Micor, Inc.*, 436 F.3d 1098, 1102 (9th Cir. 2006) (finding third-party may be able to enforce a contract but "certainly cannot be bound to a contract it did not sign or otherwise assent to")). The Court has rejected third-party beneficiary arguments to enforce nursing home arbitration contracts when invited to on multiple occasions. *Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (quoting *Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010) ("a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement")); *see also Hodge*, 422 S.C. at 574, 813 S.E.2d at 308 (nursing home conceded *Thompson* foreclosed third-party beneficiary argument). At best, even if the Arbitration Agreement was valid, it would only reach the Estate's survival claims. However, since it is not valid, it cannot compel arbitration of the wrongful death or survival claims in this action, and Defendant's motion should be denied.

VI. Additional discovery on the issue of authority is unnecessary and would violate S.C. Code Ann. § 15-48-20.

In the alternative, in the event the Defendant requests a stay of its Motion to conduct additional discovery on the nature of Plaintiff's agency relationship with his grandfather, such a stay should be denied. S.C. Code Ann. § 15-48-20 only permits a court to "summarily" proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested. Here, the only relevant and necessary evidence for the Court to make its determination is already available for the Court's review. Any further discovery with the goal of revisiting the arbitrability of this case would only serve to protract this litigation, offend section 15-48-20's mandate for an expedient determination of arbitrability, waste judicial resources, and increase costs for both parties unnecessarily. The Court should deny any potential request for additional discovery.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Compel Arbitration.

PARKER LAW GROUP, LLP

BY: s/ Lee D. Cope

Lee D. Cope

SC Bar No.: 14361

John E. Parker, Jr.

SC Bar No.: 104225

P.O. Box 457

Hampton, SC 29924

(803) 943-2111

ATTORNEYS FOR THE PLAINTIFF

May 31, 2022.
Hampton, South Carolina

SOUTH CAROLINA DURABLE FINANCIAL POWER OF ATTORNEY

I, Louie Arnes, the principal, of Gaffney, State of S.C., hereby designate STEVEN MC LARSON, of Gaffney, State of S.C., my attorney-in-fact (hereinafter my "attorney-in-fact"), to act as initialed below, in my name, in my stead and for my benefit, hereby revoking any and all financial powers of attorney I may have executed in the past.

201900003654
Filed for Record in
CHEROKEE COUNTY, SC
PHYLLIS COYLE, REGISTER OF DEEDS
07-29-2019 At 09:27 am.
PWR OF ATTY 16.00
Volume 114 Page 1255 - 1259

EFFECTIVE DATE

(Choose the applicable paragraph by placing your initials in the preceding space)

PA - A. I grant my attorney-in-fact the powers set forth herein immediately upon the execution of this document. These powers shall not be affected by any subsequent disability or incapacity I may experience in the future.

or

 - B. I grant my attorney-in-fact the powers set forth herein only when it has been determined in writing, by my attending physician, that I am unable to properly handle my financial affairs.

POWERS OF ATTORNEY-IN-FACT

My attorney-in-fact shall exercise powers in my best interests and for my welfare, as a fiduciary. My attorney-in-fact shall have the following powers:

(Choose the applicable power(s) by placing your initials in the preceding space)

PA **BANKING** - To receive and deposit funds in any financial institution, and to withdraw funds by check or otherwise to pay for goods, services, and any other personal and business expenses for my benefit. If necessary to effect my attorney-in-fact's powers, my attorney-in-fact is authorized to execute any document required to be signed by such banking institution.

PA **SAFE DEPOSIT BOX** - To have access at any time or times to any safe-deposit box rented by me or to which I may have access, wheresoever located, including drilling, if necessary, and to remove all or any part of the contents thereof, and to surrender or relinquish said safe-deposit box; and any institution in which any such safe-deposit box may be located shall not incur any liability to me or my estate as a result of permitting my attorney-in-fact to exercise this power.

SA **LENDING OR BORROWING** - To make loans in my name; to borrow money in my name, individually or jointly with others; to give promissory notes or other obligations therefor; and to deposit or mortgage as collateral or for security for the payment thereof any or all of my securities, real estate, personal property, or other property of whatever nature and wherever situated, held by me personally or in trust for my benefit.

SA **GOVERNMENT BENEFITS** - To apply for and receive any government benefits for which I may be eligible or become eligible, including but not limited to, Social Security, Medicare and Medicaid.

SA **RETIREMENT PLAN** - To contribute to, select payment option of, roll-over, and receive benefits of any retirement plan or IRA I may own, except my attorney-in-fact shall not have power to change the beneficiary of any of my retirement plans or IRAs.

SA **TAXES** - To complete and sign any local, state and federal tax returns on my behalf, pay any taxes and assessments due and receive credits and refunds owed to me and to sign any tax agency documents necessary to effectuate these powers.

SA **INSURANCE** - To purchase, pay premiums and make claims on life, health, automobile and homeowners' insurance on my behalf, except my attorney-in-fact shall not have the power to cash in or change the beneficiary of any life insurance policy.

SA **REAL ESTATE** - To acquire, purchase, exchange, lease, grant options to sell, and sell and convey real property, or any interests therein, on such terms and conditions, including credit arrangements, as my attorney-in-fact shall deem proper; to execute, acknowledge and deliver, under seal or otherwise, any and all assignments, transfers, deeds, papers, documents or instruments which my attorney-in-fact shall deem necessary in connection therewith.

SA **PERSONAL PROPERTY** - To acquire, purchase, exchange, lease, grant options to sell, and sell and convey personal property, or any interests therein, on such terms and conditions, including credit arrangements, as my attorney-in-fact shall deem proper; to execute, acknowledge and deliver, under seal or otherwise, any and all assignments, transfers, titles, papers, documents or instruments which my attorney-in-fact shall deem necessary in connection therewith; to purchase, sell or otherwise dispose of, assign, transfer and convey shares of stock, bonds, securities and other personal property now or hereafter belonging to me, whether standing in my name or otherwise, and wherever situated.

SA **POWER TO MANAGE PROPERTY** - To maintain, repair, improve, invest, manage, insure, rent, lease, encumber, and in any manner deal with any real or personal property, tangible or intangible, or any interests therein, that I now own or may hereafter acquire, in my name and for my benefit, upon such terms and conditions as my attorney-in-fact shall deem proper.

SA **GIFTS** - To make gifts, grants, or other transfers (including the forgiveness of indebtedness and the completion of any charitable pledges I may have made) without

consideration, either outright or in trust to such person(s) (including my attorney-in-fact hereunder) or organizations as my attorney-in-fact shall select, including, without limitation, the following actions: (a) transfer by gift in advancement of a bequest or devise to beneficiaries under my will or in the absence of a will to my spouse and descendants in whatever degree; and (b) release of any life interest, or waiver, renunciation, disclaimer, or declination of any gift to me by will, deed, or trust

LA **LEGAL ADVICE AND PROCEEDINGS** - To obtain and pay for legal advice, to initiate or defend legal and administrative proceedings on my behalf, including actions against third parties who refuse, without cause, to honor this instrument.

SPECIAL INSTRUCTIONS: On the following lines are any special instructions limiting or extending the powers I give to my attorney-in-fact (Write "None" if no additional instructions are given):

AUTHORITY OF ATTORNEY-IN-FACT: Any party dealing with my attorney-in-fact hereunder may rely absolutely on the authority granted herein and need not look to the application of any proceeds nor the authority of my attorney-in-fact as to any action taken hereunder. In this regard, no person who may in good faith act in reliance upon the representations of my attorney-in-fact or the authority granted hereunder shall incur any liability to me or my estate as a result of such act. I hereby ratify and confirm whatever my attorney-in-fact shall lawfully do under this instrument. My attorney-in-fact is authorized as he or she deems necessary to bring an action in court so that this instrument shall be given the full power and effect that I intend on by executing it.

LIABILITY OF ATTORNEY-IN-FACT: My attorney-in-fact shall not incur any liability to me under this power except for a breach of fiduciary duty.

REIMBURSEMENT OF ATTORNEY-IN-FACT: My attorney-in-fact is entitled to reimbursement for reasonable expenses incurred in exercising powers hereunder, and to reasonable compensation for services provided as attorney-in-fact.

AMENDMENT AND REVOCATION: I can amend or revoke this power of attorney through a writing delivered to my attorney-in-fact. Any amendment or revocation is ineffective as to a third party until such third party has notice of such revocation or amendment.

STATE LAW: This Power of Attorney is governed by the laws of the State of South Carolina.

PHOTOCOPIES: Photocopies of this document can be relied upon as though they were originals.



IN WITNESS WHEREOF, I have on this 24 day of APRIL, 2019,
executed this Financial Power of Attorney.

Louie Arches
Principal's Signature
Louie Arches (Sm)

We, the witnesses, each do hereby declare in the presence of the principal that the principal signed and executed this instrument in the presence of each of us, that the principal signed it willingly, that each of us hereby signs this Power of Attorney as witness at the request of the principal and in the principal's presence, and that, to the best of our knowledge, the principal is eighteen years of age or over, of sound mind, and under no constraint or undue influence.

Jessie Bell
Witness's Signature

REDACTED

Address

Glenn M. Carson
Witness's Signature

REDACTED

Address

STATE OF SC
Cherokee County, ss.

On this 24 day of APRIL, 2019, before me appeared
LOUIE ARCHES, as Principal of this Power of Attorney who proved to me
through government issued photo identification to be the above-named person, in my
presence executed foregoing instrument and acknowledged that (s)he executed the
same as his/her free act and deed.

Shank
Notary Public

My commission expires: 03-18-2026

SPECIMEN SIGNATURE AND ACCEPTANCE OF APPOINTMENT

I, STEVEN MCCALSON the attorney-in-fact named above, hereby accept appointment as attorney-in-fact in accordance with the foregoing instrument.

Steven McCalsen
Attorney-in-Fact's Signature
Steven McCalsen (SM)

STATE OF SC
Cherokee County, ss.

On this 24 day of APRIL, 20 19, before me appeared STEVEN MCCALSON, as Attorney-in-Fact of this Power of Attorney who proved to me through government issued photo identification to be the above-named person, in my presence executed the foregoing acceptance of appointment and acknowledged that (s)he executed the same as his/her free act and deed.

[Signature]
Notary Public

My commission expires: 03-18-2026

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

INFORMATION ABOUT THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT. BEFORE SIGNING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

1. THIS DOCUMENT GIVES THE PERSON YOU NAME AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOU CANNOT MAKE THE DECISION FOR YOURSELF. THIS POWER INCLUDES THE POWER TO MAKE DECISIONS ABOUT LIFE-SUSTAINING TREATMENT. UNLESS YOU STATE OTHERWISE, YOUR AGENT WILL HAVE THE SAME AUTHORITY TO MAKE DECISIONS ABOUT YOUR HEALTH CARE AS YOU WOULD HAVE.
2. THIS POWER IS SUBJECT TO ANY LIMITATIONS OR STATEMENTS OF YOUR DESIRES THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TREATMENT YOU DO NOT DESIRE OR TREATMENT YOU WANT TO BE SURE YOU RECEIVE. YOUR AGENT WILL BE OBLIGATED TO FOLLOW YOUR INSTRUCTIONS WHEN MAKING DECISIONS ON YOUR BEHALF. YOU MAY ATTACH ADDITIONAL PAGES IF YOU NEED MORE SPACE TO COMPLETE THE STATEMENT.
3. AFTER YOU HAVE SIGNED THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE HEALTH CARE DECISIONS FOR YOURSELF IF YOU ARE MENTALLY COMPETENT TO DO SO. AFTER YOU HAVE SIGNED THIS DOCUMENT, NO TREATMENT MAY BE GIVEN TO YOU OR STOPPED OVER YOUR OBJECTION IF YOU ARE MENTALLY COMPETENT TO MAKE THAT DECISION.
4. YOU HAVE THE RIGHT TO REVOKE THIS DOCUMENT, AND TERMINATE YOUR AGENT'S AUTHORITY, BY INFORMING EITHER YOUR AGENT OR YOUR HEALTH CARE PROVIDER ORALLY OR IN WRITING.
5. IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A SOCIAL WORKER, LAWYER, OR OTHER PERSON TO EXPLAIN IT TO YOU.
6. THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS TWO PERSONS SIGN AS WITNESSES. EACH OF THESE PERSONS MUST EITHER WITNESS YOUR SIGNING OF THE POWER OF ATTORNEY OR WITNESS YOUR ACKNOWLEDGMENT THAT THE SIGNATURE ON THE POWER OF ATTORNEY IS YOURS.

THE FOLLOWING PERSONS MAY NOT ACT AS WITNESSES:

- A. YOUR SPOUSE, YOUR CHILDREN, GRANDCHILDREN, AND OTHER LINEAL DESCENDANTS; YOUR PARENTS, GRANDPARENTS, AND OTHER LINEAL ANCESTORS; YOUR SIBLINGS AND THEIR LINEAL DESCENDANTS; OR A SPOUSE OF ANY OF THESE PERSONS.
- B. A PERSON WHO IS DIRECTLY FINANCIALLY RESPONSIBLE FOR YOUR MEDICAL CARE.
- C. A PERSON WHO IS NAMED IN YOUR WILL, OR, IF YOU HAVE NO WILL, WHO WOULD INHERIT YOUR PROPERTY BY INTESTATE SUCCESSION.

