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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Kershaw County
Court of Common Pleas

Daniel Coble, Circuit Court Judge

Case No. 2023-CP-28-00524
Appellate Case No. 2025-001943

Lynn Marie Sanborn
as Personal Representative of the Estate of Shirley Mallory,

Respondent,

v.

Palmetto Springdale Operating, LLC, d/b/a Springdale Healthcare Center and Ashley Lloyd,

Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in denying Defendants'[1] motion to compel Plaintiff's[2] claims to arbitration?[3]

A. Did the circuit court misstate the burden on Defendants when it stated, "[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement"?

B. Does the purported presumption, cited by the circuit court, against arbitration where the party resisting arbitration is a nonsignatory violate the FAA[4]?

C. Is the circuit court's merger/equitable estoppel analysis erroneous? In other words, should the circuit court have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Mallory 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?

(1) Should the circuit court have found that the Admission Agreement and the Arbitration Agreement merged?

(a) Most respectfully, is this Court's merger analysis in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E. 2d 144 (Ct. App. 2023), which the circuit court relied on, erroneous and incomplete, such that it should not control the disposition of this matter?

(2) Had the circuit court found the Admission Agreement and the Arbitration Agreement merged, as respectfully it should have, should the circuit court have found that equitable estoppel applies to prohibit Plaintiff from denying the enforceability of the Arbitration Agreement?

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[1] "Defendants" refers to Defendant/Appellants, Palmetto Springdale Operating, LLC d/b/a Springdale Healthcare Center (the "Facility") and Ashley Lloyd ("Ms. Lloyd"), collectively. The Facility is a skilled nursing facility.

[2] "Plaintiff" refers to Plaintiff/Respondent, Lynn Marie Sanborn, as Personal Representative of the Estate of Shirley Mallory ("Ms. Mallory"). "Ms. Sanborn" refers to Lynn Marie Sanborn in the capacity in which she signed the Admission Agreement and the Arbitration Agreement on Ms. Mallory's behalf.

[3] To be clear, out of an abundance of caution, this issue, and the corresponding argument, covers circuit court error in terms of both the denial of Defendants' principal motion and the denial of their motion to alter, amend, and/or reconsider the denial of their principal motion.

[4] The "FAA" refers to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA").

STATEMENT OF THE CASE

With the help of her daughter Ms. Sanborn, Ms. Mallory was admitted as a resident of the Facility in January 2020. Ms. Sanborn handled the paperwork in conjunction with Ms. Mallory's admission, and in doing so, she signed an Admission Agreement[5] and an Arbitration Agreement[6] on her behalf.

Plaintiff commenced this wrongful death and survival action in the Kershaw County Court of Common Pleas on July 20, 2023, claiming Defendants are liable for allegedly deficient care/treatment Ms. Mallory received during her residency at the Facility. (R. pp. 14-35.)

Based on the Arbitration Agreement that Ms. Sanborn signed on behalf of Ms. Mallory in conjunction with her admission to the Facility, Defendants moved to stay this action and compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (R. pp. 61-62; R. pp. 66-67; R. pp. 128-129; R. pp. 74-127, 63.)[7] [8]

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[5] (R. pp. 116-127.)

[6] (R. p. 63.) Without question, the FAA applies to the Arbitration Agreement. 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 v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *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). Here, the Arbitration Agreement expressly states that the FAA applies. (R. p. 63.) And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381-82, 759 S.E.2d 727, 732-33 (2014).

[7] The Motion to Compel Arbitration was originally filed October 20, 2023, but was withdrawn without prejudice. After the parties' effort to resolve the matter reached an impasse at mediation on May 6, 2025, Defendants re-filed the Motion to Compel Arbitration on May 9, 2025, which motion was itself withdrawn without prejudice and re-filed on June 13, 2025.

[8] Without question, Plaintiff's claims against Defendants are within the scope of the Arbitration Agreement, the plain language of which calls 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 [Ms. Mallory's] stay at [the] Facility, or to the

Following a hearing on July 17, 2025,[9] the circuit court, the Honorable Daniel Coble presiding, denied the Motion to Compel Arbitration by order filed August 7, 2025. (R. pp. 1-10.) Pursuant to Rule 59(e), SCRCP, on August 18, 2025, Defendants timely moved the circuit court to alter, amend, and/or reconsider its decision. (R. pp. 130-155.) The circuit court denied the motion by order filed August 21, 2025. (R. pp. 11-13.)

