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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Case No. 2023-CP-20-00268
Appellate Case No. 2024-000596

Thomas D. Kilpatrick
as Special Administrator for the Estate of Anthony Lemon,

Respondent,

v.

Pruitthealth-Ridgeway, LLC f/k/a Unihealth Post-Acute Care-Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Clinical Consulting, LLC, Fundamental Long Term Care Holdings, Inc., Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC,

Defendants,

Of which THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC, are the

Appellants.

RECORD ON APPEAL

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Attorneys for Appellants

INDEX

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1 The "Facility" refers to Defendant/Appellant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center.

2 "HVH" refers to Defendant/Appellant Hunt Valley Holdings, LLC.

3 "FCOS" refers to Defendant/Appellant Fundamental Clinical and Operational Services, LLC.

4 "THISC" refers to Defendant/Appellant THI of South Carolina, LLC.

5 "FAS" refers to Defendant/Appellant Fundamental Administrative Services, LLC.

[6] The arbitration was the intended Exhibit 2 but the admission agreement was inadvertently filed as Exhibit 2. Both documents appear elsewhere in the ROA.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	CIVIL ACTION NO.: 2023-CP-20-00268
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	**ORDER DENYING MOTION TO COMPEL ARBITRATION & MOTIONS TO STAY**

This matter came before the Court on February 29, 2024, on a Motion to Compel Arbitration filed by Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Midlands") pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA") and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and related motions to stay this litigation pending the outcome of the arbitration that Midlands seeks to compel by Defendants THI of South Carolin, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental

Administrative Services, LLC, and Hunt Valley Holdings, LLC (collectively, the "Motions to Stay").[1] Present at the hearing and arguing on behalf of the moving parties was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Neil E. Alger. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Midlands' Motion to Compel Arbitration for the reasons set forth herein[2] and, in turn, denies the Motions to Stay.

The Court notes that in oral argument, there was no mentionable dispute as to the facts presented by either Plaintiff or Midlands; even to the extent that Plaintiff presented facts that Midlands had not, Midlands did not present competent evidence to dispute Plaintiff's evidence. The Court adopts the following undisputed facts for its ruling. The Plaintiff in this wrongful death and survival action is Thomas D. Kilpatrick, an attorney appointed by Probate who is an unrelated and uninvolved person in the underlying dispute. Mr. Kilpatrick commenced this action by filing a Notice of Intent on April 3, 2023, followed by a Summons and Complaint on August 31, 2023, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Lemon while he was a resident at Midlands' assisted living facility. Specifically, Mr. Lemon developed serious pressure injuries and bedsores between June and July of 2020 after being assessed as a high-risk for pressure injuries by Midlands. Mr. Lemon passed away on July 30, 2021. On January 2, 2024, Midlands filed a Motion to

[1] Midlands' Motion to Compel Arbitration and the Motions to Stay were all filed on January 2, 2024, and heard together on February 29, 2024. The Motions to Stay are based on Section 3 of the FAA. 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 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."). Accordingly, the success of the Motions to Stay is tied to the success of Midlands' Motion to Compel Arbitration, and the denial of Midlands' Motion to Compel Arbitration requires the denial of the Motions to Stay.

[2] Plaintiff submitted with his Memorandum in Opposition twelve unpublished opinions of the Court of Appeals. The arguments presented to the Court by Midlands' motion are in large part analogous to those presented in the unpublished opinions. The unpublished opinions denied arbitration based on well-established precedent from other published opinions of the S.C. appellate courts which are referenced herein.

Compel Arbitration, relying on an Arbitration Agreement that was signed individually by the mother of Mr. Lemon, Ms. Minnie Gamble dated January 9, 2012. As noted above, Ms. Gamble held no power of attorney for Mr. Lemon and is not a party to the present action.

The basis of Midlands' Motion is that a valid and enforceable arbitration agreement exists between the parties. The Arbitration Agreement relied upon by Midlands was signed by the decedent's mother, Minnie Gamble, at the time of his admission to Midlands' facility, and it appears that no valid power of attorney was relied on by Midlands. No power of attorney of any sort has been presented in this matter. Evidence presented by Plaintiff indicates that the decedent was suffering from multiple sclerosis which impacted him physically, but the records indicated that he had the mental capacity to sign the facility's Admission Agreement or Arbitration Agreement at the time he was admitted. While the Court recognizes the arguments offered by Midlands for presumptions in favor of arbitration, this Court's analysis begins and ends by answering the threshold inquiry that there is not a legally enforceable arbitration agreement.

At the outset, Ms. Gamble did not have any authority to enter the Admission Agreement and Arbitration Agreements on the decedent's behalf under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. § 44-66-10 *et seq* because it is indicated that Decedent had his cognitive ability. Under the Act, an individual is only authorized to make health care decisions on behalf of an ***incapacitated*** adult. S.C. Code Ann. § 44-66-30. Therefore, based on the evidence before the Court, it appears that Ms. Gamble did not even have authority to make health care decisions on behalf of the decedent at the time of admission, much less the authority to waive his estate's right to a jury trial.

Even if Ms. Gamble had authority under the Act to enter the Admission Agreement in furtherance of the decedent's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. Therefore, the Court must determine (1) if the

Arbitration Agreement merged with and was a part of the Admission Agreement such that Plaintiff in her capacity as personal representative would be equitably estopped from denying the Arbitration Agreement's validity, and (2) if Ms. Gamble had actual or apparent authority to enter the Arbitration Agreement on behalf of the decedent. The Court finds the answer to both inquiries is "no".

While a signed Arbitration Agreement exists in this case, it is not a valid, enforceable agreement for the simple reason that the decedent's mother, Ms. Gamble, did not have any authority to execute the Arbitration Agreement at the time it was entered by the parties. When an individual is incapacitated, a family member may be authorized to make decisions concerning **health care** under the Adult Health Care Consent Act. S.C. Code Ann. § 44-66-30(A). 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, even if the Act was applied, it only would have given Ms. Gamble authority to consent on behalf of the decedent to the provision of medical care, including placement in Midlands' facility, as well as authority to make certain financial decisions on behalf of the decedent 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).

Midlands' Arbitration Agreement is admittedly optional, and separate from its Admission Agreement, and contains no provision for medical, nursing, or health care services to be provided to residents, nor does it require any financial commitment to pay for such services. The agreement is separately titled "Facility – Resident/Representative Arbitration Agreement", is paginated as "Page 1 of 1", and contains its own signature lines. The agreement is signed by Ms. Gamble as "Resident/Representative." 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 at best 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., Midlands. *See Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

In sum, the Act provides statutory authority for family members to make an incapacitated loved one's health care decisions. Thus, the only authority to enter into agreements to arbitrate is reserved for powers of attorney or other legal instruments outlined in the probate code which are not present in this case. As previously stated, the Act is not applicable because it is apparent that Decedent maintained his cognitive ability, but even if it is determined that the Act was applicable, then it is doubtful in this case that there ever was a valid conferral of authority under the Act for executing this Arbitration Agreement. Aside from the Act, Ms. Gamble in her individual capacity had no legal authority to sign the Arbitration Agreement in a representative capacity for the Decedent as she apparently did not possess or present Midlands with documentation demonstrating power of attorney or guardianship. This lack of documentation is clearly indicative that Midlands knew or should have known that Ms. Gamble lacked authority, and there is no evidence in the record that indicates that Midlands made any effort to verify or validate the authority that Midlands is now asserting Ms. Gamble possessed. Since Ms. Gamble lacked legal authority, the Arbitration Agreement is void and unenforceable.

Further, Plaintiff cannot be equitably estopped from denying enforcement of the Arbitration 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, Jollev & Smith*, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Without any further analysis, Midlands has not carried its burden by presenting this Court with any evidence aside from the Arbitration Agreement and Admission Agreement. Midlands has not submitted any affidavits or competent evidence that carries its burden of proof to factually satisfy this argument asserting equitable estoppel. As a legal matter, Midlands has not and cannot meet its burden to establish these elements, primarily because Midlands cannot prove it lacked the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Midlands had the ability to determine whether Ms. Gamble had authority to sign an arbitration agreement on Decedent's behalf. In fact, Midlands is a residential care facility that regularly engages in the admission and contract process. First, under the Adult Healthcare Consent Act, Midlands had a duty to undertake and document its efforts to ascertain whether Ms. Gamble or someone else had priority and authority under the Act to make Decedent's health care decisions, and it failed to do so. Second, Decedent had his mental capacity and according to the evidence in the record, he was capable of providing his own acquiescence to these agreements which he did not and Midlands circumvented his own authority by having Ms. Gamble act as a signatory. Midlands is a sophisticated business entity frequently interacting with residents and their families during the rehabilitation center admission process. Midlands is or should be familiar with the legal concepts of guardianship and powers-of-attorney. Midlands had the ability to ask Ms. Gamble whether she was Decedent's attorney-in-fact, to determine if Decedent had his mental capacity, to determine if some other legal authority existed, and it had the ability to request supporting documentation proving authority. No evidence is in the record that Midlands appropriately complied with these inquiries. Since Midlands has not cited or provided evidence on this element of equitable estoppel, Plaintiff is not equitably estopped from denying the Arbitration Agreement. Further, 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.

Midlands' 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 Decedent benefited from the terms of the Admission Agreement, the personal representative of his estate should be estopped 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 Midlands 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 contract. Here, as explained above and below, the 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. Incidentally, 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 non-signatory's claim must be directly, not just indirectly, based on the contract containing the arbitration agreement).

Additionally, Plaintiff did not have any 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). South Carolina law requires that to prove apparent authority, the defendant must show that the purported principal consciously or impliedly represented another to be his agent. *Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Once again, Midlands has not provided this Court with any competent evidence that is persuasive for establishing common law agency. The simple fact that Ms. Gamble signed the agreements so that her son could be admitted to Midlands' facility and receive health care in no way indicates a manifestation of authority by Decedent to waive his right to a jury trial or agree to arbitration. Neither the Admission Agreement, nor the Arbitration Agreement, offer any probative evidence indicating Decedent's intention. Midlands has not come forward with any evidence that Decedent ever manifested any form of assent establishing Ms. Gamble as his agent and accordingly, Midlands has failed to meet its burden of proof.

Midlands' assertion that Plaintiff held "inherent agency powers" to act on behalf of the decedent is unsupported by South Carolina law. South Carolina law is clear that an individual does not have inherent agency powers concerning health care, financial, and other affairs of their spouse, much less a mother or extended family member. *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).

Based on the tenants of contract law, this Court is not convinced that this agreement is enforceable. The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. Of S.C.*, 354 S.C. 397, 406 (2003). Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. This Arbitration Agreement has no direct mention of consideration. Midlands has argued that the arbitration agreement is a bilateral contract and consideration is provided through the exchanging of promises to enter into arbitration. The S.C. Supreme Court held long ago:

> A promise may constitute the consideration for another promise. But a promise is not a good consideration for a promise unless there is absolutely ***mutuality of the engagement***, so that each party has the right to hold the other to a positive agreement. ***In case the promise of one of the parties impose no legal duty upon the party making it, such promise furnishes no consideration for a promise.***

Int'l Shoe Co. v. Herndon, 135 S.E. 202, 205 (1926) (emphasis added) (*citing* Elliott on Contracts, vol. 1, § 231). Although Midlands has argued that both parties are forfeiting their right to trial by jury for binding arbitration, the reality is that the obligation and detriment falls almost exclusively on the resident. *Id.* The reality is that no duty is owed by the resident to the nursing home facility other than to pay one's bills which happens to be exclusively related to the admission agreement, not the arbitration agreement; the two agreements do not merge. Midlands is unable to articulate or provide this court with any evidence of consideration for the Arbitration Agreement, and therefore, the arbitration agreement fails as a matter of law.

Lastly, it is doubtful that the scope of the Arbitration Agreement, even if it was valid, would cover wrongful death claims asserted on behalf of a decedent's statutory beneficiaries. That is because the wrongful death claim belongs solely to the wrongful death beneficiaries, and is brought only on their behalf by the personal representative of the estate. 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). The statutory beneficiaries are non-signatories 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.

A third-party beneficiary may only be bound by an arbitration agreement if it is attempting to enforce the contract containing the arbitration agreement. *Thompson*, 426 S.C. at 57, 784 S.E.2d at 687. 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 Midlands' breach of common law duties arising from its care for Decedent. 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 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). However, since it is not valid, this Court will not compel arbitration of the wrongful death or survival claims in this action.

Based on the foregoing authorities and findings, the Court denies Midlands' Motion to Compel Arbitration. This Court's denial of Midlands' motion is based entirely on South Carolina law and the failure of Midlands to meet its burden of persuasion for the enforceability of the contract that has been presented to this Court. In recognition of its contractual origins and limitations, Section 2 of the FAA dictates that arbitration agreements "shall be valid, irrevocable, and enforceable, ***save upon such grounds as exist at law or in equity for the revocation of any contract***." 9 U.S.C. § 2. (emphasis added). This Court's ruling in no way relies on or contravenes any presumption or the auspices of the FAA, but rather, as the FAA directs on the basis of law and equity, the Court finds that this Arbitration Agreement is not valid or enforceable.

And having thus determined that Midlands' Motion to Compel Arbitration should be denied, the Motions to Stay must be denied, too.

THEREFORE, IT IS ORDERED that the Midlands' Motion to Compel Arbitration and the Motions to Stay are DENIED.

IT IS SO ORDERED.

3/14/24

The Honorable Patrick C. Fant, III
Presiding Court Judge

Fairfield Common Pleas

Case Caption: Thomas D Kilpatrick , plaintiff, et al VS Pruitthealth Ridgeway L L C , defendant, et al

Case Number: 2023CP2000268

Type: Order/Other

So Ordered

Patrick C. Fant, III

Electronically signed on 2024-03-14 16:02:19 page 12 of 12

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	CIVIL ACTION NO.: 2023-CP-20-
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	**SUMMONS** (Jury Trial Requested)

TO THE DEFENDANTS 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 690 North Green Street, Post Office Box 2530, Ridgeland, SC 29936, 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.

PARKER LAW GROUP, LLP

BY: *s/Neil E. Alger*
Neil E. Alger, Esquire
Bar # 100530
P.O. Box 2530
Ridgeland, SC 29936

ATTORNEY FOR PLAINTIFF

August 31, 2023
Ridgeland, South Carolina

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	CIVIL ACTION NO.: 2023-CP-20-
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	**<u>COMPLAINT</u>** *(Jury Trial Demanded)*

The Plaintiff alleges:

1. That the Decedent, Anthony Lemon, was a citizen and resident of the County of Richland, State of South Carolina.

2. That Thomas D. Kilpatrick, an estate planning attorney, has been appointed the Special Administrator of the Estate of Anthony Lemon and brings this action pursuant to the S.C. Code Ann. 15-51-10, the Wrongful Death Act, and other applicable statutory and/or common law.

3. That upon information and belief, Defendant, Pruitthealth – Ridgeway, LLC f/k/a Unihealth Post-Acute Care – Tanglewood, LLC, is a limited liability corporation organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in the County of Fairfield, South Carolina.

4. That upon information and belief, Defendant, United Health Services of South Carolina, Inc., is a limited liability corporation organized and existing pursuant to the laws of the State of South Carolina and provides services in the County of Fairfield, South Carolina.

5. That upon information and belief, Defendant, Pruitthealth Consulting Services, Inc., is a foreign corporation believed to be organized under the laws of the State of Georgia and provides services in the County of Fairfield, South Carolina.

6. That upon information and belief, Defendant, Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., is a foreign corporation believed to be organized under the laws of the State of Georgia and provides services in the County of Fairfield, South Carolina.

7. That upon information and belief, Defendant, Pruitthealth, Inc., is a foreign corporation believed to be organized under the laws of the State of Georgia and provides services in the County of Fairfield, South Carolina.

8. That upon information and belief, Defendant, Neil Pruitt, Jr., is a resident of Georgia and is the licensee responsible for the overall management and operation of the Pruitthealth – Ridgeway facility.