- D. A BENEFICIARY OF A LIFE INSURANCE POLICY ON YOUR LIFE.
- E. THE PERSONS NAMED IN THE HEALTH CARE POWER OF ATTORNEY AS YOUR AGENT OR SUCCESSOR AGENT.
- F. YOUR PHYSICIAN OR AN EMPLOYEE OF YOUR PHYSICIAN.
- G. ANY PERSON WHO WOULD HAVE A CLAIM AGAINST ANY PORTION OF YOUR ESTATE (PERSONS TO WHOM YOU OWE MONEY).

IF YOU ARE A PATIENT IN A HEALTH FACILITY, NO MORE THAN ONE WITNESS MAY BE AN EMPLOYEE OF THAT FACILITY.

- 7. YOUR AGENT MUST BE A PERSON WHO IS 18 YEARS OLD OR OLDER AND OF SOUND MIND. IT MAY NOT BE YOUR DOCTOR OR ANY OTHER HEALTH CARE PROVIDER THAT IS NOW PROVIDING YOU WITH TREATMENT; OR AN EMPLOYEE OF YOUR DOCTOR OR PROVIDER; OR A SPOUSE OF THE DOCTOR, PROVIDER, OR EMPLOYEE; UNLESS THE PERSON IS A RELATIVE OF YOURS.
- 8. YOU SHOULD INFORM THE PERSON THAT YOU WANT HIM OR HER TO BE YOUR HEALTH CARE AGENT. YOU SHOULD DISCUSS THIS DOCUMENT WITH YOUR AGENT AND YOUR PHYSICIAN AND GIVE EACH A SIGNED COPY. IF YOU ARE IN A HEALTH CARE FACILITY OR A NURSING CARE FACILITY, A COPY OF THIS DOCUMENT SHOULD BE INCLUDED IN YOUR MEDICAL RECORD.

SOUTH CAROLINA HEALTH CARE POWER OF ATTORNEY

1. DESIGNATION OF HEALTH CARE AGENT

I, Louie Arnes, hereby appoint:
(Principal)

(Agent's Name) Steven McCaigson

(Agent's Address) REDACTED

Telephone: home: _____ work: _____ mobile: 864-763-3703

as my agent to make health care decisions for me as authorized in this document.

Successor Agent: If an agent named by me dies, becomes legally disabled, resigns, refuses to act, becomes unavailable, or if an agent who is my spouse is divorced or separated from me, I name the following as successors to my agent, each to act alone and successively, in the order named:

a. First Alternate Agent:

REDACTED
Address _____

Telephone: home: _____ work: _____ mobile: 864-763-3703

b. Second Alternate Agent:

Address: _____

Telephone: home: _____ work: _____ mobile: _____

Unavailability of Agent(s): If at any relevant time the agent or successor agents named here are unable or unwilling to make decisions concerning my health care, and those decisions are to be made by a guardian, by the Probate Court, or by a surrogate pursuant to the Adult Health Care Consent Act, it is my intention that the guardian, Probate Court, or surrogate make those decisions in accordance with my directions as stated in this document.

2. EFFECTIVE DATE AND DURABILITY

By this document I intend to create a durable power of attorney effective upon, and only during, any period of mental incompetence, except as provided in Paragraph 3 below.

3. HIPAA AUTHORIZATION

When considering or making health care decisions for me, all individually identifiable health information and medical records shall be released without restriction to my health care agent(s) and/or my alternate health care agent(s) named above including, but not limited to, (i) diagnostic, treatment, other health care, and related insurance and financial records and information associated with any past, present, or future physical or mental health condition including, but not limited to, diagnosis or treatment of HIV/AIDS, sexually transmitted disease(s), mental illness, and/or drug or alcohol abuse and (ii) any written opinion relating to my health that such health care agent(s) and/or alternate health care agent(s) may have requested. Without limiting the generality of the foregoing, this release authority applies to all health information and medical records governed by the Health Information Portability and

Accountability Act of 1996 (HIPAA), 42 USC 1320d and 45 CFR 160-164; is effective whether or not I am mentally competent; has no expiration date; and shall terminate only in the event that I revoke the authority in writing and deliver it to my health care provider.

4. AGENT'S POWERS

I grant to my agent full authority to make decisions for me regarding my health care. In exercising this authority, my agent shall follow my desires as stated in this document or otherwise expressed by me or known to my agent. In making any decision, my agent shall attempt to discuss the proposed decision with me to determine my desires if I am able to communicate in any way. If my agent cannot determine the choice I would want made, then my agent shall make a choice for me based upon what my agent believes to be in my best interests. My agent's authority to interpret my desires is intended to be as broad as possible, except for any limitations I may state below.

Accordingly, unless specifically limited by the provisions specified below, my agent is authorized as follows:

- A. To consent, refuse, or withdraw consent to any and all types of medical care, treatment, surgical procedures, diagnostic procedures, medication, and the use of mechanical or other procedures that affect any bodily function, including, but not limited to, artificial respiration, nutritional support and hydration, and cardiopulmonary resuscitation;
 - B. To authorize, or refuse to authorize, any medication or procedure intended to relieve pain, even though such use may lead to physical damage, addiction, or hasten the moment of, but not intentionally cause, my death;
 - C. To authorize my admission to or discharge, even against medical advice, from any hospital, nursing care facility, or similar facility or service;
 - D. To take any other action necessary to making, documenting, and assuring implementation of decisions concerning my health care, including, but not limited to, granting any waiver or release from liability required by any hospital, physician, nursing care provider, or other health care provider; signing any documents relating to refusals of treatment or the leaving of a facility against medical advice, and pursuing any legal action in my name, and at the expense of my estate to force compliance with my wishes as determined by my agent, or to seek actual or punitive damages for the failure to comply.
 - E. The powers granted above do not include the following powers or are subject to the following rules or limitations:
-
-
-

5. ORGAN DONATION (INITIAL ONLY ONE)

My agent may A may not consent to the donation of all or any of my tissue or organs for purposes of transplantation.

6. EFFECT ON DECLARATION OF A DESIRE FOR A NATURAL DEATH (LIVING WILL)

I understand that if I have a valid Declaration of a Desire for a Natural Death, the instructions contained in the Declaration will be given effect in any situation to which they are applicable. My agent will have authority to make decisions concerning my health care only in situations to which the Declaration does

not apply.

7. STATEMENT OF DESIRES CONCERNING LIFE-SUSTAINING TREATMENT

With respect to any Life-Sustaining Treatment, I direct the following:

(INITIAL ONLY ONE OF THE FOLLOWING 3 PARAGRAPHS)

(1) ☐ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged nor do I want life-sustaining treatment to be provided or continued if my agent believes the burdens of the treatment outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved and the quality as well as the possible extension of my life in making decisions concerning life-sustaining treatment.

OR

(2) ☐ DIRECTIVE TO WITHHOLD OR WITHDRAW TREATMENT. I do not want my life to be prolonged and I do not want life-sustaining treatment:

- a. if I have a condition that is incurable or irreversible and, without the administration of life-sustaining procedures, expected to result in death within a relatively short period of time; or
- b. if I am in a state of permanent unconsciousness.

OR

(3) ☒ DIRECTIVE FOR MAXIMUM TREATMENT. I want my life to be prolonged to the greatest extent possible, within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedures.

8. STATEMENT OF DESIRES REGARDING TUBE FEEDING

With respect to Nutrition and Hydration provided by means of a nasogastric tube or tube into the stomach, intestines, or veins, I wish to make clear that in situations where life-sustaining treatment is being withheld or withdrawn pursuant to Item 7, (INITIAL ONLY ONE OF THE FOLLOWING THREE PARAGRAPHS):

(a) ☐ GRANT OF DISCRETION TO AGENT. I do not want my life to be prolonged by tube feeding if my agent believes the burdens of tube feeding outweigh the expected benefits. I want my agent to consider the relief of suffering, my personal beliefs, the expense involved, and the quality as well as the possible extension of my life in making this decision.

OR

(b) ☐ DIRECTIVE TO WITHHOLD OR WITHDRAW TUBE FEEDING. I do not want my life prolonged by tube feeding.

OR

(c) ☒ DIRECTIVE FOR PROVISION OF TUBE FEEDING. I want tube feeding to be provided within the standards of accepted medical practice, without regard to my condition, the chances I have for recovery, or the cost of the procedure, and without regard to whether other forms of life-sustaining treatment are being withheld or withdrawn.

IF YOU DO NOT INITIAL ANY OF THE STATEMENTS IN ITEM 8, YOUR AGENT WILL NOT

(This portion of the document is optional and is not required to create a valid health care power of attorney.)

STATE OF SOUTH CAROLINA

COUNTY OF CATAWBE

The foregoing instrument was acknowledged before me by Principal on APRIL 24

20 19

Notary Public for South Carolina

My Commission Expires: 03-18-2026

HAVE AUTHORITY TO DIRECT THAT NUTRITION AND HYDRATION NECESSARY FOR COMFORT CARE OR ALLEVIATION OF PAIN BE WITHDRAWN.

9. ADMINISTRATIVE PROVISIONS

A. I revoke any prior Health Care Power of Attorney and any provisions relating to health care of any other prior power of attorney.

B. This power of attorney is intended to be valid in any jurisdiction in which it is presented.

BY SIGNING HERE I INDICATE THAT I UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND THE EFFECT OF THIS GRANT OF POWERS TO MY AGENT.

I sign my name to this Health Care Power of Attorney on

this 24 day of April, 20 19. My current home address is:

Principal's Signature: *[Signature]*

Print Name of Principal: LOUIE ARCHES

I declare, on the basis of information and belief, that the person who signed or acknowledged this document (the principal) is personally known to me, that he/she signed or acknowledged this Health Care Power of Attorney in my presence, and that he/she appears to be of sound mind and under no duress, fraud, or undue influence. I am not related to the principal by blood, marriage, or adoption, either as a spouse, a lineal ancestor, descendant of the parents of the principal, or spouse of any of them. I am not directly financially responsible for the principal's medical care. I am not entitled to any portion of the principal's estate upon his decease, whether under any will or as an heir by intestate succession, nor am I the beneficiary of an insurance policy on the principal's life, nor do I have a claim against the principal's estate as of this time. I am not the principal's attending physician, nor an employee of the attending physician. No more than one witness is an employee of a health facility in which the principal is a patient. I am not appointed as Health Care Agent or Successor Health Care Agent by this document.

Witness No. 1

Signature: *[Signature]*

Date: 04-24-2019

Print Name: ROBIN K Ramsey

Telephone: (864) 461-8351

Address: REDACTED

Witness No. 2

Signature: *[Signature]*

Date: 4/24/19

Print Name: GLORIA ANN MCCASKEY

Telephone: REDACTED

Address: REDACTED

SOCIAL SECURITY ADMINISTRATION

TOE 250

Form Approved
OMB No. 0960-0014

FOR SSA USE ONLY

REQUEST TO
BE SELECTED
AS PAYEE

FOR SSA USE ONLY

Name or Bene. Sym.	Program	Date of Birth	Type	Gdn.	Cus.	Inst.	Nam.

DISTRICT OFFICE CODE

STATE AND COUNTY CODE:

PRINT IN INK:

The name of the NUMBER HOLDER

Louis Arches

SOCIAL SECURITY NUMBER

SOCIAL SECURITY NUMBER(S)

The name of the PERSON(S) (if different from above) for whom you are filing (the "claimant(s)")

Answer item 1 ONLY if you are the claimant and want your benefits paid directly to you.

1. I request that I be paid directly.

CHECK HERE ☐ and answer only items 3, 5, 6, and 8 before signing the form on page 4.

I REQUEST THAT THE SOCIAL SECURITY, SUPPLEMENTAL SECURITY INCOME, BLACK LUNG OR SPECIAL VETERANS BENEFITS FOR THE CLAIMANT(S) NAMED ABOVE BE PAID TO ME AS REPRESENTATIVE PAYEE.

2. Explain why you think the claimant is not able to handle his/her own benefits.
(In your answer, describe how he/she manages any money he/she receives now.)☐ Claimant is a minor child.

Mentally unstable

3. Explain why you would be the best representative payee. (Use Remarks if you need more space.)

Lives in facility

4. If you are appointed payee, how will you know about the claimant's needs?

- ☒ Live with me or in the institution I represent.
- ☐ Daily visits.
- ☐ Visits at least once a week.
- ☐ By other means. Explain:

5. Does the claimant have a court-appointed legal guardian? ☐ YES ☐ NO

IF YES, enter the legal guardian's:

NAME

ADDRESS

PHONE NUMBER

TITLE

DATE OF APPOINTMENT

Explain the circumstances of the appointment. (Use remarks if you need more space.)

EXHIBIT

C

Form SSA-11-BK (03-2006) EF (03-2006)
Destroy Prior Editions

Page 1

Arches- OCCH 71

6. (a) Where does the claimant live?

- ☐ Alone
☐ In my home (Go to (b).)
☐ With a relative (Go to (b).)
☐ With someone else (Go to (b).)
☐ In a board and care facility (Go to (b).)
- ☐ In a public institution (Go to (c).)
☐ In a private institution (Go to (c).)
☐ In a nursing home (Go to (c).)
☒ In the institution I represent (Go to (a).)

(b) Enter the names and relationships of any other people who live with the claimant.

NAME	RELATIONSHIP

(c) Enter the claimant's residence and mailing addresses (if different from yours).

Residence:

Mailing:

Telephone Number:

(d) Do you expect the claimant's living arrangements to change in the next year?

☐ YES ☐ NO

If YES, explain what changes are expected and when they will occur. (Use Remarks if you need more space.)