By notice served and filed September 22, 2025, this appeal timely follows. (R. pp. 156-162.)

STANDARD OF REVIEW

A circuit court's determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). "Under de novo review, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.* Issues of law, however, are reviewed without any particular deference to the circuit court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within circuit court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon the exercise

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provisions of care or services to [Ms. Mallory] . . . ." (R. p. 63.) And to be clear, the Arbitration Agreement plainly covers Plaintiff's claims against not only the Facility but also Ms. Lloyd, as it expressly states that that it not only covers the Facility itself but also the Facility's "agents, employees, and servants" (R. p. 63), and Plaintiff's complaint alleges that Ms. Lloyd is the Administrator of the Facility. (R. p. 15 ¶ 3.) But 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.").

[9] (R. pp. 48-60.)

of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

ARGUMENT

I. The circuit court erred in denying the Motion to Compel Arbitration.

A. The circuit court misstated the burden on Defendants when it stated, "[t]he party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement."[10]

This statement is erroneous to the extent that it suggests the only way the proponent of arbitration can prevail is via an arbitration agreement that is "enforceable" per se. This is not so. Coupled with the merger of the Admission Agreement and the Arbitration Agreement, equitable estoppel provides a workable theory for enforcement of an arbitration agreement against a nonsignatory. *See 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).

Conceptually, Defendants' merger/equitable estoppel argument is not an argument for the *enforceability* of the Arbitration Agreement per se but rather for Plaintiff to be *estopped to deny the enforceability* of the Arbitration Agreement. *See Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354, 755 S.E.2d 450, 455 (2014) ("Appellants contend that *even if* Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is *nevertheless equitably estopped to deny* the [arbitration agreement's] enforceability.") (emphasis added). In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and because

[10] (R. p. 2; *see also id.* ("Arbitration is available only when the parties involved contractually agree to arbitrate. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Arbitration will be denied if a court determines no agreement to arbitrate existed.") (internal citations omitted).)

Ms. Mallory effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, as personal representative of Ms. Mallory's estate, is estopped to deny the enforceability of the Arbitration Agreement merged therewith. Accordingly, any contention about the Arbitration Agreement's supposed lack of enforceability (whether because of Ms. Sanborn's lack of authority, actual or apparent, or because of another alleged defect in contract formation, or because of the inapplicability of the South Carolina Adult Health Care Consent Act or of Ms. Sanborn's lack of authority thereunder) is beside the point and unavailing to refute Defendants' merger/equitable estoppel argument, which, again, turns not on the question of whether they showed that the Arbitration Agreement is enforceable but whether they showed that Ms. Mallory and, in turn, Plaintiff, as personal representative of Ms. Mallory's estate, should be estopped to deny that the Arbitration Agreement is enforceable—and, most respectfully, they did so.

B. The FAA requires arbitration agreements to be placed on equal footing with all other contracts under South Carolina law, and the purported presumption, cited by the circuit court,[11] against arbitration where the party resisting arbitration is a nonsignatory violates the FAA.

"[T]he basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate"[12] 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*

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[11] (R. p. 2 ("In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory.") (citing *Wilson*, 426 S.C. 326, 827 S.E.2d 167).)

[12] *Allied-Bruce*, 513 U.S. at 270.

Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis added); *see also* 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement*.") (emphasis added).

While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423 (2017) (citing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). Under the FAA, "courts *must* place arbitration agreements on *equal footing with other contracts* . . . ." *Concepcion* at 339 (emphasis added); *see also Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, 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).

The circuit court cites *Wilson*, 426 S.C. 326, 827 S.E.2d 167, for the proposition that, under South Carolina law, there is a presumption against arbitration when enforcement is sought against a non-signatory. (R. p. 2.) But the FAA requires arbitration agreements to be placed on equal footing with all other contracts under state law and prohibits courts from setting aside arbitration agreements based on state-law defenses "that apply only to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339. Thus, under the