9. That collectively, the Defendants named in numbers 3 through 8, own, control, operate, and manage the Defendants' business and facilities including Pruitthealth - Ridgeway (hereinafter referred to as "Pruitt") where some of the allegations contained herein occurred; that these Defendants

controlled the care and treatment services that were provided, and were responsible for the operational outcomes that occurred

10. That upon information and belief, Defendant THI of South Carolina at Columbia, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and doing business as Midlands Health and Rehabilitation Center with its principal place of business in the County of Richland, South Carolina.

11. That upon information and belief, Defendant THI of South Carolina, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

12. That upon information and belief, Defendant, Fundamental Clinical and Operational Services, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

13. That upon information and belief, Defendant, Fundamental Clinical Consulting, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

14. That upon information and belief, Defendant, Fundamental Long Term Care Holdings, Inc., is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

15. That upon information and belief, Defendant, Fundamental Administrative Services, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

16. That upon information and belief, Defendant, Hunt Valley Holdings, LLC, is a foreign corporation believed to be organized under the laws of the State of Delaware and provides services in the County of Richland, South Carolina.

17. That collectively, the Defendants named in numbers 10 through 16, own, control, operate, and manage the Defendants' business and facilities including Midlands Health and Rehabilitation Center (hereinafter referred to as "Midlands") where some of the allegations contained herein occurred; that these Defendants controlled the care and treatment services that were provided, and were responsible for the operational outcomes that occurred.

FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANTS, THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC
(Negligence/Gross Negligence)

18. That Mr. Lemon was admitted into Defendants' facility, Midlands, on or around May 8, 2017; that Mr. Lemon was 47 years old and had a diagnosis of Multiple Sclerosis.

19. That while a resident at the Defendants' facility, Mr. Lemon required skilled nursing care from the staff at the nursing home as well as assistance with daily living activities, including assistance with eating.

20. That Mr. Lemon was at risk for falls, skin breakdown and aspiration.

21. That upon entry into the Defendants' facility, Mr. Lemon was without compromise to his skin or tissue; that during his stay he was supposed to have been cared for by the Defendants, yet Mr. Lemon developed avoidable pressure sores.

22. That between the months of July and September 2017, Mr. Lemon developed two unstageable pressure sores to his right and left heels. These sores eventually healed.

23. That Defendants knew or should have known that Mr. Lemon was high risk for pressure sores.

24. That Defendants knew or should have known that skin assessments for Mr. Lemon were required by the standard of care.

25. That according to the skin assessments contained within the chart, staff of Midlands stopped performing skin assessments on or around July 2020.

26. That on multiple occasions, Mr. Lemon was noted to choke on his food; however, staff of Midlands failed to assess his lungs, failed to update his care plan and failed to alert his physician.

27. That on or around July 31, 2020, Mr. Lemon's temperature was elevated and was given Tylenol by the staff of Midlands.

28. That on or around July 31, 2020, Mr. Lemon was admitted into Providence Hospital in Columbia, located in the County of Richland, South Carolina, presenting hypotension, tachycardia and dehydration.

29. Upon his admittance into the hospital, the staff at Providence Hospital discovered that Mr. Lemon had developed sepsis due to a sacral wound infection.

30. That on or around August 3, 2020, Mr. Lemon was discharged from Providence Hospital and admitted into Pruitthealth – Ridgeway.

31. While in the Defendants' care, custody and control, Mr. Lemon 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 Defendant, combining and concurring:

a. In failing to provide proper and adequate medical attention;

b. In failing to provide adequate assessments and monitoring of Mr. Lemon's skin condition;

c. In failing to properly document changes in Mr. Lemon's condition;

d. In failing to implement appropriate skin prevention measures;

e. In failing to turn and reposition Mr. Lemon;

f. In failing to properly monitor Mr. Lemon;

g. In failing to complete a timely assessment;

h. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mr. Lemon;

i. In failing to manage its revenue and income such that appropriate care may be rendered to Mr. Lemon;

j. In failing to exercise reasonable care for the well-being of Mr. Lemon under the circumstances;

k. In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; and

l. In such other particulars as the evidence may establish.

FOR A SECOND CAUSE OF ACTION AGAINST DEFENDANTS, PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., AND NEIL PRUITT, JR.
(Negligence/Gross Negligence)

32. Upon his admittance to Pruitt, staff treated Mr. Lemon's sacral wound.

33. That on or around September 1, 2020, Mr. Lemon's sacral wound resolved.

34. That Mr. Lemon remained a resident of PruittHealth – Ridgeway; that as a result of repeated neglect, he was transferred to Prisma Health Richland hospital.

35. That on or around July 30, 2021, Mr. Lemon died while a patient at Prisma Health Richland in Columbia, located in the County of Richland, South Carolina.

36. While in the Defendants' care, custody and control, Mr. Lemon 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 Defendant, combining and concurring:

a. In failing to provide proper and adequate medical attention;

b. In failing to provide adequate assessments and monitoring of Mr. Lemon's skin condition;

c. In failing to properly document changes in Mr. Lemon's condition;

d. In failing to implement appropriate skin prevention measures;

e. In failing to turn and reposition Mr. Lemon;

f. In failing to properly monitor Mr. Lemon;

g. In failing to complete a timely assessment;

h. In failing to have sufficient nursing and nursing assist time to provide the care that was needed for Mr. Lemon;

i. In failing to manage its revenue and income such that appropriate care may be rendered to Mr. Lemon;

j. In failing to exercise reasonable care for the well-being of Mr. Lemon under the circumstances;

k. In failing to exercise that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances; and

l. In such other particulars as the evidence may establish.

37. That by reason and in consequence of the aforesaid negligent, careless, reckless, willful, wanton and grossly negligent conduct of the Defendants, Mr. Lemon sustained serious and severe injuries; that the above injuries were of such a nature as to require him to spend money for hospitalization, doctor's care and other medical necessities; that Mr. Lemon suffered great pain, humiliation and mental anguish.

38. That by reason for the foregoing, Plaintiff is informed and believes that Mr. Lemon's estate is entitled to judgment against the Defendants for both actual and punitive damages; all of which damages which 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 for judgment against Defendants for actual damages, together with punitive damages in an appropriate amount, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

PARKER LAW GROUP, LLP

BY: *s/Neil E. Alger*
Neil E. Alger, Esquire
Bar # 100530
P.O. Box 2530
Ridgeland, SC 29936

ATTORNEY FOR PLAINTIFF

August 31, 2023
Ridgeland, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON,	)	CASE NO. 2023-CP-20-00268
PLAINTIFF,	)	
vs.	)	
PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC,	)	**DEFENDANT THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER'S ANSWER TO PLAINTIFF'S COMPLAINT**
DEFENDANTS.	)	

TO: NEIL E. ALGER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

Defendant THI of South Carolina at Columbia, LLC, d/b/a Midlands Health and Rehabilitation Center (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 Defendant admits the allegations set forth in Paragraph 1 of the Plaintiff's Complaint, upon information and belief.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are legal conclusions 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.

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, those allegations are denied to the extent they are directed at this Defendant.

5. Responding to Paragraph 10 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 Richland County, South Carolina. Any allegations inconsistent with this response is denied and strict proof is demanded thereof.

6. The allegations set forth in Paragraphs 11, 12, 13, 14, 15, and 16 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, those allegations are denied to the extent they are directed at this Defendant.

7. Responding to the allegations set forth in Paragraph 17 of the Plaintiff's Complaint, this Defendant admits it is the sole licensee and operator of the skilled nursing facility at issue in the Plaintiff's Complaint, where Lemon was a resident. This Defendant would further assert that all care provided to Mr. Lemon was in accordance with the applicable standard of care. Any allegations inconsistent with this response or which assert or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof. Further, to the extent the allegations set forth in the above Paragraph call for legal conclusions or are directed at parties other than this Defendant, no response is required.

8. Responding to the allegations set forth in Paragraphs 18, 19, and 20 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Lemon's medical records for their contents. This Defendant denies any and all allegations inconsistent with Mr. Lemon's medical records 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. Lemon during his residency at the Facility was at all times in compliance with the governing standard of care.

9. This Defendant denies the allegations set forth in Paragraph 21 of Plaintiff's Complaint and would further crave reference to Mr. Lemon's medical records for their contents. Any allegations inconsistent with this response are denied.

10. Responding to the allegations set forth in Paragraph 22 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Lemon's medical records for their contents. This Defendant denies any and all allegations inconsistent with Mr. Lemon's medical records 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. Lemon during his residency at the Facility was at all times in compliance with the governing standard of care.

11. Responding to the allegations set forth in Paragraph 23 of the Plaintiff's Complaint, this Defendant would crave reference to Mr. Lemon's chart for its contents and for details concerning Mr. Lemon's risk for pressure sores and staff members' knowledge thereof. This Defendant denies any and all allegations inconsistent with Mr. Lemon's medical records or which are intended to allege liability, wrongdoing, or damages against this Defendant. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Mr. Lemon during his residency at the Facility was at all times in compliance with the governing standard of care. To the extent the allegations in the above Paragraph call for legal conclusions, no response is required.

12. The allegations set forth in Paragraph 24 of the Plaintiff's Complaint contain legal conclusions and therefore no response is required. To the extent a response is required, this Defendant would deny the allegations set forth in the above response to the extent they allege or assert liability and/or damages as to this Defendant.

13. Responding to the allegations set forth in Paragraphs 25, 26, 27, 28, 29, and 30 of Plaintiff's Complaint, this Defendant would crave reference to Mr. Lemon's medical records for their contents. This Defendant denies any and all allegations inconsistent with Mr. Lemon's medical records or which are intended to allege liability, wrongdoing, or damages against this Defendant. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Mr. Lemon during his residency at the Facility was at all times in compliance with the governing standard of care.

14. This Defendant denies the allegations of Paragraph 31 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

15. The allegations set forth in Paragraphs 32, 33, 34, 35, 36, 37, and 38 of the Plaintiff's Complaint appear to be directed at parties other than this Defendant and therefore require no response. To the extent a response is required, those allegations are denied to the extent they allege or assert liability and/or damages as to this Defendant.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

17. 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

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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

24. 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

25. 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

26. 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

27. 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

29. 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.

CLEMENT RIVERS, LLP

By: *D. Jay Davis, Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
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Attorneys for the Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center

Charleston, South Carolina

Dated: October 11, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON,	)	CASE NO. 2023-CP-20-00268
PLAINTIFF,	)	
vs.	)	
PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC,	)	**DEFENDANT HUNT VALLEY HOLDINGS, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT**
DEFENDANTS.	)	

TO: NEIL E. ALGER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

The Defendant Hunt Valley Holdings, LLC (hereinafter this "Defendant"), *subject to and without waiving any defenses, including defenses to 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. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are legal conclusions 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.

4. The allegations set forth in Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 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, those allegations are denied to the extent they are directed at this Defendant.

5. Responding to the allegations set forth in Paragraph 16 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware. The remaining allegations in the above Paragraph are denied.

6. This Defendant denies the allegations set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof.

7. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 18, 19, and 20 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

8. This Defendant denies the allegations set forth in Paragraph 21 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

9. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 22 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

10. This Defendant denies the allegations set forth in Paragraphs 23 and 24 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or

treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

11. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 25, 26, 27, 28, 29, and 30 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

12. This Defendant denies the allegations set forth in Paragraphs 31 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

13. The allegations set forth in Paragraphs 32, 33, 34, 35, 36, 37, and 38 of Plaintiff's Complaint appear to be 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.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

15. 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

16. 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

17. 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

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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

24. 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. 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

27. 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: *D. Jay Davis, Jr.*

D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
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Attorneys for the Defendant Hunt Valley Holdings, LLC

Charleston, South Carolina

Dated: October 11, 2023

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, PLAINTIFF, vs. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, DEFENDANTS.	CASE NO. 2023-CP-20-00268 **DEFENDANT FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT**

TO: NEIL E. ALGER, ESQUIRE, 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. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are legal conclusions 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.

4. The allegations set forth in Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, and 11 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, those allegations are denied to the extent they are directed at this Defendant.

5. Responding to the allegations set forth in Paragraph 12 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware which provides consulting services to the Facility pursuant to a contract. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

6. The allegations set forth in Paragraphs 13, 14, 15, and 16 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, those allegations are denied to the extent they are directed at this Defendant.

7. This Defendant denies the allegations set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof.

8. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 18, 19, and 20 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

9. This Defendant denies the allegations set forth in Paragraph 21 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

10. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 22 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. Lemon. This

Defendant further denies any interaction or relationship with Mr. Lemon 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.

11. This Defendant denies the allegations set forth in Paragraphs 23 and 24 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

12. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 25, 26, 27, 28, 29, and 30 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

13. This Defendant denies the allegations set forth in Paragraphs 31 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

14. The allegations set forth in Paragraphs 32, 33, 34, 35, 36, 37, and 38 of Plaintiff's Complaint appear to be 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.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. 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

17. 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

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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

24. 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. 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

27. 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: *D. Jay Davis, Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.: 103620

P.O. Box 993, Charleston, SC 29402
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mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: October 11, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, PLAINTIFF,	)	CASE NO. 2023-CP-20-00268
vs.	)	
PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, DEFENDANTS.	)	**DEFENDANT THI OF SOUTH CAROLINA, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT**

TO: NEIL E. ALGER, ESQUIRE, 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. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are legal conclusions 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.

4. The allegations set forth in Paragraphs 3, 4, 5, 6, 7, 8, 9, and 10 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, those allegations are denied to the extent they are directed at this Defendant.

5. Responding to the allegations set forth in Paragraph 11 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.

6. The allegations set forth in Paragraphs 12, 13, 14, 15, and 16 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.

7. This Defendant denies the allegations set forth in Paragraph 17 of Plaintiff's Complaint as stated.

8. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 18, 19, and 20 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

9. This Defendant denies the allegations set forth in Paragraph 21 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

10. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 22 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

11. This Defendant denies the allegations set forth in Paragraphs 23 and 24 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

12. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 25, 26, 27, 28, 29, and 30 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

13. This Defendant denies the allegations set forth in Paragraphs 31 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

14. The allegations set forth in Paragraphs 32, 33, 34, 35, 36, 37, and 38 of Plaintiff's Complaint appear to be 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.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. 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

17. 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

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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

24. 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. 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

27. 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: *D. Jay Davis, Jr*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
SC State Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant THI of South Carolina, LLC

Charleston, South Carolina

Dated: October 11, 2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON,	)	CASE NO. 2023-CP-20-00268
PLAINTIFF,	)	
vs.	)	
PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC,	)	**DEFENDANT FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S ANSWER TO PLAINTIFF'S COMPLAINT**
DEFENDANTS.	)	

TO: NEIL E. ALGER, ESQUIRE, 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. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 1 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

3. The allegations set forth in Paragraph 2 of Plaintiff's Complaint are legal conclusions 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.

4. The allegations set forth in Paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 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, those allegations are denied to the extent they are directed at this Defendant.

5. Responding to the allegations set forth in Paragraph 15 of Plaintiff's Complaint, this Defendant admits it is an LLC organized under the laws of the state of Delaware which provides services to the Facility pursuant to a contract. Any allegations inconsistent with this response are denied and strict proof is demanded thereof.

6. The allegations set forth in Paragraph 16 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, those allegations are denied to the extent they are directed at this Defendant.

7. This Defendant denies the allegations set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof.

8. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 18, 19, and 20 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

9. This Defendant denies the allegations set forth in Paragraph 21 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

10. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 22 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon 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.

11. This Defendant denies the allegations set forth in Paragraphs 23 and 24 of the Plaintiff's Complaint to the extent the allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided care or treatment to Mr. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

12. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 25, 26, 27, 28, 29, and 30 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. Lemon. This Defendant further denies any interaction or relationship with Mr. Lemon of any kind. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

13. This Defendant denies the allegations set forth in Paragraphs 31 of Plaintiff's Complaint including all subparts, and demands strict proof thereof.

14. The allegations set forth in Paragraphs 32, 33, 34, 35, 36, 37, and 38 of Plaintiff's Complaint appear to be 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.