7. If you are applying on behalf of minor child(ren) and you are not the parent,

Does the child(ren) have a living natural or adoptive parent? ☐ YES ☐ NO

If YES, enter: (a) Name of parent _____

(b) Address of parent _____

(c) Telephone number _____

(d) Does the parent show interest in the child? ☐ YES ☐ NO

Please explain. _____

8. List the names and relationship of any (other) relatives or close friends who have provided support and/or show active interest with the claimant. Describe the type and amount of support and/or how interest is displayed.

NAME	ADDRESS/PHONE NO.	RELATIONSHIP	DESCRIBE SUPPORT/INTEREST

8. Check the block that describes your relationship to the claimant.

(a) ☐ Official of bank, agency or institution with responsibility for the person. Enter below which you represent:☐ Bank☐ Social Agency☐ Public Official☒ Institution:☐ Federal☐ State/Local☐ Private non-profit☒ Private proprietary institution. Is the institution licensed under State law?☒ YES☐ NO

IF (a) ABOVE CHECKED, COMPLETE ONLY QUESTIONS 10 AND 11 AND SIGN THE FORM ON PAGE 4.

(b) ☐ Parent(c) ☐ Spouse(d) ☐ Other Relative - Specify _____(e) ☐ Legal Representative(f) ☐ Board and Care Home Operator(g) ☐ Other Individual - Specify _____

IF (b), (c), (d), or (e) ABOVE CHECKED, GO ON TO QUESTION 12

INFORMATION ABOUT INSTITUTIONS, AGENCIES AND BANKS APPLYING TO BE REPRESENTATIVE PAYEE

10. (a) Enter the name of the institution Oakridge Community Care
 (b) Enter the EIN of the institution [REDACTED]

11. Is the claimant indebted to your institution for past care and maintenance? ☒ YES ☐ NO
 If YES, give the amount of the debt, the date(s) the debt was incurred and the description of the debt.

\$1573.00

INFORMATION ABOUT INDIVIDUALS APPLYING TO BE REPRESENTATIVE PAYEE

12. Enter: YOUR NAME _____
 DATE OF BIRTH _____
 SOCIAL SECURITY NUMBER _____
 ANY OTHER NAME YOU HAVE USED _____
 OTHER SSN'S YOU HAVE USED _____

13. How long have you known the claimant? _____

14. Does the claimant owe you any money now or will he/she owe you money in the future? ☐ YES ☐ NO
 If YES, enter the amount he/she owes you, the date(s) the debt was/will be incurred and describe why the debt was/will be incurred.

15. If the claimant lives with you, who takes care of the claimant when work or other activity takes you away from home? What is his/her relationship to the claimant?

16. (a) Main source of your income

- ☐ Employed (answer (b) below)
☐ Self-employed (Type of Business _____)
☐ Social Security or Black Lung benefits (Claim Number _____)
☐ Pension (describe _____)
☐ Supplemental Security Income payments (Claim Number _____)
☐ AFDC (County & State _____)
☐ Other Welfare (describe _____)
☐ Other (describe _____)

- (b) Enter your employer's name and address:

How long have you been employed by this employer?

(If less than 1 year, enter name and address of previous employer in Remarks.)

17. (a) Have you ever been convicted of a felony? ☐ YES ☐ NO

If YES: What was the crime?

On what date were you convicted?

What was your sentence?

If imprisoned, when were you released?

If probation was ordered, when did/will your probation end?

- (b) Have you ever been convicted of any offense under federal or state law which resulted in imprisonment for more than one year? ☐ YES ☐ NO

If YES: What was the crime?

On what date were you convicted?

What was your sentence?

If imprisoned, when were you released?

If probation was ordered, when did/will your probation end?

18.	Do you have any unsatisfied FELONY warrants (or in jurisdictions that do not define crimes as felonies, a crime punishable by death or imprisonment exceeding 1 year) for your arrest? ☐ YES ☐ NO
	If YES: Date of Warrant _____ State where warrant was issued _____
19.	How long have you lived at your current address? (Give Date MM/YY) (If less than 1 year, enter previous address in Remarks) _____

REMARKS: (This space may be used for explaining any answers to the questions. If you need more space, attach a separate sheet.)

PLEASE READ THE FOLLOWING INFORMATION CAREFULLY BEFORE SIGNING THIS FORM

I/my organization:

- Must use all payments made to me/my organization as the representative payee for the claimant's current needs or (if not currently needed) save them for his/her future needs.
- May be held liable for repayment if I/my organization misuse the payments or if I/my organization am/is at fault for any overpayment of benefits.
- May be punished under Federal law by fine, imprisonment or both if I/my organization am/is found guilty of misuse of Social Security or SSI benefits.

I/my organization will:

- Use the payments for the claimant's current needs and save any currently unneeded benefits for future use.
- File an accounting report on how the payments were used, and make all supporting records available for review if requested by the Social Security Administration.
- Reimburse the amount of any loss suffered by any claimant due to misuse of Social Security or SSI funds by me/my organization.
- Notify the Social Security Administration when the claimant dies, leaves my/my organization's custody or otherwise changes his/her living arrangements or he/she is no longer my/my organization's responsibility.
- Comply with the conditions for reporting certain events (listed on the attached sheets) which I/my organization will keep for my/my organization's records and for returning checks the claimant is not due.
- File an annual report of earnings if required.
- Notify the Social Security Administration as soon as I/my organization can no longer act as representative payee or the claimant no longer needs a payee.

I declare under penalty of perjury that I have examined all the information on this form, and on any accompanying statements or forms, and it is true and correct to the best of my knowledge.

SIGNATURE OF APPLICANT	DATE (Month, day, year) <u>2/1/19</u>
Signature (First name, middle initial, last name) (Write in ink)	Telephone number(s) at Which You May Be Contacted During the Day
SIGN HERE <u>Amanda Wasten</u>	<u>864 472 6979 ext:5</u>

Print Your Name & Title (If a representative or employee of an institution/organization) Amanda Wasten Assistant Admin

Mailing Address (Number and street, Apt. No., P.O. Box, or Rural Route)

REDACTED

Name of County

Spartanburg

Residence Address (Number and street, Apt. No., P.O. Box, or Rural Route)

REDACTED

Name of County

Spartanburg

Witnesses are only required if this application has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the applicant making the request must sign below, giving their full addresses.

1. SIGNATURE OF WITNESS

2. SIGNATURE OF WITNESS

ADDRESS (Number and street, City, State and ZIP Code)

ADDRESS (Number and street, City, State and ZIP Code)


PASRR Level I Screening

 Participant Name: Louie E Arches
 CLTC Number: 9804115

 Date Screened: 04/15/2019
 Screened by: CLTC

General

 Date of review: 04/15/2019
 Type of review: Medicaid

 Completed by: CLTC
 Location of review: Residential Care Facility

MR Screening
General

 Diagnosis of intellectual disability or related disability made prior to age 22: No
 IQ tested below 70: No data
 Was time of test prior to age 22: N/A
 Does participant have 3rd grade education (if not, state reason in comments): Yes

Adaptive Behavior

 Could participant ever perform self care activities: Yes
 Did he/she help care for spouse/parents/children: Yes
 Was participant ever able to cook and perform household duties: Yes
 Was participant gainfully employed? If not, explain in comments: Yes
 Did participant have drivers license: Yes

Cognitive Behavior

 Memory: Does participant remember what he/she had for breakfast or lunch: No
 Simple math: Can participant add 12 + 8: No
 Concept formation: Can participant describe the difference between a fish and a dog: No

Comments

[Pamela Robinson 04/15/2019]: Participant unable to answer cognitive behavior questions. Staff at residential care facility assisted with answering other questions.

MI Screening
General

 Diagnosis of mental illness: No
 Diagnoses:
 History of psychiatric hospitalization within previous two years:
 • Hospitalization from to

Current behavioral indicators
Comments

[Pamela Robinson 04/15/2019]: None noted per PC.

1 of 3 | Printed: 04/16/2019 | Participant: (9804115) Louie E Arches

Arches- OCCH 78

Arches, Louis - [REDACTED]
Sex - Male

Progress Note
May 6, 2019

Elite Patient Care - South Carolina

Patient: Arches, Louis - [REDACTED]
Sex: Male
DOB: [REDACTED]
Location: Magnolia Manor of Inman, 103/1
Admit/Discharge Date: 05/06/2019
Supervising Provider: Albert Ford



CC/HPI THIS VISIT

Patient is a poor historian due to cognitive/psychiatric impairment

Chief Complaint/Reason for this Visit

stabilization visit/new admit

HPI Relating to this Visit

81-year-old male with a history of gross hematuria hypothyroidism due to acquired atrophy of thyroid, stage III chronic kidney disease and major neurocognitive disorder due to multiple etiologies without behavioral disturbance. He also has a past medical history of constipation and hypertension. He is seen and examined today at the hospitalization for transmit altered mentation and is being admitted for skilled rehab. He is alert to self only he is verbal but mumble speech and not really making any sense he is unable to answer any questions correctly.

He is able to follow simple commands but does require frequent redirection. He is ambulatory in his room, appears to have a steady gait. He was able to sit down on the bed for a couple minutes for his physical examination. No family at the bedside to provide a detail detail history. He does not appear to be in any acute distress he will be evaluated by speech therapy, occupational therapy and physical therapy for his rehab needs.

ADMISSION INFORMATION RELATING TO THIS STAY

Admit History - Reason for Admission for this Stay

Hospitalization 4/26/2019 - 5/6/2019

Patient is 81-year-old male admitted for transit altered mentation. He had gross hematuria due to a UTI; culture was negative and a UTI and was ruled out.

T A versus acute CVA was also suspected however patient could not undergo MRI of the brain. - not able to tolerate the procedure altered mentation resolve with supportive measures and Coumadin as needed Seroquel and although he may have had an acute CVA versus TIA he cannot be placed on antiplatelet therapy because of the gross hematuria And in view of his advanced dementia, reduced mobility, do not think a statin would be beneficial for him. His TSH level was normal he is being referred to skilled facility and a followup with his urologist for gross hematuria.

PAST MEDICAL HISTORY

Active Medical Problems

- major neurocognitive disorder : w/o behavioral disturbances
- Frank hematuria
- Hypothyroidism : due to acquired atrophy of thyroid
- Chronic kidney disease stage 3
- Constipation
- HTN
- Dementia
- Debility

Electronically signed by: Timekia Hill on May 15, 2019 at 10:57PM EDT

1 of 3

Arches- MMI 7

Arches, Louis - 81yrs
Sex - Male

Progress Note
May 6, 2019

Elite Patient Care - South Carolina

SOCIAL HISTORY

Alcohol Use
Unknown

Tobacco Use
Never smoker

Drug Use
Unknown

REVIEW OF SYSTEMS

Eye: (-)Redness, (-)Discharge, (-)Tearing

Ear, Nose, Mouth: (-)Nosebleed

Cardiovascular: (-)Peripheral Edema

Respiratory: (-)Prod. Cough, (-)Wheezing, (-)SOB

Additional Text

states he is not in pain

Gastrointestinal: (-)Diarrhea, (-)Vomiting

Psychological: (-)Confusion

Skin: (-)Rash, (-)Swelling

Allergies: (-)Cough

PHYSICAL EXAM

General: Vitals Reviewed, Awake, Alert, Calm, Cooperative, Appears Comfortable

Eye: PERRLA

Head, Ear, Nose, Throat: Normocephalic, Pinna & Canals Normal, Nasal Septum/Mucosa Normal, Normal Lips/Gums

Neck: Normal Appearance of the Neck, No Thyromegaly, Neck Supple, Full ROM, Normal Carotids without Bruits

Respiratory: Respirations Even/Unlabored, No Frank Rales/Rhonchi, No Wheezing, Clear to Auscultation

Cardiovascular: Regular Rhythm, No Murmurs, No Gallops or Rubs, Peripheral Pulses

Gastrointestinal: Abdomen Soft, Non-Tender, Normoactive BS, No Guarding or Rebound, No Masses/Pulsatile Masses

Genitourinary: deferred

Musculoskeletal: Normal Joints, Poor Strength

Neurologic: alert follows simple commands

Skin: Normal Temp, No Unusual Rashes or Lesions

Chest: Normal Shape/Movement

Gross Lymphadenopathy: No Abnormal Bruising

Psychologic: Insight Impaired

Cognitive Status: Dementia

Functional Status: Ambulatory

MEDICATIONS/ALLERGIES

Environmental Allergies

• No known environmental allergies

Medications

- cyanocobalamin 1000 MCG Oral Capsule (Start Date: Unknown -) 1 tab po daily
- quetiapine 25 MG [Seroquel] (Start Date: Unknown -) 1 tab po 3 times a day
- donepezil HCl 5 MG Oral Tablet (Start Date: Unknown -) 1 tab po daily
- Levothyroxine (Start Date: Unknown -) 50mcg 1 tab po daily
- Risperidone 0.5 MG Oral Tablet (Start Date: Unknown -) 1 tab po 2 times a day

ASSESSMENT AND PLAN

1. Dementia: alert to person only

able to follow simple commands

Continue donepezil

Speech therapy to evaluate and treat

2. Frank hematuria: hx of gross hematuria

referral for urology -

Dr Clifton Lide Williams Jr -

391 Serpentine Drive ste 500

864.585.8221 fax 864.573.5882

3. Hypothyroidism: continue synthroid

4. HTN: PMH of HTN

currently not on any BP medications

Electronically signed by: Timekia Hill on May 15, 2019 at 10:57PM EDT

2 of 3

Arches- MMI 8

Arches, Louis - 81yrs
Sex - Male

Progress Note
May 6, 2019

Elite Patient Care - South Carolina

BP was elevated 160/82 this a.m. per discharge summary
vitals

continue monitor vitals per unit policy

5. Major neurocognitive disorder due to multiple
etiologies w/o behavioral disturbances; alert and orient
to self only

verbal - confusion- able to follow simple commands
requires frequent redirection
currentlu on seroquel 3 x a day and risperidone 2 times a
day
Psych Consult