FAA, there cannot be a presumption against enforcement of arbitration agreements against nonsignatories unless the same presumption also applies to enforcement of all other contracts against nonsignatories. Defendants are aware of no such general presumption under South Carolina law, and the circuit court cites none. Indeed, where the *Wilson* Court itself referenced "a presumption *against* arbitration . . . where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate,"[13] it cited no South Carolina authority and the authority it did cite addressed arbitration in particular, not contracts generally. *Id.* ("*Global Pac., LLC v. Kirkpatrick*, 88 N.E.3d 431, 435 (Ohio Ct. App. 2017) ('Because no party can be required to submit to arbitration when it has not first agreed to do so, in a case where the party resisting arbitration is not a signatory to any written agreement to arbitrate, a presumption against arbitration arises.'); *cf. Comer v. Micor, Inc.*, 436 F.3d 1098, 1103-04 (9th Cir. 2006) (noting 'the general rule that a nonsignatory is not bound by an arbitration clause')."). The supposed presumption against arbitration violates the FAA's equal footing rule and cannot be applied in this case.

C. The circuit court's merger/equitable estoppel analysis is erroneous. The circuit court should have found (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Mallory effectively embraced and directly benefitted from the Admission Agreement, Plaintiff, i.e., her estate, is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

(1) The circuit court should have found that the Admission Agreement and the Arbitration Agreement merged.

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 [Adult Health Care Consent]

[13] 426 S.C. at 337-38, 827 S.E.2d at 173 (emphasis in original).

> Act, 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 354-55, 755 S.E.2d at 455 (emphasis added).

Here, the Court erred in rejecting Defendants' 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), and, as addressed separately below, in *Solesbee*, 438 S.C. 638, 885 S.E.2d 144.

The circuit court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. (R. pp. 5-6.) The merger question examines whether, "where instruments are executed at the same time, by the same

parties, for the same purpose, and in the course of the same transaction,"[14] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[15] 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.

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. The Huffines Co., LLC v. Lockhart*, 365 S.C. at 188, 617 S.E.2d at 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). No such inference can be drawn

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[14] *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

[15] 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).

here. Indeed, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman's* progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that 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. (R. p. 63.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (R. p. 127.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[16]), 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." (R. p. 127.) Without question, the Arbitration Agreement is among these other 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 Agreement*.") (emphasis added)).[17]

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[16] 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the "Entire Agreement" clause expressly referred to a separate arbitration agreement and, thus, "recognize[d] the '*separatedness*' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts.") (emphasis added).

[17] To be clear, the point here is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather that the very fact that the language that the *Stott* and *Hodge* Courts used in discussing the facts of the cases so

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Ms. Mallory's 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

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readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" / "documents related to . . . admission" that it illustrates that, in its plain, ordinary, and popular sense, "Admissions materials" plainly includes the Arbitration Agreement. *See Beaufort Cnty. Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 516, 709 S.E.2d 85, 90 (Ct. App. 2011) ("If the contract's language is clear and unambiguous, the language alone, understood in its plain, ordinary, and popular sense, determines the contract's force and effect."). Moreover, this connection between the Admission Agreement and the Arbitration Agreement (with the Arbitration Agreement being understood in the plain, ordinary, and popular sense as included in the term "Admissions materials") is underscored by the *Coleman* Court's recognition that an admission agreement and arbitration agreement signed in conjunction with resident's admission to a nursing facility are 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).

Arbitration Agreement's) sole reason for being. (R. p. 63 (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 [Ms. Mallory's] stay at [the] Facility, or to the provisions of care or services to [Ms. Mallory] . . . ."); R. p. 63 ("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 Ms. Mallory's relationship with the Facility, the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 116-127 (setting forth the terms of Ms. Mallory's admission to the Facility) *with* R. p. 63 (providing for arbitration of disputes arising out of Ms. Mallory's 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* R. p. 125 ("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* R. p. 63 (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. 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. It

must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific 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. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta[18] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[19]—in recognizing a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302

[18] *Id.* at 407 S.C. at 355-56, 755 S.E.2d at 455 ("By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Even if* the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, appellants.") (emphasis added) (internal citation omitted); *see Nash v. Tindall Corp.*, 375 S.C. 36, 40-41, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Judicial dicta is not essential to the decision. Dicta . . . is a statement on a matter not necessarily involved in the case, and is not binding as authority.") (internal citations and quotations marks omitted).

[19] To be clear, none of *Coleman's* progeny has addressed this either.