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

16. 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

17. 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

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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

24. 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

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

FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE

26. 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

27. 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: *D. Jay Davis, Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
Matthew O. Riddle
SC State Bar ID No.: 76650
Gaillard T. Dotterer, III
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(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: October 11, 2023

STATE OF SOUTH CAROLINA: COURT OF COMMON PLEAS
SIXTH JUDICIAL CIRCUIT: FAIRFIELD COUNTY

Thomas D. Kilpatrick as Special Administrator for the Estate of Anthony Lemon	Docket No. 2023-CP-20-00268
Plaintiff,	
V.	
Pruitthealth-Ridgeway,LLC, et al.	**Motion to Compel**
Defendant.	

February 29, 2024
Fairfield, South Carolina

B-E-F-O-R-E:

THE HONORABLE PATRICK C. FANT, II

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

Neil E. Alger, ESQ.
Attorney for the Plaintiff

Russell G. Hines, ESQ.
Attorney's for the Defendant's

Maria DiScioscia, RPR
Official Court Reporter

THE COURT: I guess we're here, this is a Motion to Compel.

MR. HINES: Thank you, your Honor. May it please the Court.

Russ Hines for all the moving parties.

And this Motion to Compel is a Motion to Compel Arbitration, so it's not a Discovery Motion. I realized that on your roster, you don't have -- you don't have but so much information.

If I could just, as a housekeeping --

THE COURT: -- I do have this.

MR. HINES: Very good. Just as a housekeeping matter, I wanted to make sure I've got to identify -- because there are, I think, five total motions. But really, it's one motion and four motions that are all identical that tag along with the lead dog, so to speak.

THE COURT: Okay.

MR. HINES: The Motion to Compel is made by the defendant called THI of South Carolina Columbia, LLC, d/b/a Midlands Health and Rehabilitation Center. Then we have four motions that are identical in substance. They're all Motions to Stay. And defendant who've made those are THI of South Carolina, LLC; Fundamental Clinical Operations Services, LLC; Fundamental Administrative Services, LLC; and Hunt

Valley Holdings, LLC.

And if I could, just to get that out of the way, to say that those motions, the Motion to Stay that is. What they do is, they recognized that this THI, I'll call them, is just a facility. Because what it is, is a skilled nursing facility.

I guess I should probably give your Honor a little bit of a background on the facts. It's a medical malpractice case -- it's a malpractice case in the context of a skilled nursing facility. So the parties moving to Compel Arbitration is the facility itself. These others are the defendants. And what the other defendant's Motion to Stay say:

Is that, we're asking for the case against us to be stayed pending the outcome of the Motion to Compel Arbitration and any arbitration that is, in fact, compelled. So the case should be stayed as to these other parties. And the basis for that stay is the same in every case. And it comes from Section 3 of the Federal Arbitration Act. And the FAA definitely applies here, your Honor, because we're talking about a situation where the -- it has to do with the transaction involving interstate commerce. And we can get into some of the specifics in our briefing.

But to explain, the FAA always applies when talking about a transaction or regarding a transaction, an agreement regarding a transaction involving interstate commerce.

And in particular, there's a case called *Dean versus Heritage Health Care* and has other parties, we've cited it in our brief. Where our supreme court recognized in the context of skilled nursing care, you're dealing with interstate commerce. So an Arbitration Agreement in that context would attribute FAA.

My point of that is to say, that under Section 3 of the FAA, it provides that -- if the Court will indulge a little bit of reading.

"If any suit or proceeding be brought in any of the Court's 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 with the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had."

We've cited another case called *Stokes versus Metro Life.* The cite on that is 351 S.C. 606, a Court of Appeals case from 2002.

"The FAA clearly requires the Court to stay any suit or proceeding pending the arbitration of any issue referable to arbitration under agreement in writing for such arbitration."

I realize that's a mouthful. And the reason I wanted to say that at the outset, your Honor, is simply to say:

As goes the motion -- or arbitration, go the Motions to Stay, as the argument. Our argument is, if the Court will agree with the facility, that arbitration should be compelled, the FAA requires the stay as to the rest of the case. And that's what these other defendant's have moved for a stay have asked for. It's a stay against them.

If the Court doesn't agree with us, doesn't agree with the facility, that arbitration should be compelled, then their motions for a stay are effectively mooted, because there would be no reason for the stay absent arbitration being brought.

So with that, I'll move to the Motion to Compel Arbitration, your Honor. And as I mentioned, it is a motion -- the context of the case is a skilled nursing care facility. And I will admit at the outset that -- well, my argument, just to give a little bit of a roadmap here, it's a little bit cumbersome to make it candidally. And that's one of the reasons why our memo in support is a bit long, because there's some steps that need to be explained. But the basic idea that I'm arguing to you your Honor, is not about -- I should also say that we filed a rather extensive memo. And I realize that our time here is limited, so I do rely on that.

THE COURT: I'm here to listen to you.

MR. HINES: Thank you, your Honor. But I'm gonna try and hit the high points and certainly answer any questions that your Honor my have. And if your Honor will allow me to respond to opposing counsel's argument at the appropriate time, I'll do that. But I do want to say that that memo is there in the background and we do rely on it.

But the -- it's sort of a one-two punch you might say, as far as my argument. There is -- the Arbitration Agreement that we are seeking the Court to enforce was not signed by the resident in this case. The resident who was admitted to the facility, Anthony Lemon, was admitted with the help of a family member named Minnie Gamble. And it was Ms. Gamble who signed an Admission Agreement and Arbitration Agreement on behalf of the resident, Mr. Lemon, back when he was admitted to the facility. And I wanted to say that at the outset. I'm not able to make an argument to your Honor today based upon Ms. Gamble having power of attorney to act for Mr. Lemon or an argument based on the agency.

The argument that I'm making, comes a concept of merger, coupled with equitable estoppel.

In the case of merger, what we're talking about and there's a case called *Coleman versus Mariner Health Care* that we've cited in our brief. And it recognizes and it recognizes specifically in the context of an admission to a nursing facility.

"An Arbitration Agreement signed at the time of admission along with an Admission Agreement, where you have multiple instruments signed at the same time, by the same parties, for the same purpose, and of course, the same transaction, the law will deem those instruments to be merged and that they should be treated together as a single instrument and construed in that fashion."

The point here, is my argument starts with that proposition of merger. Merger with the Arbitration Agreement and Admission Agreement. If the Court will go along with me to that point, there's another concept that comes into play, which is equitable estoppel. And in particular, a concept of direct benefits estoppel.

And that concept is recognized in a case called *Wilson versus Willis* cited in our brief. That's a supreme court case I think in 2019, South Carolina Supreme Court, that is. And the idea of *Wilson versus Willis*, was a direct benefits estoppel that it recognizes is that essentially, you can't have your cake and eat it too. And you cannot directly benefit from the provision of a contract that contains Arbitration Agreement and then accept those benefits under the provisions of that contract and then deny the enforceability of an Arbitration Agreement in the same contract. You can't pick and choose the parts of the contracts you like if you directly benefited from certain provisions of that. And that's why I call it a one-two punch. The reason for the first part is the merger is, if you will agree your Honor, that Admission Agreement and Arbitration Agreement should be merged so they're altogether as one contract. On the benefit side of that, there's no question that Mr. Lemon was admitted pursuant to the Admission Agreement and received various services during his stay at the facility, various treatments, care... There's no question that he received benefits based upon that Admission Agreement. With which, I'm arguing under the merger side of this, that we wished an Arbitration Agreement should be construed as being part of.

That's the rough outline of this. Merger of the Admission Agreement, Arbitration Agreement. And then equitable estoppel based upon the direct benefits Mr. Lemon received under that merge and agreement.

And to put a little more meat on those bones, your Honor. I also need to bring to the Court's attention. We've cited this and we've distinguished this, a case called *Solesbee. Solesbee versus Fundamental.* That's a case that the Court of Appeals decided back in 2023. And we were counsel in that case as well, and the Court decided against us.

In that case, the Court decided against us on the basis of, it's rejection of our merger argument. And I do have to acknowledge that the Admission Agreement in this case and the Arbitration Agreement in this case, are the same four documents that were at issue in the *Solesbee case*. The reason why I believe it's appropriate nonetheless for us to argue to your Honor today, the merger of Admission Agreement and Arbitration Agreement, notwithstanding *Solesbee,* and again, we've dedicated a number of pages to this, is because the *Solesbee* Court, although, it rejected our arguments for merger in that case, it did not do so in a way that actually refuted or recognized all of those arguments. And it also, like in that case and the

Arbitration Agreement and the Admissions Agreement to some other authorities, namely a case called the *Coleman case* that I mentioned and another case called *Hodge*. And those cases were very different and their differences between the facts of the case that we have here and it was also the facts in *Solesbee* in terms of what these documents said and those other cases, *Coleman* and *Hodge* and what they said. And again, I realize it's a lot of ground to cover here. But if your Honor will remember, I mentioned that in the *Coleman case*, the Court said, "the same parties, time, purpose, transaction." If you've got all those boxes checked with multiple instruments the doctrine of merger says, "they should be deemed to be construed together, unless, there is evidence of a contrary intention." Meaning, intention to have them not merged. So *Coleman* actually gives us the backbone -- the bedrock upon which to build this argument by recognizing, "yes, in the context of Admission Agreement and Arbitration Agreement, upon entry into a nursing facility, if you check all these boxes, parties, purpose, time, and transaction, they're all the same and merger does apply." *Coleman* flat out says, "yes, the proponents of arbitration in that case, they're right," every one of those is present here. So *Coleman* not only recognizes the validity that propositioned, but it also recognizes our ability to merge Admission Agreements, Arbitration Agreements. It recognized that everyone of those boxes were checked. What it ended up finding was, we find there actually is evidence of an intention to contrary to merger. And the reason it found that was because it looked at the Admission Agreement and it had an entire agreement clause in it, a merger clause in it and that merger clause made a reference to the Arbitration Agreement.

And it said: Well, this a textual basis here where these documents are treating these things as separate. It used the word "separatedness" the *Coleman Court* said. It also said, we looked at the Arbitration Agreement. There is a provision in it that says, "this can be disclaimed within 30 days." And it's essentially treated as if it never existed.

Well, so -- and the Court looks at that and says: That's an indication of intention contrary to merger, because the document itself can essentially vanish and not even be apart of this thing, in which it's supposed to have been merged. We don't have that here. And the *Solesbee Court*, respectfully, never addressed that even though it ruled against us. It did not at all look at these differences between the cases. And in again, in *Solesbee* there's currently a cert pending. We remain with some hope that the supreme court will take a look at it. But whether or not the supreme court does, I believe there's daylight between the Court's actual decision in *Solesbee* and the arguments that I'm making now. Which are, that the *Solesbee Court* didn't address the arguments I'm making now. I feel like if the *Solesbee Court* had addressed the arguments I'm making now, and flat out -- and shot them down, that would be a different situation. The *Solesbee Court* didn't do that. And I would also add that the *Solesbee Courts* arguments, for the ones it did address, it's reasoning is mistaken respectfully. And I do believe it's appropriate to continue to argue that point.

As I've mentioned, we don't have a revocation provision in this Arbitration Argument, that doesn't even exist. Moreover, what we do have is the Admission Agreement. There is an entire agreement provision. Unlike what happened in the case in *Coleman*, the entire agreement provision specifically references other admissions materials being incorporated by reference therein. So unlike in *Coleman*, we you have this notion with a "separatedness" there was evidence there. Ours is explicitly contemplating something that's not separated. It negates referencing other admissions materials. We cite in our brief a case called, *Stock versus White Oak Manner* and another case, the *Hodge* case. Where the court of appeals, just in setting forth the background in those cases, recognized the Admission Agreements and Arbitration Agreements as being documents that were signed in conjunction with admission.

I should be clear, that issue wasn't put to those court's, they didn't hold that. My point is, when you're talking about the construction of the plain language of the document it says:

"Other Admission materials are included."

And the *Stock Court* and the *Hodge Court*, they're both explaining the background of the facts for those two cases. They say things -- paraphrasing like, "relative of the resident signed arbitration agreement, other admissions documentation upon admission." Then they go on to analyze the case. It underscores the point that just in the plain ordinary meaning of "admissions documents" those are the documents you sign at the time of the admissions. Which, in this case, was obviously the Arbitration Agreement. That's a basis for distinguishing obviously this case from *Coleman*. Also, it get's back to the, respectfully, the error of the *Solesbee Courts* ways in ruling against us and the client we represented in that case.

And I can make that point a little bit further if I look, for instance, directly at *Solesbee*. If I'll go over that with your Honor, I'll do that briefly.

The *Solesbee Court* made a few points citing -- well, the *Hodge case* in particular, and I guess in *Coleman* as well. But it said:

"Here the Admission Agreement provides it's governed by South Carolina law and the Arbitration Agreement provides it's governed by federal law."

So the Court's thinking was that that means there's some indication there of separatedness between the two, because you have two different bodies of law to govern. Well, there's two reasons why that's incorrect and doesn't actually address the arguments that we've made.

One, it's incorrect factually. This is what the -- it's not the case that the Admission Agreement says is governed by South Carolina Law and the Arbitration Agreement says it's governed by the FAA, federal law. What the Admission Agreement actually says is: "This agreement will be governed by and construed in accordance with the applicable federal regulations and those of the State in which the facility is located."

What the Arbitration Agreement says: "The parties acknowledge that interstate commerce is involved and this is governed by the FAA."

Well, I mentioned "factually" the idea that these agreements express the idea that they're governed by different bodies of law is simply correct. I just read the Admissions Agreement. It actually says it's gonna be construed in accordance with state law too.

Essentially, what it says is it's gonna be incorporated in accordance with state law except for where it's displaced by federal regulations that would preempt state law. That's exactly the same thing as saying, the FAA applies to the Arbitration Agreement. The FAA preempts South Carolina law. One of the things it does, in fact historically, the reason it was passed was because it was to -- because congress wanted to stop state courts, and this all goes back the maybe the 40s, that were sort of antagonistic to the idea of arbitration agreements and were not enforcing them. And said: We're gonna pass the FAA. But all the FAA really does is, it prevents state's from applying state specific law that treats Arbitration Agreements different than other contracts.

Arbitration Agreements ^ Check court says: "You have to place Arbitration Agreements on equal footing with all the contracts under state law." The point of that here is to say, sort of the irony of *Solesbee Court* thinking that two different bodies of law applies. The FAA just holds South Carolina to applying South Carolina Law evenhandedly. If you're determining whether or not an Arbitration Agreement is to be enforced even under the FAA, you apply South Carolina contract principals, you just apply them in a way that it doesn't single out Arbitration Agreements with this favor of treatment.

In fact, the FAA is really providing it's South Carolina substantive law will apply. That's all off-base, that reasoning in *Solesbee,* and the *Solesbee Court* never explained or addressed that and we made these arguments to it.

Furthermore, under something called *Prima Paint Doctrine,* arbitration clauses are always supposed to be looked at in a way in terms of their contract, the validity and clause. They are looked at in a way, at least a certain sense, as being separate from the agreements that they're in, the contracts that they're in. And that applies whether -- so my point is, the FAA would apply -- let's imagine you had a situation that this Admission Agreement just had an arbitration clause in it. One document, without questions. No question of merger. The FAA would always apply to that Arbitration

Agreement. It doesn't have to be separate, because it involves interstate commerce. In the *Dean case* that I mentioned, it holds that that's the case and it wouldn't take *Dean* to do it. It's obvious that it does, because of the was the services are provided in the context of these skilled nursing facilities.

My whole point is, your Honor, that no intention contrary to merger there. There are formal basis that *Solesbee* got into and we do address each one of them in some detail. And your Honor's been very indulgent of the time, other wise this has been one heck of a monolog. And I have some sympathy for your Honor and everyone else in the Court to hear it.

But if you have any questions, I'd be delighted to do my best to answer them. Other wise, I'll wait for opposing counsel to rebut this and I'd ask for time to reply.

THE COURT: Okay. Thank you.

Yes, sir?

MR. ALGER: Your Honor, Neil Alger here for the plaintiff's.

Thanks Russ.

Anybody need a break?

THE COURT: (Court laughs.)

MR. ALGER: Where do we dive-in.