Electronically signed by: Timekia Hill on May 15, 2019 at 10:57PM EDT

3 of 3

Arches- MMI 9

ADDRESSING DECISIONAL CAPACITY

Based upon my observation and involvement with this patient, it is my medical opinion that
Louie Arches Resident # 103

Check one of the following statements

☐ This patient DOES possess the decisional capacity to make healthcare decisions for self	☒ This patient DOES possess the decisional capacity to make healthcare decisions for self
☒ This patient DOES NOT meet all the criteria for decisional capacity, therefore is not able to make healthcare decisions for self. Furthermore, it is my opinion that due to the patient's medical conditions(s), this lack of capacity is not likely to change in the immediate future.	☒ This patient DOES NOT meet all the criteria for decisional capacity, therefore is not able to make healthcare decisions for self. Furthermore, it is my opinion that due to the patient's medical conditions(s), this lack of capacity is not likely to change in the immediate future.
Criteria not met: ☐ Oriented to ___ person ___ place ___ time ☐ Understands the nature of his/her illness ☐ Ability to understand that decisions need to be made ☐ Ability to communicate a decision ☐ Ability to understand and use information logically to reach a decision ☐ Ability to be realistic in decision making (i.e. understand the consequences of a decision)	Criteria not met: ☐ Oriented to ___ person ___ place ___ time ☐ Understands the nature of his/her illness ☐ Ability to understand that decisions need to be made ☐ Ability to communicate a decision ☐ Ability to understand and use information logically to reach a decision ☐ Ability to be realistic in decision making (i.e. understand the consequences of a decision)
Comments:	Comments:
Attending Physician: <u>[Signature]</u>	Second Physician involved in care: <u>Louie Arches FNP C 11619</u>
Date: <u>5/7/19</u>	Date:

Arches- MMI 3

**Resident Face Sheet: LOUIE ARCHES (Full Code)**

Unit: STATION 1 Room/Bed: 103/1 Status: In House	Preferred Name: Attending: Albert Ford - (980) 819-8968 Email:	
Admit Date: 05/06/2019 12:01 PM (current) Admitted From: Spartanburg Reg Med Ctr, 29303 - SC (current) Discharged: Primary Discharge Diagnosis:		Last Qualifying Hospital Stay: 04/26/2019 - 05/06/2019 Referral Source: Discharge Planner (current) Discharged To: Discharge Reason: Condition on Discharge:
Primary Payer: Medicaid SSN: [REDACTED] Medicare A #: [REDACTED] Medicare B #: [REDACTED] Medicaid #: [REDACTED] MR#: [REDACTED] Pharmacy: Remedi SeniorCare of Charlotte Race: White, not of Hispanic origin Preferred Language: English Is Responsible for Self: No Smoking Status: Service Connected Disability & %: No 0.00% VA Claims Number: Service Number:		Birth Date: [REDACTED] Age: 82 Sex: M Marital Status: Widowed Mother's Maiden Name: Religion: Baptist Prev Occupation: Address: [REDACTED] County: Spartanburg Phone: [REDACTED] Military Svc: Veteran Elig (10-5588): No Last Branch of Service: Last Branch of Service Dates: -

Insurance Information:

Insurance	Group Name	Group #	Insured's ID #	Payer Address	Payer Phone
Medicaid Coinsurance			7782410484		
Medicaid			7782410484		

Additional Fields:**Advanced Directives:**

Directive	Copy On File?	Notes
Full Code		

Allergies: No known drug allergies

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	CASE NO. 2022-CP-42-02595
STEVEN MCCARSON,	)	
as Personal Representative	)	
of the Estate of Louie Arches,	)	
	)	
Plaintiff,	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
vs.	)	DEFENDANTS' MOTIONS TO DISMISS
	)	AND COMPEL ARBITRATION OR
	)	PARTICIPATE IN DISCOVERY
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR–INMAN, LLC d/b/a	)	
Magnolia Manor–Inman, THI OF SOUTH	)	
CAROLINA AT INMAN, LLC, THI OF	)	
SOUTH CAROLINA, LLC, HUNT VALLEY	)	
HOLDINGS, LLC, FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES, LLC,	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC, THI OF	)	
BALTIMORE, LLC, and JAMES H. MACK,	)	
	)	
Defendants.	)	

TO: THE HONORABLE GRACE GILCHRIST KNIE, Presiding Judge, and LEE D. COPE, ESQUIRE, and JOHN E. PARKER, JR., ESQUIRE, of PARKER LAW GROUP, LLP, and JAMIE L. WALTERS, ESQUIRE, of KOON COOK & WALTERS, LLC, Attorneys for Plaintiff

NOW COME the Facility¹ and the Other Defendants² (collectively, “Defendants”³), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set

¹ The “Facility” refers to Defendant THI of South Carolina at Magnolia Manor–Inman, LLC d/b/a Magnolia Manor–Inman, which is a skilled nursing facility.

² The “Other Defendants” refers to Defendants THI of South Carolina, LLC (“THISC”); Hunt Valley Holdings, LLC (“HVVH”); Fundamental Administrative Services, LLC (“FAS”); Fundamental Clinical and Operational Services, LLC (“FCOS”); THI of Baltimore, Inc., misidentified in this action as “THI of Baltimore, LLC” (“THIB”); and James H. Mack (“Mack”), collectively.

³ “Defendants” includes all named defendants except for THI of South Carolina at Inman, LLC, which was dismissed without prejudice by stipulation filed September 28, 2022.

forth below, hereby most respectfully move this Honorable Court to alter, amend, and/or reconsider its Order Denying Defendants' Motions to Dismiss and Compel Arbitration or Participate in Discovery, filed July 10, 2023 (the "Subject Order"), which denied the Facility's motion, filed February 3, 2023, to compel Plaintiff's⁴ claims against it in this lawsuit to arbitration (the "Motion to Compel Arbitration") and the Other Defendants' respective motions, also filed February 3, 2023, to stay the lawsuit as to them pending the outcome of the Motion to Compel Arbitration and any arbitration proceedings (the "Motions to Stay") (collectively, the Motion to Compel Arbitration and the Motions to Stay are the "Underlying Motions").

1. **Most respectfully, Defendants ask the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motions, i.e., each and every distinct issue/argument set forth in the Underlying Motions themselves, in the Memos in Support of the Underlying Motions,⁵ and via oral argument, all of which is/are hereby incorporated herein by reference.**

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

⁴ "Plaintiff" refers to Plaintiff, Steven McCarson ("Mr. McCarson"), as Personal Representative of the Estate of Louie Arches. "Mr. Arches" refers to the decedent, Louie Arches.

⁵ The "Memos in Support of the Underlying Motions" refers, collectively, to the Facility's memo in support of the Motion to Compel Arbitration, filed May 31, 2023, and the Other Defendants' respective memos in support of the Motions to Stay, which were all filed March 24, 2023.

2. **Out of an abundance of caution, regarding the Court’s use of the plural noun “Defendants” in referring to Magnolia Manor–Inman as “Defendants’ assisted living facility”⁶ (and in any way otherwise that the language of the Subject Order might be said to obscure distinctions between Defendants⁷), the Facility admits that it operates Magnolia Manor–Inman⁸ and Mack admits that he was the administrator of Magnolia Manor–Inman while Mr. Arches was a resident,⁹ but FAS, FCOS, HVH, THIB, and THISC deny that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with him of any kind.¹⁰**

The alleged relationship between FAS, FCOS, HVH, THIB, and THISC and Mr. Arches is very much in dispute, and obviously, it would be improper, both procedurally¹¹ and evidentially,¹² for the Court to weigh in on the dispute at this time. Accordingly, even though the Subject Order does not actually purport to determine any factual issue in this regard, out of an abundance of caution, to the extent that it might potentially expose Defendants to any threat of prejudice going forward, Defendants object to the Subject Order’s inclusion of any language that is inconsistent with the Facility’s admission that it operates Magnolia Manor–Inman,¹³ Mack’s admission that he was the administrator of Magnolia Manor–Inman while Mr. Arches was a

⁶ (Subject Order p. 2.)

⁷ (*See, e.g.*, Subject Order p. 2 (“Decedent fell numerous times between May and December of 2019 after being assessed as a high fall risk by *Defendants*.”) (emphasis added).)

⁸ (Facility’s Answer ¶ 3 (“This Defendant admits it is organized pursuant to the laws of the State of Delaware and operates the skilled nursing facility at issue in Plaintiff’s Complaint located in Spartanburg County, South Carolina”).)

⁹ (Mack’s Answer ¶ 4 (“[T]his Defendant admits he was the administrator of Magnolia Manor–Inman while Mr. Arches was a resident”).)

¹⁰ (FAS’s Answer ¶ 6 (“This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Arches. This Defendant further denies any interaction or relationship with Mr. Arches of any kind.”); FCOS’s Answer ¶ 6 (same); HVH’s Answer ¶ 6 (same); THIB’s Answer ¶ 6 (same); THISC’s Answer ¶ 6 (same).)

¹¹ *See Worsley Companies, Inc. v. Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000) (“If triable issues exist, those issues must go to the jury.”).

¹² *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”).

¹³ (Facility’s Answer ¶ 3.)

resident,¹⁴ and FAS, FCOS, HVH, THIB, and THISC's denials that they have ever operated any skilled nursing facility or provided care or treatment to Mr. Arches or had any interaction or relationship with him of any kind. (FAS's Answer ¶ 6; FCOS's Answer ¶ 6; HVH's Answer ¶ 6; THIB's Answer ¶ 6; THISC's Answer ¶ 6.)

3. **Most respectfully, the merger/equitable estoppel analysis in the Subject Order is erroneous. The Court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Mr. Arches effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith—and, thus, granted the Motion to Compel Arbitration and, in turn, the Motions to Stay.**

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, as indeed reflected by the Subject Order's primary focus on the Motion to Compel Arbitration, the denial of the Motion to Compel Arbitration dictated the denial (as moot) of the Motions to Stay. Accordingly, to show why the Court should have granted the Motion to Compel Arbitration is, in turn, to show why it should have granted the Motions to Stay. *See* 9 U.S.C. § 3 ("If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement*, providing the applicant for the stay is not in default in proceeding with such arbitration.") (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) ("[The] FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration

¹⁴ (Mack's Answer ¶ 4.)

of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”).

The core question here is this: Is the Arbitration Agreement (which Mr. McCarson signed for Mr. Arches¹⁵) enforceable against Mr. Arches—or, more precisely, against Plaintiff, who stands in Mr. Arches’ shoes as the personal representative of his estate—even though it was not signed by Mr. Arches himself? The answer is yes. The Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement (and, for that matter, the Admission Agreement) is enforceable.

To be clear, the Facility’s merger/equitable estoppel argument is a standalone argument. It does not depend on any showing of authority (actual or apparent or otherwise) on the part of Mr. McCarson or otherwise on the existence of any valid agreement per se. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that “Appellants’

¹⁵ The Background section of the Subject Order refers to the Arbitration Agreement as having been “signed *individually* by [Mr. McCarson].” (Subject Order p. 2 (emphasis added).) Even though the Subject Order does not actually purport to determine any factual issue in this regard, out of an abundance of caution, to the extent that the Subject Order’s use of the word “individually” here might be said to constitute a finding by the Court that Mr. McCarson did not sign the Arbitration Agreement on behalf of Mr. Arches, such a finding is clearly erroneous. It was, of course, Mr. Arches, not Mr. McCarson, who was admitted as a resident of the Facility, and as Mr. McCarson was not being admitted as a resident of the Facility, Mr. McCarson did not (nor could he) sign the Admission Agreement and the Arbitration Agreement for himself as the resident. Rather, he signed (and only could have signed) as the representative of the resident, Mr. Arches. (See Admission Agreement; Arbitration Agreement; *see also* Aff. of Katilia Brannon (attesting to the admissions process for Mr. Arches and Mr. McCarson’s signing of the Admission Agreement and the Arbitration Agreement on behalf of Mr. Arches in conjunction therewith).)

equitable estoppel argument,” which “[wa]s premised on [Appellants’] contention that, under state law, the admission agreements and the [arbitration agreements] merged,” as follows: “Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement’s] enforceability*.”) (emphasis added).

Conceptually, the Facility’s merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Mr. Arches, and, in turn, Plaintiff (the personal representative of his estate), to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Mr. Arches having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in Mr. Arches’ shoes as the personal representative of his estate) is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith. And by its very nature, i.e., because the Facility’s argument in favor of direct benefits estoppel is based on the direct benefits Mr. Arches received under the Admission Agreement (with which the Arbitration Agreement merged), this argument applies with equal force to estop Plaintiff from denying the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

Accordingly, as to the Facility’s merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement’s supposed lack of validity—e.g., that Mr. McCarson lacked authority to sign the Admission Agreement/Arbitration Agreement on behalf of Mr. Arches under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the “AHCCA”), and/or because Mr. McCarson

lacked power of attorney over Mr. Arches—is beside the point and unavailing to refute the Facility’s merger/equitable estoppel argument, which, again, turns not on the question of whether the Admission Agreement/Arbitration Agreement is enforceable per se but whether Mr. Arches, and, in turn, Plaintiff (the personal representative of his estate), is estopped to deny its enforceability.