(2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, the circuit court's finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. 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. The 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 circuit 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 Ms. Mallory's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

(a) Most respectfully, the merger analysis in *Solesbee*, which the circuit court relied on,[20] is erroneous and incomplete, and it should not control the disposition of this matter.

In *Solesbee*, this Court affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as here[21]—although, most respectfully, the *Solesbee* Court (a) erred as to those aspects of the argument that it addressed[22] and (b), in any event, did not actually address all material aspects of the argument, leaving gaps in the *Solesbee* decision through which Defendants' position still fits. In affirming the denial of the motion to compel arbitration in *Solesbee*, the *Solesbee* Court 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.").)[23] Most respectfully, *Solesbee* should not control the disposition of this matter.

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

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[20] (R. p. 6.)

[21] Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

[22] While Defendants acknowledge that our Supreme Court denied certiorari in *Solesbee*, it would note that a writ of certiorari is not a matter of right but solely a matter of the Supreme Court's discretion. Rule 242(b), SCACR ("A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons."). In other words, by denying certiorari, the Supreme Court has only expressed its decision to exercise its discretion to not review the case. It has not implicitly blessed the *Solesbee* Court's analysis as correct.

[23] To be clear, the *Solesbee* Court's analysis 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/equitable estoppel argument.

Agreement provides it is governed by federal law." But it is 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." (R. pp. 116-127.) 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.

(R. p. 63.)

Again, without question, the FAA applies to the Arbitration Agreement, as it does "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction"[24]—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."). 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

[24] *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363.

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. (R. p. 63.)

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 indeed, even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself. Accordingly, the supposed difference in the governing law cannot support any reasonable inference of 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 649, 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." (R. p. 127.) 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 concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make

something a nullity),[25] whereas "termination" is to put or bring something 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 649, 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 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. Again, the very nature of *merger* is to *merge* separate documents.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration

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[25] *Black's Law Dictionary* p. 1321 revocation (7th ed. 1999); *id.* at 89 annulment ("The act of nullifying or making void.").

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. 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 Ms. Sanborn on Ms. Mallory's 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 Arbitrations Agreement's) sole reason for being. (*See* R. p. 63 (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 . . . ."); R. p. 63 ("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 her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* R. pp. 116-127 (setting forth the terms of the admission) *with* R. p. 63 (providing for arbitration of disputes arising out of the admission).)

Accordingly, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this matter.

(2) Had the circuit court found the Admission Agreement and the Arbitration Agreement merged, as respectfully it should have, the circuit court should have found that equitable estoppel applies to prohibit Plaintiff from denying the enforceability of the Arbitration Agreement.

Again, Defendants' merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Sanborn or otherwise on the existence of any per se valid and enforceable agreement between the parties. *Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 ("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*, 407 S.C. at 354-55, 755 S.E.2d at 455 (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).

In *Wilson*, our Supreme 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 Defendants contend Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Mallory received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was 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 an arbitration case like this, and it instructs that 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. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted). As set forth in our Supreme Court's controlling decision in *Wilson*, and consistent with this Court's decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the nonsignatory has exploited other parts of the contract by reaping its benefits. Indeed, to require more than this—or, in other words, to limit the applicability of direct benefits estoppel to only instances where the nonsignatory's claim relies solely on the

contract terms to impose liability—is to invite the very sort of have-your-cake-and-eat-it-too inequity that the doctrine aims to prevent in the first place. Neither *Wilson* nor this Court's decision in *Pearson* nor general notions of equity countenance,[26] much less call for, such a result.

Here, Ms. Mallory was a direct beneficiary. To deny her 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—even her complaint does not go nearly so far as that. (*See* R. pp. 15-30.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Mallory received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the circuit court should have found that the Arbitration Agreement merged with the Admission Agreement and that Ms. Mallory, and in turn her estate, Plaintiff, is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. Mallory having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.[27]

CONCLUSION

For the foregoing reasons, Defendants ask this Honorable Court to reverse the circuit court and stay this action in favor of arbitration between Plaintiff and Defendants (or,

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[26] *See Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983) ("Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.").

[27] To be clear, although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about the enforceability of the Admission Agreement, Defendants' equitable estoppel argument applies with equal force to the Admission Agreement.

alternatively, reverse the circuit court and remand the case to the circuit court with instructions that it stay this action in favor of arbitration between Plaintiff and Defendants).

Respectfully submitted,

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June 3, 2026