I should say: Russ, myself, and many of us who practice in the realm of nursing home, I think we have all argued these motions and issues until we're almost blue in the face.

Russ and his partners have been up through the appellate courts numerous times, as myself, and my partners. And we're we are at here today, sitting here today is, with a lot of precedent guiding the way. We also have some other issues that I want to discus before we even get into the precedential aspect of the law in this. Is the context of this particular case, which we didn't hear anything about.

Mr. Lemon was admitted to this facility in 2012 due to symptoms related to a diagnoses of MS and he was physically deteriorating. But he still had his mental faculties. In fact, we attached the medical records to our brief in order to provide the Court with some evidence. But he had his mental capacity. They found he was alert, oriented, place, time, self. And there were numerous instances in the record -- in fact, all the way up from 2012 until 2019, where he would have had the requisite capacity to do any contracting he needed to do on his own.

Now, as you did hear, this agreement, as well as, Admission Agreement were not signed by Mr. Lemon.

We know from the basic tenets of contract law, that that's an exception to the normal course of business under contract, right. And that there are only a few instances where somebody can enforce a contract where you have not actually signed it yourself. And in the context of this case, and the arguments presented by opposing counsel, the only way in which that could derive would be through a power of attorney. A legal enforceable power of attorney, which we don't have or through apparent authority. And in order for the apparent authority argument to have been successful, the defense would have to come forward, the burden of proof is on them. And without even getting into the law here, I'll say, I've read through their brief. I looked at their exhibits. I looked for affidavits and I see no evidence that's been submitted to this Court in order to establish an kind of apparent authority, there's none.

So unequivocally, this Court can say that they have failed to meet the evidentiary burden, proof of burden for them to establish that aspect of their arguments. There's other portions of their brief where similar burdens of proof can be applied and can, quite frankly, negate their arguments because they have failed to meet that part. And I will say, the Court, between them and my own brief, I think you have about 100 pages of reading material for you to review and that's exclusive of all exhibits. So rather than me going through and sort of checking off the sections, I'll just simply say: Keep that in mind as you review the arguments for the requisite burdens of proof to be met, because it hasn't been. It just hasn't. The only burden of proof that has been met is if they want to actually argue the terms of the contract itself, which false back on the arguments you didn't hear regarding merger and equitable estoppel.

In this case the precedent is out there. It is established through *Coleman*, through *Thompson*, through *Hodge*. And then, most recently, in the last six months those precedents -- *Solesbee* -- those precedents have all been reaffirmed through unpublished opinions. So I'm not arguing the precedential value of those opinions, but I did attach them to my brief. Because, your Honor, can simply say: I can rely in comfort on those precedents knowing that the appellant courts themselves have withheld them, turned them down, and sent them home.

There are, I believe, I attached 10 unpublished opinions that all came out within the last four months that have firmly rejected the arguments that have been presented here by opposing counsel.

So it seems to me, that while the defense is attempting to essentially thread the needling here with their equitable estoppel argument, as well as, the discussions of theory and construing of the *Wilson case* in order to make it align itself and counter to *Solesbee*. Our court's have consider this. And while they haven't maybe touched on the exact arguments of counsel, they have said that precedent establishes that:

One, these agreements do not merger. And these agreements have been reviewed by our court's in the appellant process. And no court has yet found that these agreement merge.

And two, that in order for the equitable estoppel argument to be successful, you must find that the agreements come together and they don't.

My understanding is that the *Solesbee case* was a published opinion from the court of appeals. So there is precedential value there. The rehearing was denied and I believe it's currently pending up at our supreme court. That doesn't negate the precedential value that it has from our court of appeals.

Just as in *Thompson* and just as in *Hodge*, I wouldn't be surprised if our supreme court were to deny cert and simply leave the precedential value that it has in court of appeals right now.

Both of those cases were attempted to be elevated up to our supreme court and both the certs were denied. So those precedents remain in place.

But I will say the *Thompson* case is clear. It's unequivocal. That when there are standalone agreements such as this, where you have an Admission Agreement and you have an Arbitration Agreement and they're separately paginated. They're two completely separate documents. In fact, the Arbitration Agreement itself notes it's exclusivity in it's own terms.

And I don't have it in front of me because I didn't want to waste the paper and print off the voluminous exhibits we have. But it says right in the last paragraph of the agreement that: "It is a standalone agreement." That it is, "exclusive of all other contracts." So based on that, based on the basic obvious difference that the two separate agreements, the Court found that merger is not applicable.

There was some mention in opposing counsel's arguments about the *Prima Paint Doctrine* in *Dean*. I'll simply say that as an initial inquiry, this Court can take the concepts that were articulated by defense counsel about presumption and the favor arbitrability and set them aside. Because *Dean* in it's footnote *Prima Paint* -- pretty much every case that has come out in the last 10 to 15 years has recognized that a threshold matter for this court in conjunction with Section 2 of the FAA: "That the Court sitting in law and equity must first determine that there is in fact a contact." And that, is for the Court to decide based on state law principals, on a basic fundamental contract terms.

And going full circle, your Honor. In this instance, we don't have a contract. There is no way that Mr. Hines or the facts of this case can honestly stand in front of you and say that, Ms. Gamble, Ms. Minnie Gamble, had some kind of authority to bind Mr. Lemon, because Mr. Lemon had capacity. He could have signed the agreement on his own. Ms. Gamble had no legal authority over what she could have signed on his behalf.

With that, I'll take a break and hear if Mr. Hines has anything in rebut.

THE COURT: Thank you.

Yes, sir?

MR. HINES: Your Honor, I'll move through this as briefly as possible.

In fact, I'll be very brief. And this is a bit unusual for me to start by asking this. It's just occurred to me when Mr. Alger mentioned a brief. I realized it wasn't because it filed something way in advance. I thank you. I hadn't had a chance to see their brief. I just wanted to flip through it.

I would imagine we would at least, in our counter points to what's in here. But in particular, because this is a wrongful death case, I thought that -- and it occurred to me to look and see if they're making the argument that specifically, you can't have an arbitration of a wrongful death, even if you have -- it's argued sometimes, your Honor, that when it comes to wrongful death, to enforce arbitration or compel a claim under that arbitration, you have to have an arbitration agreement that's enforceable against all of the wrongful death beneficiaries. And that's a different argument then what I've addressed so far and I'll address it in just one moment. But to be clear, the logic of that argument is, even if there's no question that -- in fact, the logic of that argument is even if Mr. Lemon with full contractual capacity signed that Arbitration Agreement, that you still couldn't compel the wrongful death claim in arbitration. That's the logic of it. The logic of it is, that's it's own independent in pattern talk Judge.

I will argue against that by saying the *Dean case* does not go, so far as, to hold specifically that -- it doesn't specifically refute their argument, but it does give us a pretty good way of starting to do it. Which is saying that, it recognizes that it would be contrary to the FAA to exclude a certain type of claim from arbituability. Because the FAA requires, obviously, the Arbitration Agreement to be placed on equal footing with all the contracts. And you can't come up with a state law rule that says, you can't arbitrate wrongful death claims. That much is for sure. The FAA says, you can't do that.

Now, *Dean* doesn't go further in talking about the logical implications of that. The logical implications of that, as a practical matter, are that if the rule is, all of the wrongful death beneficiaries in the case have to agree on arbitration, you're going to throw a whole bunch of cold water on the idea of arbitrating wrongful death claims based upon any sort of agreement to arbitrate like this one. Where you're talking about the people entering into a relationship and they have agreements that address that relationship and the claims that might arise out of it. I'm not saying that you couldn't conceivably get wrongful beneficiaries to all agree after the claim has risen, but I find it to be highly unlikely.

If that is the case, I do think *Dean* certainly suggest that you would have a problem with the FAA to do that. But more than that, it's a nonstarter argument to begin with under our law, because any agreement or any sort of contractual provision that would be enforceable against the wrongful death, the decedent, would also be effective to defeat the wrongful death beneficiaries claim. Keep in mind, it is not in fact their claim. They're simply the beneficiary of the claim that has to be brought by the personal representative of the decedents estate. That claim does derive from the claim. It has -- for the claim to even exist the decedent themselves, statutorily would have to have had a claim against whoever the tort feasor is, it's being sued for wrongful death. The decedent would have to have a claim. In as much as you can enforce the arbitration against the decedent, you can enforce it against the wrongful death beneficiaries.

Similarly, let's imagine that you have a situation where somebody was hurt in an accident and they're not yet deceased, they're in a hospital. And somehow, they start settlement negotiations with that decedent when they're in the hospital. And they come up with some agreement to resolve any and all claims arising our of the accident that put them there to include any and all claims, obviously and they sign a release and the decedent passes away after that.

Obviously, the wrongful death claim based upon that accident wouldn't even accrue until the decedent passed away. Nonetheless, the release the decedent signed waiving any and all claims would bar a wrongful death suit.

Again, I'm talking about -- we're not hairsplitting the language of the release. But image that the release does indeed cover any and all ground, known, unknown, now and future, anything arising out of that accident. In the same way that such a release would be enforceable against a wrongful death beneficiary, against the claim to defeat the claim, the wrongful death. So does an arbitration operate, not to defeat it, but to require it to be arbitrated. So I just want to make sure I wasn't silent on that point, your Honor.

Back to what Mr. Alger did argue. He mentioned that I'm trying to thread the needle. Well, he's right about that. I'll certainly give him that. I just would say that we are indeed threading it. There's room in there to get the thread, that's my point. Not that this might be an attempt. But surely, that's exactly what we're doing. We recognized that there are eventually head-wins, but we're nonetheless, trying to chart that course past them. And he did mention a number of -- I don't even blame him. I can understand the point. But no precedential value means no precedential value. You can stack to the roof opinions with -- that have no precedential value. And say to the Court: I'm not asking you to rely on them. Well, again, I get --

THE COURT: -- he does have a published opinion.

MR. HINES: He has one, that's right. And that's what I believe all you need in terms -- if we were on all fours. I'm not trying to tarnish the one he's got. But I am trying to distinguish to the Court, that it's really not addressed all facts. And the fact that he even seemed to give me a little bit of a nod when he says: "Even the Court had to address exactly what they're arguing." That's my point, the Court has not knocked out from underneath us what we're arguing.

And the whole point about having to say: There's no power of attorney, no agency they commissioned.

My equitable estoppel argument, merger, and estoppel argument, doesn't align with either of those principals. It's completely independent of that.

In fact, the was estoppel works is, I'm not having to prove we had a valid agreement per se. I'm just establishing that the plaintiff is estopped to try to argue it's not enforceable. I have more that one way to skin this cat. In fact, *Wilson versus Willis* recognizes that there are recognized theory under South Carolina Law in which you can enforce an Arbitration Agreement against a non-signatory, among them estoppel.

So the legal framework, your Honor, is there and I suggest to the Court that the factual building on that framework is there in this case, with all due respect to the *Solesbee Court*, which I have to acknowledge is there. And have to acknowledge, it did deal with these same four documents. It just did not deal and refute with these same arguments.

Thank you, your Honor.

THE COURT: Thank you.

MR. ALGER: Your Honor, and I will be brief 'cause I know there's other individuals waiting now.

Back to the equitable estoppel argument. In order for that to be successful, the defendant would have had to come forward and show that the party to be estopped, which in this instance is the estate of Mr. Lemon.

That he acted in a way of having to a false representation.

That he intended that such conduct be acted on by the other party.

That he had actual constructive knowledge of the real facts.

It's almost -- it is a kin to saying he acted fraudulently. With that notion, back to the basic burden of proof in this instance, nothing has been presented to this Court showing that Mr. Lemon acted in any of those ways. You don't have any testimony here, unfortunately, Mr. Lemon is deceased. His family members can't attest to this. There is no medical record, or doctor, or nurse, no admission assistant. Nobody can come forward and establish those facts and they haven't been presented to this Court.

So simply, based on the burden of proof, the Court can't find equitable estoppel as even a viable reason to compel this in arbitration, because those requisite elements haven't been met.

Lastly, not to open another avenue. As a fundamental issue as well, the Arbitration Agreement itself is flawed, in that, it lacks consideration. Our courts as you have heard over and over again, they find that these two agreements do not merge. And however the defendant wants to put it, there is that element lacking in a contract. You've got to have neutrality of promises. You've got to have the contract itself and you have to have consideration. And there is no consideration in this instance, no real consideration in this instance. And the reason is, because the promise that is exchanged is that neither party will bring suit against them and if they do, it will be by arbitration. But that, what we know from our simple tort law is:

What does it mean to bring suit, right?

In order to have suit, you have to have a duty.

I have to be responsible to you for acting in some way. And in this instance, there is no duty of Mr. Lemon back to the nursing home. He can't make a promise that is an impossibility. The nursing home has a duty to provide care and treatment for him. They have a duty to make sure that he is not neglected, that he's feed, that he's taken care of. The list goes on and on of the duties that the nursing home has to Mr. Lemon. Mr. Lemon, the only duty he has back to the nursing home is to pay his bill and be present, but that's under the Admission Agreement. They don't merge. So what consideration is there that's left for Mr. Lemon back to the nursing home? There is none. He has no other duty. And so there can't be that neutrality of promises in order to establish the consideration of the contract. And with that, I'm done.

THE COURT: Thank you.

MR. HINES: If you will, your Honor, like 30 seconds.

THE COURT: Sure.

MR. HINES: That argument, the last argument, about the lack of consideration is:

One, it's beside the point. And because as I've just mentioned, one, it goes by counsel's own argument that it was premised on the idea that he was isolating the Arbitration Agreement as not merged. So obviously, my point is, it is merged. And I'll acknowledge to the Court that my argument flows from the proposition that we're talking merger of admission and arbitration and so really it does not under-mind my merger, estoppel argument at all.

It also doesn't under-mind it because, I'm again, not arguing for a contract to be enforceable per se. I'm arguing on the basis of estoppel, which is a different way of getting there.

The other point is, you mentioned the idea of not -- and I would also say, there is consideration to the extent it could matter for the Admission Agreement mutual promise to arbitrate. I understood counsel to say: There was no duty to flow from Mr. Lemon back toward the facility, but the duty to pay them. Well, that's a duty. We've got mutual promise to arbitrate any claims that arise including the claim that he might -- the facility might have against him for nonpayment or any other conceivable claim that could arise from that relationship. And it's beyond me, in a moment to think about all the different things that could possibly arise. But anyway, it's really not -- it really doesn't matter, because again, it's not material to my argument, which goes through merger.

And the final point, maybe the most important one, your Honor. Opposing counsel talked about the burden of proof about representations that were made by Mr. Lemon and so forth. Essentially, something analogized as fraudulent conduct. That's just the wrong test, your Honor, for equitable estoppel. The *Wilson versus Willis* case is about direct benefits estoppel, not -- *Wilson versus Wilson* even makes a footnote of this. Is that because of the traditional six part test for estoppel. It looks about like three parts about the party to be estopped. And three parts about the party asserting estoppel and that's just not the right test.

So I can will conceded that's I've not passed that test. It's just that it's not a test that I have to take to make my argument. My argument is based on direct benefits. Thank you, your Honor.

THE COURT: Okay. Thank you. I will take this under advisement and be back with you.

(Whereupon, the above-captioned motion was concluded.)

C E R T I F I C A T E

I, the undersigned Maria DiScioscia, Official Court Reporter for the Sixth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of the record of all the proceedings in the captioned case, in the Circuit Court for Fairfield, South Carolina, on the 29th day of February, 2024.

I do further certify that I am not related, either by blood or marriage, to any of the parties in this action; and that I am in no way interested in the outcome of this matter.

Maria DiScioscia

____
Maria DiScioscia
Official Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON,	)	CASE NO. 2023-CP-20-00268
PLAINTIFF,	)	
vs.	)	
PRUITTHEALTH - RIDGEWAY, LLC f/k/a UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. f/k/a UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC,	)	**DEFENDANT THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a MIDLANDS HEALTH AND REHABILITATION CENTER'S MOTION TO STAY OR DISMISS ACTION AND COMPEL ARBITRATION**
DEFENDANTS.	)	

TO: NEIL E. ALGER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant, THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("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 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 Anthony Lemon's admission to the Facility. (See Arbitration Agreement attached as Exhibit A). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff's claims be submitted to arbitration.