(a) The Court’s merger analysis is erroneous.

In *Coleman*, even though our Supreme Court found against merger on the particular *facts* of the case, it nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [AHCCA], she is nevertheless equitably estopped to deny the [arbitration agreement’s] enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants’ equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Klutts Resort Realty, Inc. v. Down ’Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the Court erred in rejecting the Facility’s merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).¹⁶

The Court wrongly concluded that the Admission Agreement and the Arbitration Agreement are separate contacts that do not merge. The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”¹⁷ as undoubtedly the Admission Agreement and the Arbitration Agreement were here,¹⁸ there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything indicating a contrary *intention* . . .”) (emphasis added). And “in attempting to ascertain th[e] [parties’] intention,” our courts “endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

¹⁶ The Court also erred in its reliance on the recent case of *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), which is separately addressed below.

¹⁷ *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

¹⁸ To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents *were* executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreements at issue in *Coleman*, *Thompson*, and *Hodge*, all of which contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not, the instant Arbitration Agreement has no disclaimer/revocation provision. (Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of “separatedness” (in the parlance of the *Coleman* Court¹⁹), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” (Admission Agreement p. 12.) Without question, the plain and

¹⁹ 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘separatedness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

ordinary meaning of the language “other Admissions materials” is such as to embrace the Arbitration Agreement. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) (“The same day as Decedent’s admission to White Oak, Stott, acting as Decedent’s authorized representative, signed White Oak’s admission documentation—including the Arbitration Agreement.”) (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 (“Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.”) (emphasis added)). And any notion that there is ambiguity in this regard is unsupported and erroneous.

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Mr. Arches’ residency at the Facility. But all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration

Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (Arbitration Agreement (providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Mr. Arches'] stay at [the] Facility, or to the provisions of care or services to [Mr. Arches]"); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Mr. Arches' relationship with the Facility, the Admission Agreement setting forth the terms of his admission, the Arbitration Agreement providing for arbitration of disputes arising out of his admission. (*Compare* Admission Agreement (setting forth the terms of Mr. Arches' admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Mr. Arches' admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 ("This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that

South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of “separatedness.” Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact that there is indeed no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. Merger is *presumed* upon the occurrence of a particular set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the Court’s finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. It must be remembered that the presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). The merger

presumption is “earned,” so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Mr. Arches’ admission to the Facility and would not have been done at all but for his admission to the Facility.

(1) The Court erred in its reliance on *Solesbee*, 438 S.C. 638, 885 S.E.2d 144—indeed, the *Solesbee* Court’s merger analysis is itself erroneous.

During the pendency of this case, the Court of Appeals decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility’s here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court of Appeals likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility’s equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 (“Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility’s] equitable estoppel argument was properly denied.”).²⁰ Most respectfully, the

²⁰ To be clear, the Court of Appeals’ decision in *Solesbee* turned on its affirmance of the circuit court’s ruling against *merger* of the Arbitration Agreement and the Admission

Court erred in its reliance on *Solesbee*—and, indeed, the *Solesbee* Court’s merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the Underlying Motions.²¹

First, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.” 438 S.C. at 648, 885 S.E.2d at 149. It is simply not true that “the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law.”

Regarding governing law, what the Admission Agreement actually states is this: “This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located.” (Admission Agreement p. 10.) And what the Arbitration Agreement actually states is this:

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

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the “FAA”), applies to the Arbitration Agreement.²² The FAA applies whenever an arbitration agreement involves

Agreement. Consequently, the *Solesbee* Court did not address the substance of the *equitable estoppel* prong of the merger/equitable estoppel argument.

²¹ In this regard, the Facility would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

²² The Arbitration Agreement expressly states that the FAA applies (Arbitration Agreement), and this must be enforced like any other contract term. *Damico v. Lennar Carolinas, LLC*, 430 S.C. 188, 196, 844 S.E.2d 66, 70 (Ct. App. 2020) (“We first consider whether the FAA applies. We hold it does, for two reasons. First, the [subject contract] provides the parties ‘specifically agree that this transaction involves interstate commerce.’ We must enforce this

interstate commerce—and this is so even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA “create[d] a body of federal substantive law,” which is “applicable in state and federal courts.”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (“[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract.”); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

agreement like any other contract term.”) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 363–64 (2001) (finding the FAA applied because the parties had agreed that the subject contract involved interstate commerce)). Moreover, and in any event, the FAA applies “to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363; *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress’s power under the Commerce Clause); *id.* at 273–77 (1995) (explaining that unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

Essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and they do not support any reasonable inference of any intent contrary to merger.

Second, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” 438 S.C. at 648–49, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any “Entire Agreement” provision. Rather, the “Entire Agreement” provision of the Admission Agreement expressly states, “other Admissions materials . . . are made a part of this Agreement by reference.” (Admission Agreement p. 12.) And as in the instant case, the Arbitration Agreement that was signed in conjunction with the admission is clearly among these “other Admissions materials.” Moreover, that the Arbitration Agreement “shall survive any termination or breach of this Agreement or the Admission Agreement” just means that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. Again, this is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. 2d at 612–13 (“Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.”).

Third, the *Solesbee* Court erroneously found against merger on the basis that “[t]he Arbitration Agreement is silent as to whether it could be revoked, but the Admission Agreement provides, ‘Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.’” 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. The absence of a “revocation” provision is one way in which the Arbitration Agreement is materially different from those at issue in *Coleman* and *Hodge*, and, for that matter, *Thompson*. Moreover, the *Solesbee* Court drew a false equivalency between the concepts of “revocation” and “termination.” A “revocation” is an annulment (i.e., making something a nullity),²³ whereas “termination” is putting or bringing something that properly exists to an end—which is materially different from making something a nullity, i.e., void and never having properly existed in the first place. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that “the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages.” 438 S.C. at 648, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are

²³ *Black’s Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment (“The act of nullifying or making void.”).

separate instruments, a fact which does not actually suggest anything probative about whether they were intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. Again, the very nature of *merger* is to *merge* multiple things together as one.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 648, 885 S.E.2d at 149. While, again, it is certainly true that the Arbitration Agreement was voluntary, this fact provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. Again, the two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Mr. McCarson on Mr. Arches' behalf in the instant case. While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e.,

without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement’s) sole reason for being. (See Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility”).)

Again, even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident’s relationship with the Facility: the Admission Agreement setting forth the terms of the admission, the Arbitration Agreement providing for arbitration of disputes arising out of the admission. (*Compare* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

(b) The Court’s equitable estoppel analysis is erroneous.

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court’s decision in *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including

estoppel). The *Wilson* Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Mr. Arches received direct benefits (in the form of his admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in a case like this.

The key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 (“Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement

containing an arbitration clause, and receives benefits flowing directly from the agreement”) (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 (“It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.”) (internal citations omitted). Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable.

Here, Mr. Arches was a direct beneficiary. Indeed, to deny his receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of his residency: every night’s stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even Plaintiff’s complaint does not go nearly so far as that. (*See Comp.*)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Arches received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement’s enforceability, Mr. Arches having effectively embraced the contract with the Facility for the purpose of his admission and receipt of the benefits thereof.

4. The Facility’s merger/equitable estoppel argument applies with equal force to require arbitration of the wrongful death claim.

The Subject Order reflects the Court’s view that, even if the Facility’s merger/equitable estoppel argument prevailed as to the survival component of this case, it would not prevail as to the wrongful death claim. This is incorrect. The Facility’s merger/equitable estoppel argument applies with equal force to require arbitration of the wrongful death claim.

The only way it could be true (i.e., legally correct) for the Arbitration Agreement not to apply with equal force to the wrongful death claim is if the claim of wrongful death (i.e., the substantive right of action) belongs to the wrongful death beneficiaries themselves. If this were the case, then general principles of contract law would indeed apply to prevent wrongful death beneficiaries from having to arbitrate “their” claims if they themselves had not agreed to do so.

A wrongful death claim, however, does not belong to the wrongful death beneficiaries. It belongs to the decedent’s personal representative, and a specific rule prohibiting enforcement of otherwise valid agreements to arbitrate wrongful death claims would violate the FAA’s requirement that arbitration agreements be placed on equal footing with all other contracts,²⁴ as indeed our Supreme Court has already recognized in *Dean*, 408 S.C. at 389, 759 S.E. at 737 n.3 (“[C]ourts *may not* refuse to compel arbitration simply because a wrongful death claim is involved.”) (emphasis added).

“The right of action for wrongful death is purely statutory and did not exist at common law” *Glenn v. E. I. DuPont Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157 (1970). A wrongful death claim must be a claim that, had the decedent lived, they could have maintained themselves. S.C. Code Ann. § 15-51-10 (“Whenever the death of a person shall be caused by the

²⁴ See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

wrongful act, neglect or default of another *and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof*, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.”) (emphasis added); *see also Maxey v. Sauls*, 242 S.C. 247, 250, 130 S.E.2d 570, 572 (1963) (“[T]he right to maintain the [wrongful death] action is based upon the condition that ‘the act, neglect or default’ must be ‘such as would, if death had not ensued, have entitled the person injured to maintain an action and recover damage in respect thereof.’ In other words, ‘*if the deceased never had a cause of action, none accrues under the wrongful death statute.*’”) (discussing prior statutory language that is identical to that in present § 15-51-10) (quoting *Scott v. Greenville Pharmacy*, 212 S.C. 485, 489, 48 S.E. 324, 326 (1948) (emphasis added)).

Accordingly, a claim of wrongful death is derivative in nature, in that it derives from (and does not arise without) a cause of action arising in favor of the *decedent*. *See Id.*; *see also* 26 S.C. Jur. Limitation of Actions § 32 (“A wrongful death action is derivative in nature”); *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 942 (D.S.C. 1988) (“If the decedent never had a cause of action, none accrues under the wrongful death statute. Furthermore, anything that would have defeated the decedent’s recovery had he survived the accident, such as contributory negligence, a valid release, or similar acts on his part, would defeat the right of recovery in behalf of his family in case of his death. It follows logically that the decedent’s failure to file a timely claim . . . is an act, or omission, on his part which should defeat the right of recovery of his personal representative.”) (internal citations and quotation marks omitted); *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010) (“*Quattlebaum*

was correctly decided and adheres to the principle that a decedent’s estate may maintain an action only when the decedent would have been entitled to maintain an action had he survived.”).

“[T]he substantive right to bring . . . a wrongful death action . . . is determined by the Probate Code.” *Fisher on behalf of estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 240, 811 S.E.2d 739, 742 (2018); *see also id.* at 242, 811 S.E.2d at 743 (“The Probate Code defines who may act on behalf of the estate of a deceased person. The Probate Code, therefore, is the substantive law by which the identity of the ‘*real party in interest*’ is determined for all civil actions *brought on behalf of the estate of a deceased person.*”) (emphasis added). “Under the Probate Code . . . *wrongful death actions must be brought by the personal representative . . .*” *Id.* (emphasis added); *see also* S.C. Code Ann. § 15-51-20 (“Every [wrongful death] action shall be brought by or in the name of the executor or administrator of [the] person [whose death was wrongfully caused].”);²⁵ *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 (“If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed by the Probate Court, it should be dismissed.”).

Even though it is for their “benefit,” a wrongful death claim does not belong to the wrongful death beneficiaries themselves. It is a claim that is brought on behalf of the estate of the deceased person. The substantive right to bring the claim belongs to decedent’s personal representative, who must bring the claim and is the real party in interest under South Carolina law. And consistent

²⁵ As explained by the *Fisher* Court, “Under the Probate Code . . . the terms ‘executor’ and ‘administrator’ do not have separate meaning, but are included within the defined term ‘personal representative.’” 422 S.C. at 240, 811 S.E.2d at 742 (citing S.C. Code Ann. § 62-1-201(33) (defining “Personal representative” to “include[] executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.”)). “Therefore, wrongful death actions must be brought by the personal representative, despite the language ‘shall be brought by . . . the executor or administrator’ that still appears in section 15-51-20.” *Id.*

with Judge Anderson’s “correct[.]”²⁶ analysis in *Quattlebaum* (which explains that anything that would have defeated the decedent’s recovery had he survived, such as, for instance, a valid release, will apply to the wrongful death claim), it necessarily follows that an enforceable arbitration agreement (or an arbitration agreement the enforceability of which the decedent, and, in turn, his personal representative, is estopped to deny) must be enforced as to a claim for wrongful death.

Accordingly, the Court erred in finding that arbitration of the wrongful death claim cannot be compelled under the Facility’s merger/equitable estoppel theory.

²⁶ *Stokes*, 389 S.C. at 349, 699 S.E.2d at 146.

5. **At a minimum, the Court should have granted the Facility's alternative request for permission to conduct limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability under principles relating to the law of agency.**

At a minimum, the Court should have allowed the Facility to engage in some appropriately limited discovery to investigate fairly the Arbitration Agreement's enforceability under principles relating to the law of agency.^{27 28 29} This would entail, at the least, allowing the Facility to depose Mr. McCarson and to follow up on any pertinent evidentiary leads revealed by his deposition.

²⁷ A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

²⁸ "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

²⁹ Moreover, authority can be supplied to an agent retroactively by express or implied ratification. *See Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. *See State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he could ratify the act of the agent, whether he was present or not, and in this we see no error.").

Otherwise, the Facility is in a Catch-22: vulnerable on the one hand to the argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable based on Mr. McCarson's agency (or related principles, such as agency by estoppel or ratification), which is a fact-intensive question, while at the same time vulnerable on the other hand to the argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It must be remembered that the Arbitration Agreement is valid on its face, bearing, as it does, Mr. McCarson's express representation of authority to bind Mr. Arches. (Arbitration Agreement ("By his . . . signature below, the executing party [(i.e., Mr. McCarson)] represents that he . . . has the authority to sign on [Mr. Arches'] behalf so as to bind [Mr. Arches] as well as [himself].").)³⁰ It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings.

Obviously, if this were an action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where it cannot conduct relevant discovery to vindicate its arbitration rights without

³⁰ The Facility would note here that, having signed the Arbitration Agreement, Mr. McCarson "is presumed to have, read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) ("[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms."); *see also Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995) (South Carolina law implies a covenant of good faith and fair dealing in every contract).

risking a waiver of those rights by the very act of attempting to vindicate them is not only patently unjust but also a violation of the FAA’s requirement that arbitration agreements must be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339 (Under the FAA, “courts *must* place arbitration agreements on *equal footing with other contracts*”); *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”) (citing *Concepcion*, 563 U.S. at 339); *Allied-Bruce*, 513 U.S. at 281 (“States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.”) (emphasis added) (internal citations omitted)).

Principles relating to the law of agency may potentially provide an additional, independent basis on which to grant the Motion to Compel Arbitration and, in turn, the Motions to Stay. Their application is fact dependent, and the allowance of discovery—without the threat of waiver—into Mr. Arches and Mr. McCarson’s course of dealing and the potential creation of an agency relationship between them (or other potential bases for enforcement of the Arbitration Agreement under related principles) is only reasonable.

6. The Subject Order improperly relies on S.C. Code Ann. § 15-48-20, because this matter is governed by the FAA.

The Subject Order cites the South Carolina Arbitration Act at § 15-48-20 for the proposition that it “permits a court to ‘summarily’ proceed to the determination of whether arbitration is appropriate when an agreement to arbitrate has been contested.” (Subject Order p. 7.) As explained, however, this matter is governed by the FAA, not the South Carolina Arbitration Act. Moreover, the use of a state law of particular applicability to arbitration agreements as a means to deny the Facility the ability to conduct discovery in an attempt to vindicate its arbitration rights violates the FAA’s commandment that arbitration agreements must be placed on equal footing with all other contracts under state law. *See Concepcion*, 563 U.S. at 339; *Kindred Nursing*, 137 S. Ct. at 1423; *Allied-Bruce*, 513 U.S. at 281.

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motions (both those advanced in writing and those advanced via oral argument), all of which Defendants incorporate by reference herein and asks the Court to (re)consider and expressly rule upon in full), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motions or, as a lesser alternative, an order granting the Facility’s request for limited discovery (and allowing additional briefing to be submitted to the Court in light of such discovery and providing that the Court will hear and decide the Underlying Motions anew with the benefit of the same) or, as a lesser alternative, to the extent that the matters raised therein might potentially expose Defendants to any threat of prejudice going forward, an order addressing No. 2 above.

PLEASE NOTE: Defendants reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
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July 20, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	CIVIL ACTION NO.: 2022-CP-42-02595
STEVEN MCCARSON AS	)	
PERSONAL REPRESENTATIVE OF	)	
THE ESTATE OF LOUIS ARCHES,	)	
	)	
	)	
v.	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANTS'
	)	MOTION FOR RECONSIDERATION
THI OF SOUTH CAROLINA AT	)	
MAGNOLIA MANOR-INMAN, LLC	)	
D/B/A MAGNOLIA MANOR-INMAN,	)	
THI OF SOUTH CAROLINA AT	)	
INMAN, LLC, THI OF SOUTH	)	
CAROLINA, LLC, HUNT VALLEY	)	
HOLDINGS, LLC, FUNDAMENTAL	)	
ADMINISTRATIVE SERVICES,	)	
LLC, FUNDAMENTAL CLINICAL	)	
AND OPERATIONAL SERVICES,	)	
LLC, THI OF BALTIMORE, LLC,	)	
AND JAMES H. MACK,	)	
	)	

The Facility has moved the Court to reconsider its July 10, 2023 Order, arguing that (1) the Court's merger and estoppel analyses are erroneous, (2) wrongful death claims do not belong to the statutory beneficiaries and instead belong to the personal representative of the decedent's estate, such that the personal representative may waive the statutory beneficiaries' rights to a jury trial, (3) the Facility should have been permitted to conduct discovery on the issue of agency, and (4) the Court erroneously applied South Carolina law in violation of the Federal Arbitration Act ("FAA"). The Court should deny the Facility's Motion for Reconsideration because its

Order does not contain any clear legal errors, and the factual findings of the Court are reasonably supported by the evidence in this case.

Under binding South Carolina authority, the exact same arbitration agreement and admission agreement at issue in this case have been previously found by the Court of Appeals not to merge, and that a nonsignatory would not be precluded from denying the validity of the arbitration agreement. *See Estate of Solesbee by Bayne v. Fundamental Clinical and Operational Servs., LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). The Facility does not point to any new evidence indicating that Steven McCarson had authority, actual or apparent, to enter the arbitration agreement at the time it was executed, nor does it make any arguments as to how he would have had authority under an effective power of attorney, conservatorship, guardianship, or common law agency principles.

Further, the case law is clear that wrongful death claims do not belong to the decedent's estate or personal representative, and since there is no evidence in the form of an affidavit or recorded power of attorney substantiating that McCarson was the Decedent's agent for the purpose of waiving the Decedent and Estate's rights to a jury trial, further discovery in the form of a deposition of McCarson would have been insufficient to prove agency. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 579, 813 S.E.2d 292, 311 (Ct. App. 2018) (finding that discovery would be futile where the only discoverable evidence on the issue of agency would have been the agent's testimony). Lastly, the Facility cannot argue on a Motion for Reconsideration that the arbitration agreement is governed by the FAA, as it has

not carried its evidentiary burden of demonstrating that the arbitration agreement involved interstate commerce. For these and the following reasons, the Court should deny the Facility's Motion for Reconsideration.

I. The Court's Order correctly found that the arbitration agreement and admission agreement did not merge.

Because arbitration exists solely by agreement of the parties, a presumption against arbitration arises where the party resisting arbitration (the Estate) is a nonsignatory to the written agreement to arbitrate.¹ *Wilson v. Willis*, 426 S.C. 326, 337, 827 S.E.2d 167, 173 (2019). State law provides when an arbitration agreement may be enforced against a nonsignatory, and South Carolina permits a nonsignatory to be bound by an arbitration agreement under several theories: incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Only two of these theories are implicated by the facts of this case: agency and estoppel. The Facility has failed to point to any evidence of agency. Therefore, the Facility may only prevail if it can show the Court's finding that the Estate was not estopped from denying the validity of the arbitration agreement is erroneous.

A nonsignatory may be estopped from denying the validity of an arbitration agreement when it receives a direct benefit from a contract containing an arbitration

¹ McCarson was acting in his individual capacity, and not in his capacity as personal representative of Mr. Arches' Estate, at the time he entered the arbitration agreement. *See Thompson v. Pruitt Corp.*, 416 S.C. 43, 61, 784 S.E.2d 679, 689 (Ct. App. 2016) (recognizing the concept that a person may act separately in individual and representative capacities).

clause. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. It is undisputed in this case that the Facility's arbitration agreement was not a clause in its admission agreement, and neither McCarson nor the Estate have received any direct benefit from the **arbitration agreement** itself. The Facility thus argues that under a theory of merger, the arbitration agreement and the admission agreement became a unified contract once they were executed, and since Mr. Arches benefited from the terms of the admission agreement, his Estate is precluded from denying the validity of the arbitration agreement. However, the language and formatting of the agreements serve as evidence that the two agreements were intended to be separate documents, and at minimum, create an ambiguity as to merger that must be construed against the Facility.

In South Carolina, “[t]he general rule is that, **in the absence of anything indicating a contrary intention**, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (emphasis added). This does not create an evidentiary presumption of merger. Here, the terms of the agreements indicate an intent that the doctrine of merger would not apply to the agreements, and at minimum create an ambiguity as to merger. *See id.* at 355-56, 755 S.E.2d at 455 (stating that ambiguity as to merger must be construed against the drafter).

In determining whether a health care facility's admission and arbitration agreements merge, South Carolina appellate courts have looked to the following factors: (1) whether the two agreements are governed by separate bodies of law, (2) whether the language of the agreements recognizes the two agreements as separate, (3) whether the agreements contain different terms regarding revocation and termination, (4) whether the agreements are separately paginated and have their own signature pages, and (5) whether both agreements are required for the execution of the other, or whether one agreement is optional. *Hodge*, 422 S.C. at 562-63, 813 S.E.2d at 302. The Court of Appeals has previously analyzed the subject admission and arbitration agreements in *Solesbee* and found the agreements do not merge.

In *Solesbee*, the Court found that the admission agreement is governed by South Carolina law, while the arbitration agreement is governed by federal law. *Solesbee*, 438 S.C. at 648, 885 S.E.2d at 149. To be precise, the admission agreement is governed by "applicable Federal regulations" and South Carolina law. The arbitration agreement, on the other hand, claims to be governed by the FAA's statutes and specifically not by South Carolina law.² Therefore, the two agreements do not purport to be governed by identical spheres of law: one is theoretically subject to state

² The Facility argues that both agreements are broadly governed by South Carolina and federal law; however, the arbitration agreement specifically claims it will only be enforced under the FAA. To the extent that the arbitration agreement provides that the arbitration **proceedings** will be governed by the South Carolina Alternate Dispute Resolution/Mediation Rules, these Rules only govern the proceedings and are irrelevant to the enforcement of the arbitration agreement and the Court's determination of merger.

law and the federal code of regulations, while the other claims to be only subject to the statutes contained within the FAA.

Second, the Court of Appeals has previously found that the language of the agreements recognizes that they are separate: “The Arbitration Agreement recognized the two documents were separate, stating the Arbitration Agreement ‘shall survive any termination or breach of this Agreement or the Admission Agreement.’” *Solesbee*, 438 S.C. at 648-49, 885 S.E.2d at 149. This language mirrors that addressed in *Coleman* and *Thompson*, in which the Supreme Court and this Court found such language to be proof that an admission agreement was separate and did not merge with an arbitration agreement:

The court then explained the evidence of the parties’ intent to keep the two agreements separate by highlighting the admission agreement’s recognition of the arbitration agreement as a separate document, i.e., “This Agreement, including all Exhibits hereto, and the Arbitration Agreement”

Thompson, 416 S.C. at 52, 784 S.E.2d at 685.

The Facility argues that the admission agreement’s “Entire Agreement” clause contains language indicating that the agreements merged, specifically the statement that “[t]he undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference **herein**.” The “Entire Agreement” provision purports to incorporate the “Admissions materials” by reference within the admission agreement itself, but nowhere within the admission agreement, including the “Entire Agreement” provision, does it ever refer to the

arbitration agreement. The “Entire Agreement” provision creates at best an ambiguity as to merger when taken in context of the totality of the circumstances.

Third, the Court of Appeals has found that the arbitration agreement contains no language indicating that it may be revoked or terminated, but the admission agreement provides that a resident may terminate the admission agreement at any time. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. Fourth, the Court of Appeals has found that the agreements are separately paginated and have their own signature pages. *Id.* Since the arbitration and admission contracts have different pagination with different signature pages, and the arbitration contract is entitled “Arbitration Agreement” at the top of its first page, these factors further indicate the drafter's intent for the arbitration agreement to stand by itself as an independent contract, at least when it suits the Facility for it to do so. *See Thompson*, 416 S.C. at 53 n.1, 784 S.E.2d at 685 n.1 (noting that a separately labeled arbitration agreement indicates the drafter's intent for the agreement to stand by itself as an independent contract). Lastly, the Court of Appeals has found that the arbitration agreement is optional and voluntary, while the admission agreement is required for admission. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149. The Facility does not dispute in this case that the arbitration agreement is voluntary and optional.

As observed by the Court of Appeals, the text of the agreements constitutes actual evidence contrary to merger and at minimum creates ambiguity as to whether the agreements merged. The Facility misconstrues that there is a legal presumption of merger, and that the above-discussed factors are not sufficient to overcome this

presumption. However, the language of *Coleman* never states that there is a presumption of merger in the context of health care facility arbitration agreements, or that one interpretation as to merger or the other is favored in any way, and in fact binding authority states that there is a presumption **against** merger when an arbitration agreement is attempted to be enforced against a nonsignatory, such as when a facility attempts to enforce the agreement against an estate when it was signed by the personal representative in their individual capacity without authority. *Wilson*, 426 S.C. at 337, 827 S.E.2d at 173. Instead, *Coleman* dictates that the Court can assume merger only if the agreements were made at the same time, by the same parties, for the same purpose, and in the course of the same transaction, so long as there is no language or other indications within the agreements of a contrary intent. The fact that there is ample evidence that the agreements were drafted in such a manner that they could, if necessary, be construed as separate contracts if anything cautions against a finding of merger. The language, pagination, and formatting of the admission agreement and arbitration agreement evince an intent for the agreements to be considered separate, presumably when such a position would work to the advantage of the Facility.