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 Bar ID No.: 12084
Matthew O. Riddle, SC Bar ID No.: 76650
Gaillard T. Dotterer, III, SC Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center

Charleston, South Carolina

Dated: January 2, 2024

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between Magnolia Manor of Cola ("Facility"), its agents, employees and servants, and Anthony Lemon ("Resident") or MINNIE GAMBLE ("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.

Minnie Gamble		MINNIE GAMBLE
Resident/Representative Signature	Date	Printed Name of Resident/Representative
[signature]	1/9/12	Beverly Williams Adm. Dg.
Authorized Agent of Facility	Date	Printed Name & Title

Original: **Business File • Photocopy: Resident/Representative**

Exhibit A

STATE OF SOUTH CAROLINA COUNTY OF FAIRFIELD	IN THE COURT OF COMMON PLEAS SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, PLAINTIFF, vs. PRUITTHEALTH - RIDGEWAY, LLC f/k/a UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. f/k/a UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, DEFENDANTS.	CASE NO. 2023-CP-20-00268 **DEFENDANT HUNT VALLEY HOLDINGS, LLC'S MOTION TO STAY**

TO: NEIL E. ALGER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant Hunt Valley Holdings, LLC (hereinafter "this Defendant"), by and through its undersigned counsel, *and subject to and without waiving its right to have this matter dismissed for lack of personal jursidiction,* 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 Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Facility Defendant") 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 Anthony Lemon's 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: *<u>/s/ D. Jay Davis, Jr.</u>*
D. Jay Davis, Jr., SC Bar ID No.: 12084
Matthew O. Riddle, SC Bar ID No.: 76650
Gaillard T. Dotterer, III, SC Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Hunt Valley Holdings, LLC

Charleston, South Carolina

Dated: January 2, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON,	)	CASE NO. 2023-CP-20-00268
PLAINTIFF,	)	
vs.	)	
PRUITTHEALTH - RIDGEWAY, LLC f/k/a UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. f/k/a UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC,	)	**DEFENDANT FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S MOTION TO STAY**
DEFENDANTS.	)	

TO: NEIL E. ALGER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant 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 Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Facility Defendant") 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 Anthony Lemon's 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: *<u>/s/ D. Jay Davis, Jr.</u>*
D. Jay Davis, Jr., SC Bar ID No.: 12084
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mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: January 2, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, PLAINTIFF, vs. PRUITTHEALTH - RIDGEWAY, LLC f/k/a UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. f/k/a UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, DEFENDANTS.	)	CASE NO. 2023-CP-20-00268 **DEFENDANT THI OF SOUTH CAROLINA, LLC'S MOTION TO STAY**

TO: NEIL E. ALGER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant 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 Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Facility Defendant") 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 Anthony Lemon's 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

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P.O. Box 993, Charleston, SC 29402
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mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant THI of South Carolina, LLC

Charleston, South Carolina

Dated: January 2, 2024

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, PLAINTIFF, vs. PRUITTHEALTH - RIDGEWAY, LLC f/k/a UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. f/k/a UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC d/b/a MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, DEFENDANTS.	CASE NO. 2023-CP-20-00268 **DEFENDANT FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S MOTION TO STAY**

TO: NEIL E. ALGER, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant 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 Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Facility Defendant") 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 Anthony Lemon's 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.

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mriddle@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: January 2, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	)	SIXTH JUDICIAL CIRCUIT
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, PLAINTIFF, vs. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC, PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, DEFENDANTS.	)	CASE NO. 2023-CP-20-00268 **DEFENDANT THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION**

TO: NEIL E. ALGER, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center ("Defendant" or the "Facility") submits this memorandum in support of its motion, filed January 1, 2024, to compel the claims asserted against it in this action to arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued Defendant alleging deficiencies relating to care/treatment Mr. Anthony Lemon ("Mr. Lemon") received while he was a resident of the Facility. In conjunction with Mr. Lemon's admission to the Facility (then known as Magnolia Manor of Columbia)[1], his mother Minne Gamble executed an Arbitration Agreement on his behalf that is enforceable—or, more specifically, that Plaintiff should be estopped to deny the enforceability of—that covers the entirety of Plaintiff's claims against the Facility. As such, Defendant respectfully requests that this Honorable Court stay the pending action and compel Plaintiff's claims to arbitration.

BACKGROUND

With the help of Ms. Gamble, Mr. Lemon was admitted to Magnolia Manor of Columbia on January 9, 2012 for skilled nursing care. Ms. Gamble handled the paperwork in conjunction with her son's admission, and in so doing, Ms. Gamble executed an Admission Agreement and an Arbitration Agreement on her son's behalf. (See **Exhibits 1** and **2**, respectively, attached hereto).

Based on the Admission Agreement and pursuant to the terms thereof, Mr. Lemon was admitted to the Facility and received skilled nursing care and treatment. During his stay at the Facility, Mr. Lemon received and accepted the benefits of the Admission Agreement, which included the Facility furnishing him a room, providing routine meals, and rendering nursing, personal, and custodial care. Plaintiff has never challenged any agreement's validity until now. To the best of Defendant's knowledge, even now, Plaintiff has not asserted that the Admission Agreement is invalid or that Mr. Lemon entered the Facility unwillingly or without consent.

Ms. Gamble explicitly represented that she was authorized to admit her son to the Facility and execute documents on his behalf, including the Arbitration Agreement. Indeed, the very first

[1] The nursing facility changed names to Midland's Health and Rehabilitation Center after Mr. Lemon's admission.

provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, which would, of course, include Ms. Gamble's authority to bind her son (See **Ex. 1**). Ms. Gamble signed the Admission Agreement on behalf of her son 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 Ms. Gamble's authority to sign on behalf of her son, 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 these proceedings and compel this matter to arbitration pursuant to the FAA.

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 <u>shall</u> 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 Ms. Gamble's signature on behalf of Mr. Lemon, along with her express representation that she is authorized to sign for Mr. Lemon.[3] It is countersigned by the Facility's representative. 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 arbitration[4] before an arbitrator who is either agreed upon by the 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

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[3] By virtue of her signature, Ms. Gamble 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. Lemon's 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 Ms. Gamble 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 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.").

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*, 53 l 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 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.

(*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, Ms. Gamble, acting on behalf of Mr. Lemon, represented that she understood and assented to their terms. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The Arbitration Agreement was not a precondition of admission to the Facility and was not a "take it or leave it" contract in the sense that Ms. Gamble did not have to agree to it on behalf of Mr. Lemon for him to be admitted to the Facility. Ms. Gamble had the option not to enter into the Arbitration Agreement on behalf of her son, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her son stayed at the Facility and received skilled nursing care after admission.

Defendant offered the option of entering into the Arbitration Agreement. Ms. Gamble did not have to accept this offer nor has there been any suggestion (much less evidence) that she 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 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, these courts have agreed that these agreements are not unconscionable. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) (attached hereto as **Exhibit 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, infra*. 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 require arbitration agreements to be placed on equal footing with all other types of contracts under state law. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is without merit.

IV. PLAINTIFF'S CLAIMS 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.").

A. The Plain Language of the Agreement Binds Plaintiff.

According to the plain language of the Arbitration Agreement and consistent with her actions during the admissions process, Ms. Gamble represented herself to admissions personnel at the Facility as her son's representative with the authority to sign documents and enter agreements on his behalf.[5] It was clearly Ms. Gamble's intention to bind her son according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Ms. Gamble evinced

[5] See **Ex. 2** ("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…")

no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Ms. Gamble was authorized to enter this Agreement binding her son to arbitration, and the Agreement directly applies to the instant dispute. The Court should find this Agreement is valid and enforceable, and the present action must be stayed and compelled to arbitration.

This Court has recently found the plain language of arbitration agreements to support enforceability in at least two other cases with circumstances nearly identical to the case at bar. *See e.g. Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al,* 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (attached hereto as **Exhibit 4**); *Josephine Spears v. Rehab Center of Cheraw, LLC et al.* 2019-CP-13-00308 (January 10, 2020) (attached hereto as **Exhibit 5**). In both cases, the plaintiff was the wife of a resident at a skilled nursing facility in South Carolina. The resident's wife in each case executed an admissions agreement and an arbitration agreement *identical* to the ones in the case at bar, and as here represented to the facility that she had authority to enter these agreements on her husband's behalf. (See **Ex. 4**, p. 2-3; see **Ex. 5**, p. 1). Unlike the present case, the plaintiffs in *Price* and *Spears* later executed contradictory affidavits in opposition to the Defendants' motion to compel arbitration, disclaiming their authority to enter the agreements. Nevertheless, this Court found that the signatory plaintiffs' attestations of authority in the arbitration agreements prevailed over the contradictory affidavits, and bound plaintiffs in both cases to the terms of the agreements. The Court should reach the same conclusion in the present case, and enforce the Arbitration Agreement, particularly in the apparent absence of any affidavits or other evidence to contradict the plain language of the Agreement.

Specifically, this Court determined in *Price* that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,]" because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See **Ex. 4**, p. 5). Likewise, in *Spears*, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident identical to Ms. Gamble's attestation in the Arbitration Agreement noted above. As such, this Court in *Spears* held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See **Ex. 5**, p. 4). As in *Price* and in *Spears*, Ms. Gamble in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of his mother. Plaintiff has not submitted an affidavit or other evidence disclaiming Ms. Gamble's authority to enter such an agreement on her son's behalf. Therefore, the Court should find that Plaintiff is bound by the plain language of the Arbitration Agreement and compel this matter to arbitration.

B. <u>Ms. Gamble Possessed the Apparent and Inherent Authority to Execute and Bind Mr. Lemon to the Arbitration Agreement and/or Plaintiff Should be Estopped to Deny this Authority.</u>

1. Agency Relationship

In addition to representing herself as authorized to enter the Arbitration Agreement on her son's behalf by the plain language of the Arbitration Agreement, Ms. Gamble possessed the *apparent and inherent authority* to bind her mother under this Agreement. 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)).

Alternatively, “[a]n 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, 145-146, 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).

Clearly, in this matter, Ms. Gamble held herself out as an agent for her son without any indication to the contrary when she executed various admission documents on his behalf, including the Arbitration Agreement. Based on Ms. Gamble and her son’s conduct and explicit representations, facility representatives were justified in believing she possessed the authority to execute all admissions documents on her son’s behalf, including the Arbitration Agreement.

Moreover, by allowing Ms. Gamble to procure his admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that admission, Mr. Lemon represented that Ms. Gamble was her authorized representative to act on her behalf in connection with admission. *See R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as 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") (emphasis added).

A holding to the contrary would contradict the fundamental concept of apparent agency: *an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act*. The Facility had reason to believe that, by allowing Ms. Gamble to sign the admissions paperwork, including the documents providing for her mother's stay and the skilled nursing care provided at the Facility, Mr. Lemon cloaked his mother with the authority to execute those documents. Further, Neither of them nor any other family member repudiated or invalidated Ms. Gamble's actions. Instead, Mr. Lemon accepted the benefits of the contracts with the Facility by remaining at the Facility for multiple years and receiving skilled nursing care and services, thereby ratifying his mother's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Ms. Gamble had been authorized to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Even if Ms. Gamble lacked the actual or apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct…." *See,* §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (*abrogated on unrelated grounds)* (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r,* 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.,* 826 F.2d 581, 591 (7th Cir. 1987) ("[t]he powers of an agent are, prima facia, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.") (*citing Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established legal principle follows from one of the cardinal principles of agency law: that third parties, such as the nursing facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether Ms. Gamble was authorized to admit her son to the Facility. To the extent Plaintiff takes issue with Ms. Gamble's authority, such actions merely accompanied and were incidental to her authority to admit her son to the Facility.

2. Agency by Estoppel

"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*, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, a party must show: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Price, supra,* this Court ruled that the Plaintiff was estopped from denying that she was her sister's authorized agent during the latter's admission to the skilled nursing facility:

> In the case at the bar, [the facility] had no knowledge or reason to believe that Plaintiff was not [her husband's] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See **Ex. 4**, p. 9). Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon* the United States District Court of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (See **Ex. 3**). As in the present case, the husband in *McCutcheon* executed a number of documents on his wife's behalf upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that the husband was his wife's legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The court held:

> Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on

> behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped form denying the enforceability of the Arbitration Agreement.

Id. at *5.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow the Plaintiff in this case to assert Ms. Gamble was authorized to sign the Admissions Agreement but not the Arbitration Agreement. In the case at bar, no nursing facility representative had no knowledge or reason to believe that Gamble was not her son's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by the Facility, only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

V. PLAINTIFF SHOULD BE EQUITABLY ESTOPPED TO DENY THE ENFORCEABILITY OF THE ARBITRATION AGREEMENT.

A. 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 Admission Agreement and Arbitration Agreement should be construed together (i.e., merged) and, Mr. Lemon having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in Mr. Lemon's shoes in bringing this action) should be equitably estopped to deny the enforceability of the Arbitration Agreement merged therewith.

1. Merger

The Arbitration Agreement and Admission Agreement were executed by Ms. Gamble on behalf of Mr. Lemon. Pursuant to the FAA, the enforceability of these instruments must be determined in accordance with the general principles of South Carolina law that would apply in the context of any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement* . . . or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. (*See* **Ex. 2**.) (Emphasis added.) As previously described, the Arbitration Agreement and the Admissions Agreement were both signed by Ms. Gamble behalf of Mr. Lemon on the same day, at the same time, for the same purpose, and in the course of the same transaction—Mr. Lemon's admission to the Facility.

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. Gernqross*, 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 Court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (See **Ex. 3**). Indeed, this Court has cited *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (*See Abrams, Campsen* attached hereto as **Exhibits**

6 and **7, respectively**). More recently, this Court held that an admission agreement and arbitration agreement identical to the ones at the bar which had been signed by a resident's daughter-in-law on admission to a skilled nursing facility, were merged and that the Plaintiff was estopped from denying the validity of the arbitration agreement. *William Haynes as Personal Representative of the Estate of Elizabeth Varner vs. THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab et al*, Case Nos. 2021- CP-10- 01437 and 02477. S. C. Com. Pls. Feb. 24, 2022) (attached hereto as **Exhibit 8**).

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.[6] They should be considered merged, i.e., they should be considered and construed together as effectively one contract.

2. Equitable Estoppel of Merged Agreement

"South Carolina has recognized several theories that could bind non signatories 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 non-signatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an

[6] 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).

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.* 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. Lemon 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).[7]

[7] *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).

Of note, this Court applied this precise reasoning in *Spears*. (See **Ex. 5**). In that case, a woman admitted her husband to a skilled nursing facility and in connection with his admission, executed admission and arbitration agreements *identical* to the ones here. The agreements were both executed by the woman and a representative of the skilled nursing facility at the same time. This Court considered the agreements as merged and held that the plaintiff was estopped from refusing to comply with the arbitration agreement where, like here, the resident received "direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein." *Id.*, pg. 10 (footnote omitted).

The Court in *Haynes*, referenced above, also applied the same reasoning in holding that the Plaintiff was estopped from denying the validity of an arbitration agreement, where the resident received "direct benefits from the Admission Agreement throughout her residency at the facility, including, without limitation, the room, board, care/treatment she received therein." **(Ex. 8** at 18). The Court went on to explain that the resident "effectively embraced and directly benefited from the Admission Agreement" and therefore the Plaintiff could not deny the enforceability of the arbitration agreement, which had merged with the admission agreement. (*id.*).

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 non-signatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] non-signatory 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 non-signatory may be compelled to arbitrate where the non-signatory 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 non-signatory 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 non-signatory 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*, 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 the Court of Appeals' decision in *Pearson*, which the *Wilson* Court favorably cites, the essence of the test for direct benefits estoppel is simply whether the non-signatory 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 non-signatory'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 *Pearson* nor general notions of equity countenance,[8] much less call for, such a result.