The Facility argues that this evidence is not “actual evidence”, and that the Court’s finding of no merger is based on speculation. This begs the question of what else was the Court supposed to rely on to determine if there was an intent contrary to merger that could be gleaned from the agreements. Additionally, if the above-discussed evidence is not indicative of a contrary intent, and the Facility intended the

documents to merge, then why hasn't it made the arbitration agreement a provision of the admission agreement, or merged the two documents with an explicit merger provision? Why make separate documents to begin with? The answer to these questions is that for certain purposes, the Facility and other skilled nursing facilities want the agreements to be separate. The language of the agreements purposefully creates an ambiguity that must be construed against the drafter and the Court correctly found in this instance there was no merger of the documents. The Court of Appeals has previously reached the same conclusion based on the same language and agreements. It is not legal error for the Court to rely on binding authority in finding that the subject agreements do not merge.

II. Even if the arbitration agreement and admission agreement did merge, the Estate still would not be estopped from denying the validity of the arbitration agreement.

Equitable estoppel is “a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177. Equitable estoppel is only available when the party seeking to invoke the doctrine “was misled to his injury”. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017). If McCarson did not have authority to enter the arbitration agreement, and there is no evidence he did, then the Estate would only be estopped from denying its validity if the Facility can carry its evidentiary burden of proving the elements of estoppel to the Court. The Facility has failed to do so.

A nonsignatory such as the Estate is estopped from refusing to comply with an arbitration clause “when it receives a direct benefit from a contract containing an

arbitration clause.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). The direct benefits test is frequently used to determine whether a theory of estoppel is applicable within the arbitration context. *Solesbee*, 438 S.C. at 647, 885 S.E.2d at 148. Here, the arbitration agreement is not a clause within the admission agreement, and the two agreements did not merge. However, even if the agreements did merge, the Facility cannot satisfy the remaining requirements of the direct benefits estoppel test.

Direct benefits estoppel precludes a nonsignatory from denying the validity of an arbitration **provision** of a contract if “(1) the nonsigner’s claim arises from the contractual relationship, (2) the nonsigner has “exploited” other parts of the contract by reaping its benefits, **and** (3) the claim relies solely on the contract terms to impose liability.” *Weaver*, 431 S.C. at 230, 847 S.E.2d at 272. Thus, even if the arbitration agreement and admission agreement merged, the Facility would still have to demonstrate that the Estate’s negligence claims arise from **and** rely solely on the terms of the admission agreement to impose liability in order to benefit from a direct benefits estoppel theory.

The Estate has not asserted a breach of contract claim, or a violation of contractual duties, and instead has brought a lawsuit under a negligence theory arising from common law duties. *See Wilson*, 426 S.C. at 342, 827 S.E.2d at 176 (noting that a claim may rely on general principles of South Carolina law in addition to or to the exclusion of contractual rights). The Estate does not claim that the Facility

breached a contractual duty created by the admission agreement, but instead that it breached a duty owed by all healthcare practitioners, regardless of any contractual agreements, not to negligently care for their patients. Any contractual duties between the Decedent and the Facility are irrelevant as to whether the Facility breached common law tort duties owed to the Decedent. The Estate's claims rely on common law tort duties owed by the Facility to everyone and not solely on any provision of the admission agreement and as such, the claims do not rely solely on the contract terms to impose liability, and the Estate is not precluded by direct benefits estoppel from denying the validity of the arbitration agreement. *Weaver*, 431 S.C. at 232-33, 847 S.E.2d at 273-74.

Simply because the alleged conduct would not have arisen in the absence of the admission agreement (and Mr. Arches' admission to the Facility) does not mean that direct benefits estoppel is implicated.

When a claim depends on the contract's existence and cannot stand independently – that is, the alleged liability “arises solely from the contract or must be determined by reference to it” – equity prevents a person from avoiding the arbitration clause that was part of that agreement. But “when the substance of the claim arises from general obligations imposed by state law, including statutes, torts, and other common law duties, or federal law,” direct benefits estoppel is not implicated even if the claim refers to or relates to the contract *or would not have arisen “but for” the contract's existence*.

Wilson, 426 S.C. at 343, 827 S.E.2d at 176 (quoting *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 637 (Tex. 2018)). Therefore, just because Mr. Arches benefited from the admission agreement by receiving “every night's stay, every meal,

every amenity/service provided, every instance of care/treatment” as argued by the Facility, it does not mean that his Estate’s tort claim against the Facility depends on the agreement’s existence. This lawsuit is predicated on the breach of common law duties owed by the Facility to Mr. Arches, and would be justiciable even if McCarson did not have authority to enter the admission agreement.

Despite the Facility’s contentions, the analysis does not stop and start with whether Mr. Arches, and thus his Estate, received any benefits from the admission agreement. There are other requirements that must be met before direct benefits estoppel is implicated. The Court correctly found that direct benefits estoppel was not applicable. The Court also correctly found that since the documents did not merge, and the arbitration agreement was not a clause imbedded within the admission agreement, the Estate was not estopped from denying the arbitration agreement’s validity.

III. The wrongful death beneficiaries’ claims do not belong to the Estate.

The Court correctly found that the wrongful death claims of the statutory beneficiaries would not strictly as a matter of law be subject to arbitration. South Carolina law is very clear that wrongful death claims belong to the statutory beneficiaries and are distinct and separate from survival claims belonging to the estate. *Bennett v. Spartanburg Ry. Gas and Elec. Co.*, 97 S.C. 27, 81 S.E. 189, 190 (1914). Wrongful death actions are brought by the personal representative of the decedent directly for the benefit of the statutory beneficiaries and include pecuniary loss, mental shock and suffering, grief and sorrow, and loss of companionship: all

losses suffered by the beneficiaries themselves. S.C. Code Ann. §§ 15-51-10 and -20; *Self v. Goodrich*, 300 S.C. 349, 351, 387 S.E.2d 713, 714 (Ct. App. 1989). Survival actions, on the other hand, are separate claims for separate injuries, and belong to the estate, not the statutory beneficiaries. *See Bennett*, 97 S.C. at 27, 81 S.E. at 189-90.

The Facility argues that the wrongful death claims actually belong to the personal representative of an estate and not the statutory beneficiaries, and that the wrongful death claim is derivative of claims belonging to the decedent; ergo, a personal representative would have authority to waive jury trial rights belonging to all statutory beneficiaries. This argument mistakenly conflates the wrongful death claim and survival claims.³ The history and development of South Carolina's wrongful death and survival statutes show that wrongful death is something entirely different from the survival of tort claims after an individual's death. South Carolina courts have long recognized that these are two disparate theories of liability with distinct origins, purposes, and results. *See Grainger v. Greenville, S. & A. Ry. Co.*, 101 S.C. 399, 85 S.E. 968, 969 (1915). The statutory scheme shows wrongful death and survival are distinct claims accruing at different times and are governed by different statutes of limitation. *See* S.C. Code Ann. § 15-3-560(6).

Wrongful death claims are often erroneously perceived as derivative of survival claims. In both types of claims, the decedent's personal representative is the named

³ McCarson was obviously not personal representative of the Estate at the time he executed the arbitration agreement.

plaintiff. *Complete Auto Transit, Inc. v. Bass*, 229 S.C. 607, 612, 93 S.E.2d 912, 914 (1956). However, this fact alone is not determinative of any derivative nature the wrongful death claim may have. When asserting wrongful death and survival claims, a personal representative “function[s] under two separate and distinct trusteeships.” *Id.* In other words, while it is the personal representative’s name in the caption for a wrongful death claim, “it is clear . . . the real parties to the action were the beneficiaries.” *Claussen v. Brothers*, 148 S.C. 1, 145 S.E. 539, 541 (1928).

In light of the history and structure of wrongful death and survival claims, a number of other reported opinions have rejected the notion that the former is derivative of the latter. As early as 1907, the South Carolina Supreme Court recognized a wrongful death action is not the survival of an action which the deceased had in his lifetime, but is a "new cause of action." *Osteen v. Southern Ry., Carolina Division*, 76 S.C. 368, 57 S.E. 196, 200 (1907). *Claussen* held a wrongful death claim is "not a continuation" of any claim the decedent had before her death. *Claussen*, 145 S.E. at 540. And contrary to the Facility’s assertion that wrongful death claims belong to the personal representative, *Claussen* states that “as has been pointed out, the party in whose favor the right of action in reality exists under Lord Campbell’s Act is **not the personal representative of the deceased person.**” *Id.* at 541 (emphasis added).

A wrongful death claim is "independent" of claims the decedent had during his life and "wholly different" than any other claim available at his death. *Wellman v. Bethea*, 243 F. 222 (E.D.S.C. 1917); *In re Mayo's Estate*, 60 S.C. 401, 38 S.E. 634, 638 (1901). Wrongful death and survival claims are "separable and distinct." *Keel v.*

Seaboard Air Line Ry., 122 S.C. 17, 114 S.E. 761, 762 (1922). In sum, the Facility would mislead the Court into finding that a wrongful death claim is derivative of survival claims and belongs to the personal representative, despite the fact that "[t]he object, scope, and measure of damages" is different for the two claims. *In re Mayo's Estate*, 38 S.E. at 638.

South Carolina's appellate courts have held wrongful death claims are "distinct," "independent," "separate," "wholly different," and "not a continuation" of claims a decedent could have filed during his lifetime. The Facility does not address any of the extensive South Carolina law showing wrongful death as a distinct, independent claim that solely belongs to the statutory beneficiaries. Instead, the Facility cites to federal case law to suggest South Carolina courts have already held that wrongful death is a derivative claim. None of the authorities the Facility cites support that conclusion and none squarely address the question now before the Court.

The Facility claims the Supreme Court of South Carolina addressed the arbitrability of wrongful death claims in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014). However, *Dean* addressed a very different issue related to forum selection clauses. *See id.* at 382, 759 S.E.2d at 733 (finding the "outcome of this appeal turns" on effect of arbitral forum provision). Plus, *Dean* did not even compel arbitration in the case before it. The Facility relies on a sentence in one of *Dean's* footnotes but reads far too much into that sentence. *See id.* at 378 n.3, 759 S.E.2d at 731 n.3 ("We note that courts may not refuse to compel arbitration simply because a wrongful death claim is involved").

This footnote addressed an overly broad pronouncement in the appealed order suggesting wrongful death claims are categorically excluded from arbitration. *Id.* (citing circuit court order statement stating that "wrongful death actions are not something that's arbitrated"). That type of rule would violate the FAA's equal footing principle, if the Facility had proven in this instance that the FAA applies. *Id.* (citing *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532-33, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42 (2012)); *see also Kindred Nursing Ctrs., Ltd. P'ship v. Clark*, 581 U.S. 246, 251, 137 S. Ct. 1421, 1426, 197 L. Ed. 2d 806 (2017). However, that is not the argument the Estate makes here. A wrongful death claim may be arbitrable in instances where the statutory beneficiaries agree to arbitrate. McCarson simply argues an individual's consent to arbitrate may not be grafted into a wrongful death claim that pays different people for different losses. *Dean* does not reject that argument or even consider it.

Moreover, the Facility incorrectly argues that the Circuit Court's Order violates the "equal footing" principle. Several other courts have held that rejecting arbitration for wrongful death claims in similar cases does not violate *Marmet* or any other Supreme Court precedent on the equal footing principle.⁴ Refusing to compel

⁴ *See Carter v. SSC Odin Operating Co., LLC*, 976 N.E.2d 344, 360 (Ill. 2012) (unlike *Marmet*, Illinois was not applying a categorical anti-arbitration rule but was rather applying "common law principles governing all contracts"); *Vickers v. Canal Pointe Nursing Home & Rehab Ctr.*, 2016-Ohio-3244, 2016 WL 3080329 (Ohio App. June 1, 2016) (finding that Ohio Supreme Court precedent preventing arbitration of wrongful death claims did not create a categorical ban that would run afoul of *Marmet* because it applied generally applicable contract law rule against enforcing contract against person who had not assented).

arbitration here does not mean wrongful death claims can categorically never be arbitrated. Instead, as other courts have recognized, it simply means the Facility violated a generally applicable contract law rule by failing to prove it had consent for arbitration from all of the proper parties. Finally, reading *Dean's* footnote to have any bearing on the parties' dispute does not adequately account for either side's arguments on the key issue. *Dean* had no reason to undertake this analysis and has nothing to offer the Court in resolving this issue.

The Facility also asks the Court to declare wrongful death a "derivative" claim based essentially on one sentence in *South Carolina Jurisprudence* that has been cited in various authorities. However, the Facility fails to direct the Court to the most pertinent entry. In a chapter devoted to wrongful death claims, a section entitled "[s]eparate, independent cause of action" notes the existence of two claims at the tortious death of a person and, crucially, **"the wrongful death action and the survival action involve different, independent claims."** 28 S.C. Jur. *Wrongful Death* § 5 (emphasis added).

Finally, the Facility contends that, since S.C. Code Ann. § 15-51-10 permits wrongful death claims only when the decedent would have had a claim if he survived, then the decedent, or the estate's personal representative, has the authority to waive the statutory beneficiaries' right to a jury trial, citing *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1988) and *Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 699 S.E.2d 143 (2010). However, *Quattlebaum* (and *Stokes*) did not address arbitration at all. Instead, they simply

held that if an individual allows the statute of limitations on a personal injury claim to lapse during his life, then a wrongful death claim may not be used after his death to "revive" the stale claim. *Stokes*, 389 S.C. at 349, 699 S.E.2d at 146.