Here, Mr. Lemon effectively 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. Lemon 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 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 generally* Compl.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Mr. Lemon received the benefit of his admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. This Court should find that the Arbitration Agreement merged with the Admission Agreement and that Plaintiff is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Mr. Lemon having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.

3. *Coleman, Thompson*, and *Hodge* are Distinguishable.

[8] *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.").

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.

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 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*, 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*, 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).[9] Specifically, the Admission and Arbitration Agreements were signed by Ms. Gamble, on her son's behalf and were both countersigned by the representative of the Facility on January 9, 2012. The documents were signed by the exact same people: Ms. Gamble as representative for her son and by Pearly Williams for the Facility. The documents were signed for the same purpose and transaction of establishing Mr. Lemon's 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,

9 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 *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).

directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[10]), 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 Agreement*.") (emphasis added)).[11]

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

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[10] 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).

[11] To be clear, it is not that the holding of either *Stott* or *Hodge* established a legal standard for what counts as admission paperwork, but rather the very fact that the language that the Court of Appeals used in discussing the facts of the cases so readily made the natural and logical connection between arbitration agreements signed in conjunction with admission and "admission documentation" / "documents related to . . . admission" 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).

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,"[12] 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

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

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 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 no ambiguity as to the merger of the Admission Agreement and the Arbitration Agreement to begin with—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, as a matter of law, *merger is the <u>default</u> 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 *Coleman* Court clearly endorsed the rule of law that a presumption of merger arises where, as here, multiple instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction and that upsetting this 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,[13] (a) it did so in dicta[14] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[15]—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., 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*

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[13] *Id.* at 407 S.C. at 355–56, 755 S.E.2d at 455.

[14] *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).

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

McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation."). To allow the merger presumption to be upset based on evidence that is merely ambiguous is to allow the exception to devour the rule.

Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, 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, of course, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, 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.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon—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. Lemon's relationship with the Facility. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "[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." (**Ex. 1**, p. 12 (emphasis added)). Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed, and it does constitute admissions material; most respectfully, to conclude otherwise simply does not make sense.

The material facts of *Coleman*, *Thompson*, and *Hodge* are different from the material facts of the instant case, and those other cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

4. Respectfully, the Court of Appeals' recent decision in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023), is erroneous and should not control the disposition of the instant motion.

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.”).)[16] Most respectfully, the *Solesbee* Court’s merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the instant motion.[17]

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.)

As explained above, 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

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[16] 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.

[17] In this regard, Defendant would also note that it is still possible that the Supreme Court might review *Solesbee* via a writ of certiorari.

"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). Furthermore, 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),[18] whereas "termination" is putting or bringing

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

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 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 Ms. Gamble on Mr. Lemon'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* 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 Ms. Gamble's agency relationship with her mother and the circumstances surrounding the admissions process.

In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an Arbitration Agreement on her son's behalf in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a* at *Magnolia Place-Greenville, et. Al,* 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 9**). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the court found there was evidence to support the finding of apparent agency.

Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. *See Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center*, 2017-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019) (attached hereto as **Exhibit 10**). Judge Matie Murphy also ordered arbitration related discovery in a more recent case. *See Beverly Vaughn as Personal Representative of the Estate of Loris Paris vs. Saint Matthews Healthcare, LLC; Melissa Kizer; Melissa Davis; and Angela Smith Teliha*, 2022-CP-38-00525 (S.C. Com. Pls. Nov. 17, 2023) (attached hereto as **Exhibit 11**).

The case at the bar involves Ms. Gamble's own authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd, Brown*, and *Vaughn*, if the Court determines the record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow this Defendant to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that this Defendant moved to compel arbitration under a facially valid arbitration agreement. This Defendant firmly believes Ms. Gamble had the authority to execute the Arbitration Agreement on behalf of her son. Nevertheless no one ever called her authority to enter into the Arbitration Agreement into question until now. This Defendant had no reason to conduct discovery until this dispute arose, and even then, it still maintains its primary position that the Arbitration Agreement was enforceable based on the record as is. If further development of the record is needed on any point material to arbitrability, the Court should expressly allow this Defendant to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, i.e., without having to expose themselves to a potential Catch-22 where they could be said to have waived their arbitration rights simply by endeavoring to prove them.

CONCLUSION

For the reasons set forth herein, Defendant respectfully requests that this Court enter an order staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motions on the grounds asserted above, Defendant requests that the parties be permitted to conduct limited discovery into the issue of Mr. Lemon's authority without Defendant waiving its arbitration rights. Defendant also requests permission to be heard after such discovery is conducted and requests that it be permitted to submit supplemental memoranda along with any additional evidence obtained.

CLEMENT RIVERS, LLP

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Attorneys for the Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center

Charleston, South Carolina

Dated: February 28, 2024

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: Anthony Lemon

RESIDENT NUMBER: 300295

DATE OF ADMISSION: 1-9-2012

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Magnolia Manor of Coly ("Facility"), Anthony Lemon ("Resident") and/or Minnie Gamble ("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 aides 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.

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 reserves 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 has 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.

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 has 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.

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.

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 $ 153 . 00 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

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 has 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.

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 agrees 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 authorizes 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 remains 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.

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 agrees 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 authorizes 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 remains 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:

MMOC
1007 N. King St
Cola SC
29223

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:

Anthony Lemon

Redacted

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

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.

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, 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

Resident Social Security Number

Witness Signature — Date — Printed Name of Witness

OR

Signature of Representative, if any — Date 1/9/12 — Printed Name of Representative

Witness Signature — Date — Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official — Printed Name of Facility Official & Title

1-9-12

Date

Original: Business File • Photocopy: Resident/Representative

Acknowledgement

I acknowledge I have received the following information and/or documentation, which fully explains my rights under Federal and applicable state laws as a nursing home resident, and the rules and regulations governing my conduct as a resident. *(Resident/Representative should check and initial each item listed as it is furnished and explained.)*

- ☑ MG A written copy of Facility's Admission Agreement
- ☐ ____ A written copy of Facility's Handbook, which includes the facility's rules/regulations governing resident conduct, as well as written explanations of the following: (Admission, Discharge and Readmission policies; Bed assignment, reservation, and refund policies; Protection of Resident Funds; Resident's Rights under Federal law; Bed Hold policies; Polices/procedures for bringing personal items into the facility and securing personal belongings, valuables and money; Special Services, such as laundry, barbers and activities; Policies/procedures for filing grievances; Medicare/Medicaid Funding; Smoking Policies)
- ☐ ____ A written copy of resident's rights under applicable state laws.
- ☐ ____ A written copy of facility's policy on Advance Directives.
- ☐ ____ A written explanation of the charges for services provided by facility and outlined in the Handbook and those services offered on an as-needed basis.
- ☐ ____ A separate listing of local and government resources as furnished by the state Ombudsman and any other advocacy groups as required by state/federal law.
- ☐ ____ A separate listing of all medical professionals available to provide on-site services.
- ☐ ____ A written copy of facility's policy on the use of physical or chemical restraints, including bed rails.

By my signature below, I agree to abide by all facility's rules, policies, terms and conditions as explained to me and provided above, as well as all federal and applicable state laws.

Resident Signature	Date	Printed Name of Resident
Minnie Gamble	1/9/12	Minnie Gamble
Legal Representative Signature, if any	Date	Printed Name of Representative
Witness Signature	Date	Printed Name of Witness
[signature]	1/9/12	[handwritten name and title]
Facility Representative Signature	Date	Printed Name and Title

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

ELIJAH R. MCCUTCHEON, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CARMELA MCCUTCHEON, Plaintiff,	No. 2:11-CV-02861
vs.	**ORDER**
THI OF S.C. AT CHARLESTON, LLC, d/b/a DRIFTWOOD REHABILITATION AND NURSING CENTER, n/k/a RIVERSIDE HEALTH AND REHAB, Defendant.	

This matter is before the court on a motion to dismiss and to compel arbitration brought by defendant THI of South Carolina at Charleston, LLC, d/b/a Driftwood Rehabilitation and Nursing Center, n/k/a Riverside Health and Rehab ("Driftwood"). For the reasons set forth below, the court grants defendant's motion.

I. BACKGROUND

Elijah R. McCutcheon, individually and as personal representative of the estate of Carmela B. McCutcheon, originally filed suit on September 15, 2011, in the South Carolina Court of Common Pleas for the Ninth Judicial District. Driftwood filed a notice of removal in federal court on October 20, 2011, asserting diversity jurisdiction under 28 U.S.C. § 1332. Driftwood then answered the complaint on October 24, 2011. On November 1, 2011, Driftwood filed a motion to dismiss and to compel arbitration. On November 30, 2011, McCutcheon filed a response in opposition. Driftwood filed a reply on December 6, 2011.

Plaintiff brings this action against Driftwood for: negligence; negligence per se; breach of contract; fraud and misrepresentation; violation of the South Carolina Unfair Trade Practices Act; negligence – wrongful death; and negligence – survivorship. The dispute arises from Carmela McCutcheon's care while residing at the Driftwood Rehabilitation and Nursing Center in Charleston.

Upon her admittance into the facility, Carmela McCutcheon and Driftwood entered into an Admissions Agreement and an Arbitration Agreement. Def.'s Mot. 2. These documents were signed by Elijah McCutcheon, Carmela McCutcheon's husband, as Carmela's "'Durable Power of Attorney for Health Care' / 'Legal Guardian' / 'Responsible Party.'" See id. Ex. A. The Arbitration Agreement provided in part,

> **[I]n the event of any controversy or dispute between the parties** arising out of or relating to Health Care Center's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Health Care Center, or to the provisions of care or services to Resident, included 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/Media Rules.
>
> . . .
>
> **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.
>
> . . .
>
> **By his/her signature below, the executing party represents that he/she has the authority to sign on the Resident's behalf so as to bind the Resident as well as the Representative.**

Id. (emphasis added).

II. DISCUSSION

Driftwood moves to compel arbitration under Section 4 of the Federal Arbitration Act ("FAA"), which provides in part that a "party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . [A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 23-24 (1983). Section 2 of the FAA states that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

A court shall compel arbitration pursuant to the FAA if a party demonstrates:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute.

Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotation marks omitted). Plaintiff only contests the second and third elements of the four-part test, arguing that the dispute is not arbitrable because there is no valid and enforceable arbitration agreement, and that the FAA does not apply because the transaction does not "in fact" involve interstate or foreign commerce. While federal law governs the arbitrability of disputes, state law governs issues regarding contract formation. Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005). Because this case involves the question of whether the Arbitration Agreement was a valid contract, the court looks to South Carolina law, as the agreement was entered into in South Carolina and contemplated services to be rendered in South Carolina.

A. Existence of Enforceable Arbitration Agreement

Driftwood argues plaintiff should be equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon is bound to the agreement as a third party beneficiary. Plaintiff responds that the arbitration agreement is not enforceable.

1. Equitable Estoppel

First, Driftwood argues plaintiff should be equitably estopped from denying that Elijah McCutcheon had authority to bind Carmela McCutcheon. "[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 709 S.E.2d 54, 58 (S.C. 2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 443 S.E.2d 388, 391 (S.C. 1994). "[N]o 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); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("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.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 232 S.E.2d 20, 24 (S.C. 1977) ("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 instruments together. The theory is that the instruments are effectively one instrument or contract."). Plaintiff attempts to hold Driftwood liable for alleged breach of certain contractual terms while simultaneously denying the enforceability of other terms. Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff still takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. It would be inequitable, for example, to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of Carmela McCutcheon, but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Alternatively, Driftwood argues Carmela McCutcheon is an intended third party beneficiary and is therefore bound by 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., 611 S.E.2d 485, 488 (S.C. 2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 440 S.E.2d 890, 891 (S.C. Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co., 206 F.3d at 416-17 (emphasis added).

Carmela McCutcheon's care was the essential purpose of the agreement, as she is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Carmela McCutcheon as resident of the facility, and Driftwood as the caregiver. As such, Carmela McCutcheon was an intended beneficiary to the contract, and the court finds that the arbitration provision was binding on her and remains binding on her estate. See THI of S.C. at Columbia, LLC v. Wiggins, No 11-888, 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."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff argues the arbitration contract is unconscionable and should not be enforced. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 472 S.E.2d 242, 245 (S.C. 1996).

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 669 (S.C. 2007) (citation omitted).

Plaintiff argues the Arbitration Agreement is unconscionable because: it is not "geared towards achieving an unbiased decision by a neutral decision-maker"; Elijah McCutcheon was disadvantaged in terms of bargaining power and sophistication; and the clause stating that the agreement is governed by interstate commerce is inconspicuous and constitutes an element of surprise. Pl.'s Resp. 10-11. First, the law does not require that an arbitration agreement specifically state that the arbitrator will be neutral. Even though the Arbitration Agreement does not contain the terms "neutral" or "unbiased," it provides that, in the event the parties fail to agree on an arbitrator, the court will select one. See Def.'s Mot. Ex. A. In addition, the Arbitration Agreement here does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Driftwood alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). Next, any lack of sophistication on the part of Elijah McCutcheon does not overcome the fairness of the terms in the agreement itself. See

Munoz v. Green Tree Fin. Corp., 542 S.E.2d 360, 365 n.5 (S.C. 2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement."). Finally, the clause stating that the agreement is governed by interstate commerce was set in normal text, rather than obscured in smaller text or in a footnote. See Def.'s Mot. Ex. A. "[A] person who can read is bound to read an agreement before signing it," Munoz, 542 S.E.2d at 365, and the law generally presumes that a party to a contract has read and understood the contract's terms. Simpson, 644 S.E.2d at 670. The clause relating to interstate commerce did not constitute an unfair surprise. For these reasons, the court finds that the Arbitration Agreement was not unconscionable.[1]

B. Applicability of Federal Arbitration Act

Plaintiff argues that even if the Arbitration Agreement is enforceable, the FAA does not apply because the transaction between McCutcheon and Driftwood does not "in fact" involve interstate or foreign commerce. For an arbitration agreement to be subject to the FAA, it must involve interstate commerce. 9 U.S.C. § 2. "The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." Wiggins, No. 11-888, 2011 WL 4089435, at *1 n.3 (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273-74 (1995)). "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject

[1] Plaintiff also argues that an enforceable arbitration agreement does not exist because Elijah McCutcheon had neither apparent agency authority nor statutory authority to bind Carmela McCutcheon under the contract. Because the court holds that plaintiff is equitably estopped from denying the validity of the Arbitration Agreement, and that Carmela McCutcheon was a third party beneficiary and the Arbitration Agreement remains binding on her estate, the court need not reach plaintiff's additional arguments.

to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Def.'s Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Wood, 429 F.3d at 87 (emphasis added) (noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce"). Even without this stipulation in the Arbitration Agreement, the FAA still applies because the type of nursing home care involved here affects interstate commerce. Driftwood's Administrator, Jim Thomas, submitted an affidavit wherein he attested that food is supplied to Driftwood, located in South Carolina, by Sysco Corporation, which is headquartered in Texas. Def.'s Mot. Ex. E, ¶ 6. Thomas further stated that supplies used at Driftwood are purchased from manufacturers in California, Colorado, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Missouri, and Wisconsin. Id. at ¶¶ 7-13. These supplies must be shipped across state lines to reach Driftwood's facility. Finally, Driftwood participates in the federal Medicare and Medicaid programs. Id. at ¶ 14. The court finds this evidence sufficient to fulfill the interstate commerce requirement.

Plaintiff cites to Timms v. Greene, 427 S.E.2d 642 (S.C. 1993), as support for his argument that the transaction at issue does not involve interstate commerce. In Timms, the South Carolina Supreme Court found that an affidavit from the administrator of a health care center, in which the administrator averred that the center engaged in interstate commerce, was "insufficient to form the basis of the contract between the parties." Id. at

644. Timms is distinguishable from the present case, because the Arbitration Agreement signed by plaintiff specifically stated that the underlying transaction involves interstate commerce. Thus, the Arbitration Agreement "on its face evidences commerce." Id. The court finds that the FAA applies in this case.

III. CONCLUSION

For the foregoing reasons, the court **GRANTS** defendant's motion to compel arbitration.

The court dismisses this matter, but retains jurisdiction to select an arbitrator in the event that the parties cannot reach a mutual decision.

AND IT IS SO ORDERED.

DAVID C. NORTON
CHIEF UNITED STATES DISTRICT JUDGE

December 15, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
MACIE PRICE AS PERSONAL REPRESENTATIVE OF THE ESTATE OF MELVIN PRICE,	)	CASE NO. 2018-CP-42-01054
PLAINTIFF,	)	
vs.	)	
THI OF SOUTH CAROLINA AT MAGNOLIA MANOR INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN; THI OF SOUTH CAROLINA, LLC; AND NAKEHYA STANTON AS OWNER/MANAGER OF MAGNOLIA MANOR SPARTANBURG ,	)	**ORDER GRANTING DEFENDANT THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC'S MOTION TO DISMISS AND COMPEL ARBITRATION**
DEFENDANTS.	)	

This matter was before the Court on June 6, 2018 upon Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman's ("Magnolia" or "Defendant Magnolia") Motion to Dismiss and Compel Arbitration. Counsel of record for all pertinent parties were present including Perry M. Buckner, IV for Defendant Magnolia and Stefan B. Fielder for the Plaintiff. Having reviewed the submissions by counsel and heard all arguments advanced, the Court hereby **GRANTS** Magnolia's Motion and orders that this matter be compelled to arbitration in accordance with the below findings.

FACTUAL BACKGROUND

Plaintiff's decedent, Mr. Melvin Price, was admitted to Magnolia in February of 2015. Mr. Price was legally blind at the time of his admission with a history of multiple strokes and was recovering from a recent hospitalization. He was admitted to Magnolia with the assistance and aid of his wife of nearly 50 years, the named Plaintiff, Mrs. Macie Price. Prior to his admission, Mr. Price entered into a number of contracts with Magnolia. The contracts were each signed by the Plaintiff, as representative of Mr. Price, on February 16, 2015. These executed contracts included an Admission Agreement and Arbitration Agreement. Based on the Admission Agreement and pursuant to the agreements set forth therein, Mr. Price was admitted to Magnolia Manor and received skilled nursing care and treatment. During his stay at Magnolia, Mr. Price accepted the benefits of the contracts entered into on his behalf by his representative, Macie Price. Such benefits included, but are not limited to, Mr. Price's admission to Magnolia and his receipt of the skilled nursing care provided therein. Mr. Price never challenged any agreement's validity during his lifetime nor did any representative challenge any agreement until the Arbitration Agreement was challenged by Plaintiff in response to the instant Motion. Notably, Plaintiff does not assert that the Admissions Agreement is invalid or that Mr. Price entered Magnolia unwillingly or without consent.

Upon admission, Mrs. Price explicitly represented that she was authorized to admit Mr. Price to Magnolia and execute necessary documents on his behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admissions Agreement states that all information provided, including her authority to bind her husband to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor as the "Facility," Mr. Price as the "Resident," and Mrs. Price as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

> 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

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ROA 172

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 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.

Regarding Mrs. Price's authority to sign on behalf of her husband, 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 as well as the Representative.

The Arbitration Agreement was executed by Macie Price as "Representative" and Darlene Lindsay, the Admissions Director of the Facility, on behalf of Magnolia Manor. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court finds that matter should be dismissed and compelled to arbitration.

LAW/ANALYSIS

I. POLICY IN FAVOR OF ARBITRATION

At the outset, this Court is mindful of the strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

This Court finds that the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014). Under the FAA, any written provision in "a contract evidencing a transaction involving commerce" providing that disputes be settled by arbitration is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

> 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.*

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9 U.S.C. § 4 (emphasis added). "By its terms, the act 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).

ROA 174

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. This Court finds that Defendant Magnolia has demonstrated both.

III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

A. The Plain Language of the Agreement Binds Plaintiff

This Court finds that the Plaintiff represented herself to staff and admissions personnel at Magnolia as her husband's representative, with the authority to sign documents on Mr. Price's behalf and bind Mr. Price and the Facility pursuant to those documents.[1] It was clearly Mrs. Price's intention to bind Mr. Price (and herself, as personal representative) according to the terms of the Admissions Agreement and Arbitration Agreement and Mr. Price evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

B. Plaintiff Possessed the Apparent and Inherent Authority to Bind Mr. Price under the Arbitration Agreement, and Plaintiff Should be Estopped from Denying the Validity of the Arbitration Agreement

a. Agency Relationship / Apparent Authority / Inherent Agency

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,

[1] "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of Resident." (emphasis added).

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, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.)

This Court finds the records presented to it show that Plaintiff held herself out as an agent for her husband without any indication to the contrary. Under the record before this Court, an apparent agency relationship has been fairly demonstrated such that the Arbitration Agreement should be deemed enforceable. While Plaintiff's counsel has asserted that Mr. Price was capable of making his own decisions, no evidence was offered that Mr. Price objected or opposed the execution of any documents whatsoever. To the contrary, these facially valid contracts remained in effect for years without any formal or informal challenge by him or the Plaintiff. While the arbitration agreement is now being formally challenged, Mr. Price does not assert that the Admissions Agreement was invalid or that his wife lacked authority to admit him to Magnolia. *See, Dean v. Heritage Healthcare of Ridgeway*, LLC, 2014 WL 11802563, at *4 (S.C. Com. Pl. September 8, 2014)("To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency."); *See also, Fuller v. Eastern Fire & Cas. Ins Co* 240 S.C.75, 86, 124 S.E.2d 602, 608 (1962)(holding "[r]atification 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 in his behalf by another who at the time assumed to act as his agent.").

Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct…." *See,* §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds)*(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r,* 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.,* 826 F.2d 581, 591 (7th Cir. 1987)("[t]he powers of an agent are, prima facia, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.")(*citing Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as Magnolia, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether the Plaintiff was authorized to admit her husband to Magnolia. To the extent Plaintiff takes issue with her own authority to bind her husband to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit Mr. Price as a resident at Magnolia. Magnolia should not be disadvantaged for acting in accordance with the express representations of Plaintiff regarding her authority.

The Court finds *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007) as additional persuasive authority, as the facts are substantially similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf).

Applying *Carraway* to the instant facts, Plaintiff executed various admission documents on behalf of her husband including the Arbitration Agreement. She executed these documents in her capacity as "representative." Just as in *Carraway*, the Arbitration Agreement provides that signing was on behalf of the resident. It was Magnolia's reasonable and justified belief that Mrs. Price was her husband's authorized representative and had the authority to execute the documents on his behalf.

b. Agency by Estoppel

"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*, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In the case at bar, Magnolia had no knowledge or reason to believe that Plaintiff was not Mr. Price's authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. Magnolia relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Defendant Magnolia for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

THL

C. **The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration**

a. **Merger**

As additional grounds to compel arbitration, the Court finds the Admissions Agreement and Arbitration Agreement should be construed together and merged such that the Plaintiff is bound to arbitrate her claims against the Facility. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement* . . . or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. This Court finds that the Arbitration Agreement and the Admission Agreement were both signed by Mrs. Price on behalf of her husband on the same day, at the same time, upon Mr. Price's admission to Magnolia.

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. Gernqross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

The United States District Court for the District of South Carolina in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 (D.S.C. Dec. 15, 2011). Indeed, this very Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admissions agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Accordingly, Mr. Price, by and through the acts of his representative, the Plaintiff, and Magnolia, both contemplated that the terms of the agreement to admit Mr. Price were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Price's residency at Magnolia Place); the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admissions Agreement should be construed as part and parcel of the same agreement between the parties.

b. Equitable Estoppel of Merged Agreement

This Court finds the doctrine of equitable estoppel applies to the instant case such that Plaintiff cannot dispute the validity of the Arbitration Agreement. "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)).

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).[2]

c. ***Coleman* and *Hodge* are Distinguishable**

To the extent Plaintiff argues the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544,

[2] *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).

813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

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 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 admissions 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.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not

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state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements "were 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). Specifically, the Admissions and Arbitration Agreements were executed for the same parties, by Plaintiff, on her husband's behalf, and the Facility on February 15, 2016. The documents were signed by the exact same people: Macie Price as representative for her husband and by Darlene Lindsay, Admissions Director for Magnolia, as representative for Magnolia. The documents were signed for the same purpose and transaction of establishing Mr. Price's residency at the skilled nursing facility. While the Admissions Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Coleman* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman* and *Hodge* are not controlling Plaintiff's claims should be compelled to arbitration pursuant to the contract.

This Court recognizes that the agreements are in fact separately signed and have different terms and provisions. That is to be expected. However, unlike *Coleman* and *Hodge*, the documents are not sufficiently separate such that the presumption of merger can be overcome.

D. The Arbitration Agreement is Not Unconscionable

Lastly, this Court finds that the Arbitration Agreement is unconscionable. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. *See McCutcheon v. THI of S.C. at Charleston, LLC, supra*, at 6* - *8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

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 providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold

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2018 AUG 13 AM 11:51
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SPARTANBURG COUNTY

lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" (emphasis in original).

Since Mr. Price's representative and agent, Mrs. Price, had a duty to read and understand the documents she was signing on Mr. Price's behalf under proper authority, she also had a duty to communicate those terms to Mr. Price as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Price was unaware of the terms of the Arbitration Agreement that Mrs. Price voluntarily and with proper authority executed on her husband's behalf.

CONCLUSION

For the reasons set forth herein, the Defendant's Motion to Compel is hereby **GRANTED** and this matter is compelled to arbitration.

IT IS SO ORDERED!

Honorable Roger E. Henderson
Presiding Judge

Chesterfield
~~Spartanburg~~, South Carolina

August 7, 2018

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EXHIBIT

5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTERFIELD	)	CASE NO. 2019-CP-13-00308
JOSEPHINE SPEARS,	)	
as power of attorney for Howard Spears,	)	
	)	
Plaintiff,	)	
	)	**ORDER GRANTING DEFENDANT'S**
vs.	)	**MOTION TO COMPEL ARBITRATION**
	)	
REHAB CENTER OF CHERAW, LLC,	)	
d/b/a Chesterfield Convalescent Center,	)	
	)	
Defendant.	)	

This matter is before the Court on motion of Defendant, Rehab Center of Cheraw, LLC, d/b/a Chesterfield Convalescent Center (the "Facility"), to compel arbitration (the "Subject Motion").[1] For the reasons set forth below, the Subject Motion is GRANTED.

BACKGROUND

Plaintiff, Josephine Spears ("Plaintiff" or "Mrs. Spears"), is, and at all relevant times has been, married to Howard Spears ("Mr. Spears"). She has brought this action in her capacity as Mr. Spears's attorney-in-fact, asserting claims for damages arising out of alleged deficiencies in the care/treatment provided to Mr. Spears when he was a resident of the Facility.[2]

When Mr. Spears was admitted to the Facility in late January 2016, Mrs. Spears signed a number of documents on his behalf, including an Admission Agreement and the Arbitration Agreement that the Subject Motion seeks to enforce. Although she represented to the Facility that she had authority to sign for her husband, Mrs. Spears did not have power of attorney for Mr. Spears

[1] The Subject Motion was filed on June 21, 2019. It was heard on September 25, 2019, at the Chesterfield County Courthouse, with both parties represented by counsel. Having been duly heard and considered, it is ripe for decision.

[2] The Facility is a skilled nursing facility.

at the time. It was not until late February 2016, approximately halfway through Mr. Spears's residency at the Facility,[3] that he executed a durable power of attorney in favor of Mrs. Spears.

ANALYSIS

The issue before the Court comes down to this: Is the Arbitration Agreement (which Mrs. Spears signed for Mr. Spears) enforceable against Mr. Spears (or, more precisely, Plaintiff, i.e., Mrs. Spears, as Mr. Spears's attorney-in-fact) even though it was not signed by Mr. Spears himself? The Court concludes that, yes, the Arbitration Agreement is enforceable against Plaintiff. The Court's reasoning is as follows.

1. The Arbitration Agreement is governed by the FAA[4].

Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995). 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.

Moreover, our state Supreme Court has 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). Clearly, the Arbitration Agreement is governed by the FAA.[5]

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3 Mr. Spears's residency ended in March 2016.

4 The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

5 Indeed, neither party disputes the FAA's applicability here.

2. The Arbitration Agreement must be placed on equal footing with all other contracts.

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”[6] 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). “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)); *see also* 9 U.S.C. § 2 (providing 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.”). The FAA requires that the Court place the Arbitration Agreement “on *equal footing with other contracts* . . . .” *Concepcion* at 339 (emphasis added).

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6 *Allied–Bruce*, 513 U.S. at 270.

3. The Arbitration Agreement is valid on its face.

The Court finds that the Arbitration Agreement is valid on its face. In other words, there is nothing within the four corners of the document itself that appears out of order. It sets forth the materials terms of an agreement to arbitrate. It expressly attests to Mrs. Spears's authority to sign on behalf of Mr. Spears. It is duly signed by Mrs. Spears and the Facility's director of admissions.

The Court recognizes that Mrs. Spears has filed an affidavit in opposition to the Subject Motion, wherein she states (contrary to her representation in the Arbitration Agreement itself) that she did not have authority to sign on Mr. Spears's behalf. She also suggests that the Facility should have inquired further into her authority to sign for Mr. Spears and should have explained to her what an arbitration agreement was. To be clear, in observing that the Arbitration Agreement is valid on its face, the Court is not finding that Mrs. Spears in fact had actual or apparent authority to the sign the Arbitration Agreement on Mr. Spears's behalf.[7] The Court, however, is rejecting the notion that the Facility was obligated to investigate Mrs. Spears's authority or to explain the Arbitration Agreement's terms to her.

There is no question here as to Mrs. Spears's competency. Indeed, she expressly attests to her competency in her aforementioned affidavit. Besides that, the fact of her competency is implicit in her service as Mr. Spears's attorney-in-fact. She is thus "presumed to have read, understood, and assented to [the] terms" of the Arbitration Agreement,[8] including, of course, those whereby she represented herself to the Facility as having authority to act on Mr. Spears's behalf.

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[7] As further explained below, the Court's decision to grant the Subject motion is based on estoppel, not on a finding that Mrs. Spears had actual or apparent authority to bind Mr. Spears at the time she signed the Arbitration Agreement.

[8] *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.").

Moreover, there is an implied covenant of good faith and fair dealing in every contract,[9] and Mrs. Spears is no less bound by this covenant than the Facility. Further still, to require anything more from the Facility as a contracting party just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *Concepcion* at 339.

4. Plaintiff's claims 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 against the Facility. Moreover, even were there "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) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273–74 (4th Cir. 1997)) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted); *see also Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes.").

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9 *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

5. The Arbitration Agreement is enforceable against Plaintiff.

In opposition to the Subject Motion, Plaintiff argues that the Arbitration Agreement is not enforceable against Mr. Spears because he himself did not sign it and, at the time Mrs. Spears signed it for him (January 25, 2016), she did not have authority to do so. In furtherance of this argument, Plaintiff points to the fact that it was not until February 23, 2016,[10] that Mr. Spears gave Mrs. Spears power of attorney.[11]

"South Carolina," however, "has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "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

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[10] The Court would note here that, while the power of attorney provides no basis to find that Mrs. Spears was authorized to sign the Arbitration Agreement for Mr. Spears when she signed it, the power of attorney does confirm Mr. Spears's competency through at least the date of its execution, which was approximately one month into his residency. *See In re Thames*, 344 S.C. 564, 570, 544 S.E.2d 854, 857 (Ct. App. 2001) ("[I]n order to execute or revoke a valid power of attorney, *the principal must possess contractual capacity*.") (emphasis added).

[11] Plaintiff also argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the "Residents Bill of Rights"), gave Mrs. Spears authority to sign the Arbitration Agreement on Mrs. Spears's behalf; however, these arguments are of no moment because neither the Subject Motion nor this order relies on the AHCCA or the Resident's Bill of Rights as having granted Mrs. Spears any authority to sign the Arbitration Agreement for Mr. Spears.

there was a merger."). The Court finds that the Arbitration Agreement is enforceable against Plaintiff based on estoppel.