The statute of limitations is not at issue here and neither *Quattlebaum* nor *Stokes* have ever been cited as justification for binding nonsignatories to an arbitration contract. Plus, the legal authority holding that an individual may forfeit a wrongful death claim by ignoring or settling a personal injury suit during his life do not mean the individual, or someone acting on his behalf, may control the manner in which valid future wrongful death claims will be resolved. Several courts have made this distinction explicitly. Oklahoma, like South Carolina, bars a wrongful death suit if the decedent ended a personal injury claim during his lifetime based on the same wrongdoing. *Boler v. Sec. Health Care, L.L.C.*, 2014 OK 80, 336 P.3d 468, 477 (Okla. 2014) (citing *Haws v. Luethje*, 1972 OK 146, 503 P.2d 871 (Okla. 1972)). Even so, the court in *Boler* refused to apply a nursing home resident's arbitration contract to a wrongful death claim because doing so would violate contract principles requiring mutual assent. *Id.* at 471.

Pennsylvania also bars wrongful death claims if the decedent allowed his personal injury claim to lapse. *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 657 (Pa. Super. Ct. 2013) (citing *Moyer v. Rubright*, 651 A.2d 1139 (Pa. Super. Ct. 1994)). Yet, just like Oklahoma, Pennsylvania does not extrapolate from that rule the notion that an individual can bind other wrongful death beneficiaries to arbitration. *Pisano*, 77 A.3d at 657, 662 (refusing to find wrongful death beneficiaries lost jury trial right

"where they did not waive it of their own accord"). Thus, *Quattlebaum's*, and by extension, *Stoke's*, interpretation of section 15-51-10 does not necessarily require arbitration in this case.

Had Mr. Arches settled any claims against the Facility before his death, or if the statute of limitations had lapsed on his claim, the Estate could not now bring a wrongful death claim on behalf of the statutory beneficiaries. But it does not follow that theoretically McCarson in his individual capacity had the ability to direct the wrongful death claim to arbitration on behalf of any remaining wrongful death beneficiaries.⁵ Since Mr. Arches had a viable dispute with the Facility when he died, any proposed arbitration of the wrongful death claim must consider whether all beneficiaries agreed to waive a jury trial. In short, none of the authorities cited by the Facility support that a wrongful death claim is derivative and encompasses jury rights that may be waived by the decedent prior to his death.

In light of the historical and structural differences between South Carolina's wrongful death and survival statutes, and the remedies afforded by them, as well as substantial case law defining and treating wrongful death and survival claims

⁵ Ancillary to this argument is the issue of whether there is sufficient consideration for a health care facility's arbitration agreement to bind a nonresident signing it in their individual capacity, as any promise by the facility to forgo litigation brought against the nonresident in favor of arbitration would in reality be illusory, as there is no realistic claim arising from the admission agreement the facility could ever bring against a nonresident in their individual capacity. A promise by a facility to arbitrate such claims is of no actual detriment to the facility, no benefit to the nonresident, and is not sufficient consideration for a contract. *See Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 274, 525 S.E.2d 898, 900 (Ct. App. 1999) (stating that a benefit to the promisor or a detriment to the promise is sufficient consideration for a contract).

distinctly, the Court should reject the Facility's attempt to use McCarson's purported assent to the arbitration agreement to force arbitration on any remaining wrongful death beneficiaries. At least a dozen other jurisdictions have rejected the Facility's argument. *See FutureCare NorthPoint, LLC v. Peeler*, 143 A.3d 191, 209-10, 213 (Md. App. 2016); *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 494 n. 1 (Pa. 2016) (citing *Pisano v. Extendicare Homes, Inc.*, 77 A.3d 651, 660 (Pa. Super. 2013)); *Boler v. Sec. Health Care, LLC*, 336 P.3d 468, 477 (Okla. 2014); *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 316 P.3d 607, 614 (Ariz. Ct. App. 2014); *Daniels v. Sunrise Sr. Living, Inc.*, 212 Cal. App. 4th 674, 151 Cal. Rptr. 3d 273 (2013); *Carter v. SSC Odin Operating Co, LLC*, 976 N.E.2d 344, 355-58 (Ill. 2012); *Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012); *Woodall v. Avalon Care Center-Federal Way, LLC*, 231 P.3d 1252 (Wash. App. 2010); *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009); *Bybee v. Abdulla*, 189 P.3d 40 (Utah 2008); *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 1262 (Ohio 2007); *Chapman v. Cardiac Pacemakers, Inc.*, 673 P.2d 385 (Idaho 1983); *see also Strickholm v. Evangelical Lutheran Good Samaritan Soc'y*, Case No. 4:11-CV-00059-BLW, 2011 WL 2532395 (D. Idaho June 24, 2011). At best, even if the arbitration agreement was valid, or if the Estate was precluded from denying its validity, it would only reach the Estate's survival claims. However, since it is not valid, the Court cannot compel arbitration of the wrongful death or survival claims in this action.

IV. Discovery on the issue of agency is not warranted.

The Facility argues that at minimum the Court should have granted its request to conduct limited discovery on the issue of agency. The Court did not abuse its discretion in denying the Facility's request for discovery, as any theory of agency in this case would theoretically be predicated on Mr. Arches' representations to the Facility, and he has passed away, precluding his deposition. *See Hodge*, 422 S.C. at 577, 813 S.E.2d at 310 ("Apparent authority occurs when the *principal* by written or spoken words . . . causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him"). "A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016).

The two executed, albeit ineffective, powers of attorney were available for the Court's review, and the Facility has not argued that they were effective, or that there is some alternative source of authority available that the Facility could procure evidence of through discovery. Even if McCarson had his deposition taken, and he provided testimony that he was Mr. Arches' agent for the purposes of entering an arbitration agreement, this would still not be enough to prove agency. *See Hodge*, 422 S.C. at 579, 813 S.E.2d at 311 (stating that even if a personal representative provided in a deposition that he was the decedent's agent, this would not be sufficient to prove agency).

The Facility had the ability prior to its Motion to Compel Arbitration to undertake investigative efforts to ascertain whether any other valid power of attorney

had ever been publicly recorded (there are none), and whether McCarson or Mr. Arches ever made any representations to the Facility's employees concerning authority. An affidavit submitted by the Facility from Katilia Brannon, the employee who conducted the admissions process for Mr. Arches, only states that she "believed" McCarson had permission to execute the admissions documents because "no one informed me otherwise."

This is clearly insufficient to prove a direct manifestation by Mr. Arches to the Facility that McCarson had authority to act on his behalf and if anything indicates that no one made any manifestations of authority to Ms. Brannon whatsoever. The Facility's request for limited discovery is nothing more than a fishing expedition and delay tactic that in the end would prove to be futile on the issue of proving agency. The Court correctly denied the Facility's request for limited discovery.

V. **The Court was free to apply S.C. Code Ann. § 15-48-20 to the subject arbitration agreement, as the Facility has not produced any evidence demonstrating that the arbitration agreement involves interstate commerce and is subject to the FAA.**

The Court did not find in its Order that the FAA would apply to the subject arbitration agreement, although it was argued by the Facility that it would apply. Regardless, the Facility never carried its evidentiary burden of proving that the FAA would apply, so the Court was not preempted from applying South Carolina arbitration law to the facts of the case in finding that the Court was required to "summarily" make a decision on the Facility's Motion to Compel Arbitration under the South Carolina Arbitration Act. In its recent decision *Hicks Unlimited, Inc. v.*

UniFirst Corp., ---S.E.2d---, Op. No. 28158 (S.C. Sup. Ct. filed June 14, 2023), the Supreme Court of South Carolina determined that parties could not contractually bypass the interstate commerce requirement of the FAA to preempt the SCAA, and that the burden was on the party attempting to preempt the SCAA to prove the contract at issue involved interstate commerce. The Facility has come forward with no evidence that its arbitration agreement involved interstate commerce, other than the argument that the FAA applies because the language of the arbitration agreement says that it does. Under *Hicks*, this is insufficient to establish preemption of the SCAA.

In the alternative, the Court's Order does not exclusively rely on the language of section 15-48-20 to determine that further discovery would be futile or unnecessary, as any limited discovery involving depositions of McCarson would not be sufficient to establish agency, the Court had already reviewed the only recorded powers of attorney at issue, there is no conservatorship or guardianship, the Facility had ample opportunity to review the public record, and the Facility had previously had the opportunity to interview its employees such as Ms. Brannon, who could not attest that McCarson or Mr. Arches had made any manifestations of authority in her presence. The Court was well within its discretion, independently of section 15-48-20, to deny the Facility's request for limited discovery.

CONCLUSION

For the foregoing reasons, and those set forth in Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration, the Court should deny the Facility's Motion for Reconsideration.

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July 24, 2023
Hampton, South Carolina

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Aug 28 2023

SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595

Steven McCarson,
as Personal Representative of the Estate of Louie Arches,

Respondent,

v.

THI of South Carolina at Magnolia Manor–Inman, LLC
d/b/a Magnolia Manor–Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical And Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

Appellants.

NOTICE OF APPEAL

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Defendants/Appellants, THI of South Carolina at Magnolia Manor–Inman, LLC d/b/a Magnolia Manor–Inman, THI of South Carolina at Inman, LLC, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical And Operational Services, LLC, THI of Baltimore, LLC, and James H. Mack (“Appellants”), hereby appeal the following orders of the Honorable Grace Gilchrist Knie, Circuit Court Judge:

- **Order Denying Defendants’ Motions to Dismiss and Compel Arbitration or Participate in Discovery**, filed July 10, 2023;
- **Initial Order Regarding Motion for Reconsideration**, filed July 24, 2023;¹ and
- **Final Order Regarding Motion for Reconsideration**, filed July 27, 2023.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on July 27, 2023.

Respectfully submitted,
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August 28, 2023

¹ Appellants appeal this order out of an abundance of caution.

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Aug 28 2023

SC Court of Appeals

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

Appeal from Spartanburg County
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

Case No. 2022-CP-42-02595

Steven McCarson,
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d/b/a Magnolia Manor–Inman, THI of South Carolina at Inman, LLC,
THI of South Carolina, LLC, Hunt Valley Holdings, LLC,
Fundamental Administrative Services, LLC,
Fundamental Clinical And Operational Services, LLC,
THI of Baltimore, LLC, and James H. Mack,

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Attorneys for Appellants

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellants, hereby certify that Appellants' **NOTICE OF APPEAL** was served on Respondent on August 28, 2023, by emailing (see attached email) a copy of the same to his counsel of record:

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Attorneys for Respondent

I also certify that a copy of Appellants' **NOTICE OF APPEAL** was today, August 28, 2023, E-Filed with the lower court (see attached NEF), which also, i.e., in addition to service by email, effected service of the notice today on the above-identified counsel of record via the E-Filing System.

Respectfully submitted,
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August 28, 2023

From: [Hines, Russell](#)
To: ["Lee Cope"](#); ["Jay Parker"](#); ["jwalters@kcw-law.com"](#)
Cc: ["Shanna Jarrell"](#); [Davis, Jay](#); [Gandy, III, James D. \(Tripp\)](#); [Dotterer III, Gaillard T. \(Gilly\)](#); [Wakeham, Rebecca \(Becky\)](#); [Peterson, Susan](#); [Justman, Aimee](#); [Bell, Pollyana \(Polly\)](#); ["Brown, Steve"](#)
Subject: McCarson v. THI (2022-CP-42-02595) -- Notice of Appeal
Date: Monday, August 28, 2023 2:44:32 PM
Attachments: [McCarson v. THI \(Case No. 2022-CP-42-02595\) -- Notice of Appeal.pdf](#)
[Appealed Order filed July 10, 2023.pdf](#)
[Appealed Order filed July 24, 2023.pdf](#)
[Appealed Order filed July 27, 2023.pdf](#)
[image001.png](#)

Attached for service please find Defendants' **Notice of Appeal** in the above-referenced matter.

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***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2022CP4202595

Official File Stamp: 08-28-2023 02:54:48 PM
Court: CIRCUIT COURT
Common Pleas
Spartanburg
Case Caption: Steven Mccarson , plaintiff, et al VS Thi Of South Carolina At Magnolia Manor-Inman Llc ,
defendant, et al
Document(s) Submitted: Appeal/Notice of Appeal to Court of Appeals
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
Filed by or on behalf of: Russell Grainger Hines

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Donald Jay Davis, Jr. for James H Mack, Thi Of South Carolina At Magnolia Manor-Inman Llc,
Thi Of Baltimore Llc, Fundamental Clinical And Operational Services Llc, Fundamental
Administrative Services Llc, Hunt Valley Holdings Llc, Thi Of South Carolina Llc
Gaillard Townsend Dotterer, III for James H Mack, Thi Of South Carolina At Magnolia Manor-
Inman Llc, Thi Of Baltimore Llc, Fundamental Clinical And Operational Services Llc,
Fundamental Administrative Services Llc, Hunt Valley Holdings Llc, Thi Of South Carolina Llc
Jamie L. Walters for Steven Mccarson, Louie Arches
Lee Deer Cope for Steven Mccarson, Louie Arches
James D. Gandy, III for James H Mack, Thi Of South Carolina At Magnolia Manor-Inman Llc,
Thi Of Baltimore Llc, Fundamental Clinical And Operational Services Llc, Fundamental
Administrative Services Llc, Hunt Valley Holdings Llc, Thi Of South Carolina Llc
John Elliott Parker, Jr. for Steven Mccarson, Steven Mccarson Personal Representative
Russell Grainger Hines for James H Mack, Thi Of South Carolina At Magnolia Manor-Inman
Llc, Thi Of Baltimore Llc, Fundamental Clinical And Operational Services Llc, Fundamental
Administrative Services Llc, Hunt Valley Holdings Llc, Thi Of South Carolina Llc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Louie Arches Estate
Magnolia Manor-Inman

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May 13 2024

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material and that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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