"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." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

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,"[12] as the Admission Agreement and the Arbitration Agreement were here, there is evidence to upset the presumption of merger. This is a question of the parties' intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). "[I]n attempting to ascertain th[e] [parties'] intention," the Court "endeavor[s] 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 this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances giving rise to the merger presumption (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The*

[12] *Id.* at 355, 755 S.E.2d at 455.

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.

The cases Plaintiff cites in opposition to merger are inapposite. The "Entire Agreement" clause in the subject Admission Agreement expressly states that other admissions materials are deemed a part of it. While it is true that the Arbitration Agreement was not required for Mr. Spears's admission to the Facility, all this means is that it did not have to be agreed to for Mr. Spears 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 in fact agreed to. In other words, 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. Spears's 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.

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). The Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitrations Agreement's) sole reason for being.

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. To point to such things is 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.

Moreover, 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. Again, where, as here, the instruments in question are signed at the same time, by the same parties, for the same purpose, in the course of the same transaction, merger is presumed. 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 at best ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention—is to allow the exception to devour the rule.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement under the "direct benefits" test our Supreme Court endorsed in *Wilson*, 426 S.C. 326, 827 S.E.2d 167. 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 it is now contended that Plaintiff is estopped from refusing to comply with the Arbitration Agreement here. *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). "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.'" *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 418 (4th Cir. 2000)).

Without question, Mr. Spears received direct benefits from the Admission Agreement in the form of his admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein.[13] Plaintiff cannot now deny the validity of the Arbitration Agreement with which the Admission Agreement merged.

[13] To deny Mr. Spears's receipt of any benefit one would have to accept the absurd premise that every single aspect of his residency—every instance of care/treatment, every meal, all day every day—was deficient. Plaintiff herself does not even suggest this.

CONCLUSION

For the reasons set forth herein, the Subject Motion is hereby GRANTED, this action is STAYED, and this matter is compelled to ARBITRATION.

IT IS SO ORDERED.

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ROGER E. HENDERSON
Presiding Judge – Fourth Judicial Circuit
Court of Common Pleas – Chesterfield County

Chesterfield, South Carolina
Dated: _________________

Chesterfield Common Pleas

Case Caption: Josephine Spears , plaintiff, et al VS Rehab Center Of Cheraw Llc , defendant, et al

Case Number: 2019CP1300308

Type: Order/Other

So Ordered

s/Roger E. Henderson 2754

Electronically signed on 2020-01-09 18:09:56 page 12 of 12

EXHIBIT

6

.STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
ROBERT ABRAMS,	)	CASE NO. 2010-CP-42-6861
PLAINTIFF,	)	
vs.	)	
FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC D/B/A MAGNOLIA MANOR-INMAN; THI OF SOUTH CAROLINA AT MAGNOLIA MANOR-INMAN, LLC D/B/A MAGNOLIA MANOR-INMAN; ROBERT CROOKS; DALE LYLES; AND CAROL CLARK,	)	**ORDER**
DEFENDANTS.	)	

FILED 2012 JUN 25 AM 11:47

Date of Hearing:	July 21, 2011
Date of Re-hearing:	March 13, 2012
Attorneys for Plaintiff:	Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant:	Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark, and a Motion to Stay on behalf of Defendant Fundamental Long-Term Care Holdings, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Intentional and Negligent Infliction of Emotional Distress, Breach of Fiduciary Duty and Unjust Enrichment, pursuant to the Plaintiff's residency at the Magnolia Manor-Inman nursing facility. Plaintiff was a resident of the Magnolia Manor-Inman facility from approximately November 23, 2008, to January 23, 2009. Pursuant to Plaintiff's admission to Magnolia Manor-Inman, his wife Rebecca Abrams, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement.

The Arbitration Agreement defines Magnolia Manor-Inman as the "Health Care Center," Robert J. Abrams as the "Resident" and Rebecca Abrams as "Representative." Mot. Exh. A. The relevant provisions of the Arbitration Agreement state the following:

> It is further understood that in the event of any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, 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.

Id. The Arbitration Agreement further states that:

> 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.

Id. Regarding Rebecca Abrams authority to sign on behalf of her husband, 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 as well as the Representative.

The Arbitration Agreement was executed by Rebecca Abrams as "Representative" and the admissions director at Magnolia Manor-Inman as the "Authorized Agent for Healthcare Center."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."); 9 U.S.C. §2. The Court must "decide whether there is an agreement to arbitrate according to common law principles of contract law" and "apply ordinary state-law principles that govern the formation of contract." Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "The policy of the United States and this State is to favor arbitration of disputes." Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the "scope of arbitrable issues" should be resolved in favor of arbitration.

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a "broad principle of enforceability;" arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are "placed upon the same footing as other contracts." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party's request to arbitrate an issue "unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA]." Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court 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 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). "The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate

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95

commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce"). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Manor-Inman's Administrator, Dale Lyles, submitted an affidavit wherein he attested that medical supplies used in the care of residents and personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. D. These supplies must be shipped across state lines to reach Magnolia Manor-Inman's facility. Dale Lyles further attested that part of Mr. Abrams stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. Id. These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that

P10 / 16

"[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Exh. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

> We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"- that is, "within the flow of interstate commerce," . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a "substantial effect on interstate commerce." **Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice ... subject to federal control." Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Manor-Inman.

1. Equitable Estoppel

Magnolia Manor-Inman argues the Plaintiff should be equitably stopped from denying that Rebecca Abrams had authority to bind Robert Abrams.

"[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "[N]o 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); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("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.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) ("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 instruments together. The theory is that the instruments are effectively one instrument or contract.").

Plaintiff admits he was a resident of Magnolia Manor-Inman pursuant to the terms of the Admissions Agreement. (See Complaint ¶34: Plaintiff states he "resided at the [] facility pursuant to the terms of the admissions agreement.") Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Rebecca Abrams had authority to sign the Admissions Agreement on behalf of Robert Abrams, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court's denial of the defendant's motion to compel arbitration, the Court stated:

> The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

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19

> **substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.**

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For tbese reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

2. Third Party Beneficiary

Magnolia Manor-Inman alternatively argues that Robert Abrams is a third-party beneficiary and is therefore bound by 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). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, ratber than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

p10

Robert Abrams' care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Robert Abrams as resident of the facility, and Magnolia Manor-Inman as the caregiver. As such, Robert Abrams was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("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."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

3. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable. "[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his 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

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aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, 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.**" Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Rebecca Abrams does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Abrams in arbitration, and as such Robert Abrams is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Rebecca Abrams was bound to read, indicate she understood and agreed that she was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Manor-Inman alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

4. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Abrams' further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of "other consideration as a precondition of admission." This argument too is unpersuasive.

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p. 13

In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

5. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include "any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, or to the provisions of

p. 14

care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . ." Mot. Exh. A. Furthermore, the FAA's "text includes no exception for personal-injury [] claims" but rather "requires courts to enforce the bargain of the parties to arbitrate." Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff's Complaint fall under the terms of the Arbitration Agreement.

6. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff's Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

> This Agreement is made between Magnolia Manor-Inman ("Health Care Center"), its agents, employees and servants, and Robert J. Abrams ("Resident") or Rebecca Abrams [as "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.

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Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Dale Lyles and Carol Clark were members of Magnolia Manor-

p. 15

Inman's governing body. Further, it appears Dale Lyles was the facility administrator and Carol Clark was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Dale Lyles and Carol Clark are all agents of Magnolia Manor-Inman pursuant to their roles as members of the governing body. Further, Dale Lyles and Carol Clark are employees of Magnolia Manor-Inman. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark. The Court **STAYS** the matter as to the remaining Defendant, Fundamental Long-Term Care Holding, LLC, until the arbitration process has been completed. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark are **GRANTED** and the matter is **STAYED** for the remaining Defendant until arbitration has been completed.

IT IS SO ORDERED.

Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

RLC p.17
10-CP-42-6861
6/22/12

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	SEVENTH JUDICIAL CIRCUIT
FRANK A. CAMPSEN BY AND THROUGH HIS ATTORNEY-IN-FACT LARRY F. CAMPSEN, PLAINTIFFS, vs. FUNDAMENTAL LONG-TERM CARE HOLDINGS, LLC; FUNDAMENTAL CLINICAL CONSULTING, LLC; FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF BALTIMORE, INC.; THI OF SOUTH CAROLINA, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT SPARTANBURG, LLC D/B/A MAGNOLIA PLACE AT SPARTANBURG; EDWARD WARREN, MD; NETWORK GERIATRICS SERVICES, P.A.; ROBERT CROOKS; PATRICIA HARRIS; AND MARGARET KELLER, DEFENDANTS.	CASE NO. 2011-CP-42-0438 **ORDER**

Date of Hearing:	July 21, 2011
Date of Re-hearing:	March 13, 2012
Attorneys for Plaintiff:	Gary W. Poliakoff and Raymond P. Mullman, Jr.
Attorneys for Defendant:	Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg ("Magnolia Place"), Robert Crooks, Patricia Harris and Margaret Keller, and Motions to Stay on behalf of Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical

Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Breach of Fiduciary Duty and Unjust Enrichment, pursuant to Frank A. Campsen's residency at the Magnolia Place nursing facility. Mr. Campsen was a resident of the Magnolia Place facility from approximately October 21, 2009, to December 20, 2009. Pursuant to Mr. Campsen's admission to Magnolia Place, Larry F. Campsen, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement. Frank Campsen had previously designated Larry F. Campsen as his General Durable Power of Attorney and Healthcare Power of Attorney, and given him authority to enter into agreements on his behalf. Mtn. Exh. D.

The Arbitration Agreement defines Magnolia Place as the "Facility," Frank A. Campsen as the "Resident" and Larry Campsen as "Resident's Durable Power of Attorney for Healthcare" and "Representative." Id. The relevant provisions of the Arbitration Agreement state the following:

> It is further understood that in the event of any controversy or dispute . . . 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.

Id. The Arbitration Agreement further states that:

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p2

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.

Id. Regarding Larry Campsen's authority to sign on behalf of Frank Campsen, 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 as well as the Representative.

The Arbitration Agreement clearly sets forth the parties to be bound by the Agreement:

> 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.

Id. The Arbitration Agreement was executed by Larry Campsen as "Representative" of Frank Campsen and by the "Authorized Agent of Facility."

II. DISCUSSION

A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability

ROA 219

of an arbitration clause."); 9 U.S.C. §2. The Court must "decide whether there is an agreement to arbitrate according to common law principles of contract law" and "apply ordinary state-law principles that govern the formation of contract." Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "The policy of the United States and this State is to favor arbitration of disputes." Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the "scope of arbitrable issues" should be resolved in favor of arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a "broad principle of enforceability;" arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are "placed upon the same footing as other contracts." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party's request to arbitrate an issue "unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA]." Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves

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p5

interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). "The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely 'affecting' interstate commerce would be covered by the statute." THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. "Congress' Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that "the services and reimbursement thereof effects a transaction that involves interstate commerce." Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider "the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce"). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Place's Business Office Manager, Lynn Henderson, submitted an affidavit wherein she attested that medical supplies used in the care of residents and personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. F. These supplies must be shipped across state lines to reach Magnolia Place's facility. Timothy Johnson further attested that part of Mr. Campsen stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. Id. These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that "[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Ex. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037

(2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

> We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"- that is, "within the flow of interstate commerce," . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a "substantial effect on interstate commerce." **Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice ... subject to federal control." Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Place.

1. Larry Campsen As Personal Representative of the Estate of Frank Campsen

In pursuing this action, Larry Campsen acts as personal representative of Frank Campsen's estate. Under South Carolina law, "a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death." S.C.Code

Ann. § 62–3–703. Thus, Larry Campsen is bound in his capacity as personal representative if Frank Campsen would have been bound immediately prior to his death.

2. Equitable Estoppel

Magnolia Place argues the Plaintiff should be equitably stopped from denying that Larry Campsen had authority to bind Frank Campsen.

"[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "[N]o 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); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("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.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) ("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

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instruments together. The theory is that the instruments are effectively one instrument or contract.").

Plaintiff admits Frank Campsen was a resident of Magnolia Place pursuant to the terms of the Admissions Agreement. (See Amended Complaint ¶37: Plaintiff states Frank Campsen "resided at the [] facility pursuant to the terms of the admissions agreement.") Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Larry Campsen had authority to sign the Admissions Agreement on behalf of Frank Campsen, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in <u>American Bankers Ins. Group v. Long</u>, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court's denial of the defendant's motion to compel arbitration, the Court stated:

> The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

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> **substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.**

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

3. Third Party Beneficiary

Magnolia Place alternatively argues that Frank Campsen is a third-party beneficiary and is therefore bound by 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). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

Frank Campsen's care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Frank Campsen as resident of the facility, and Magnolia Place as the caregiver. As such, Frank Campsen was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("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."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

4. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

> In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his 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 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.

Mot. Exh. A. Furthermore, 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.**" Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Larry Campsen does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Plaintiff in arbitration, and as such Plaintiff is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Larry Campsen was bound to read, indicate he understood and agreed that he was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Place alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

5. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Plaintiff further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of "other consideration as a precondition of admission." This argument too is unpersuasive.

RDL /14

In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

6. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include "any controversy or dispute . . . relating in any way to Resident's stay at Facility, or to the provisions of care or

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8/15

services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . ." Mot. Exh. A. Furthermore, the FAA's "text includes no exception for personal-injury [] claims" but rather "requires courts to enforce the bargain of the parties to arbitrate." Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff's Amended Complaint fall under the terms of the Arbitration Agreement.

7. Defendants have not Waived their Right to Arbitrate

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff's Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

D. Defendants Magnolia Place, Robert Crooks, Patricia Harris and Margaret Keller Have Standing to Assert Arbitration

The express written language of the Arbitration Agreement indicates the following:

> This Agreement is made between Magnolia Place at Spartanburg ("Facility"), its agents, employees and servants, and Frank A. Campsen ("Resident") or Larry Campsen [as "Resident's Durable Power of Attorney for Health Care" and "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.

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Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Patricia Harris and Margaret Keller were members of Magnolia Place's governing body. Further, it appears Patricia Harris was the facility administrator and

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16

Margaret Keller was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Patricia Harris and Margaret Keller are all agents of Magnolia Place pursuant to their roles as members of the governing body for the purposes of the Arbitration Agreement. Further, Patricia Harris and Margaret Keller are employees of Magnolia Place for the purposes of the Arbitration Agreement. As such, each individual has a right to assert the terms of the Arbitration Agreement.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller. The Court **STAYS** the matter as to the Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

It is therefore

ORDERED that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller are **GRANTED** and the matter is **STAYED** for the remaining Defendants until arbitration has been completed.

IT IS SO ORDERED.

Honorable Roger L. Couch
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

p 18
11-CP-42-438
6/22/12

EXHIBIT

8

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASES NO. 2021-CP-10-01437 & -02477

WILLIAM HAYNES,
as Personal Representative of the
Estate of Elizabeth Varner,

Plaintiff,

vs.

THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a Riverside Health and Rehab,

Defendant.

WILLIAM HAYNES,
as Personal Representative of the
Estate of Elizabeth Varner,

Plaintiff,

vs.

FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC; and JERROLYN MONTGOMERY-SMALLS,

Defendants.

ORDER GRANTING MOTIONS TO COMPEL ARBITRATION AND RELATED MOTIONS TO STAY

This matter is before the Court on four motions (collectively, the "Subject Motions"): one motion in Case 1437[1], namely, the Facility's[2] motion to compel arbitration, and three motions in

[1] "Case 1437" is *Haynes v. THI of South Carolina at Charleston, LLC*, Case No. 2021-CP-10-01437.

[2] The "Facility" is THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, the defendant in Case 1437.

Case 2477[3], namely, Ms. Montgomery-Smalls'[4] motion to compel arbitration and FAS[5] and FCOS's[6] motions to stay. All of the Subject Motions were filed on October 4, 2021, and they were all heard together on February 10, 2022, with all parties' respective counsel appearing before the Court via WebEx.

Chief among the Subject Motions are the Facility and Ms. Montgomery-Smalls' substantively identical motions to compel arbitration of the claims asserted against them in Case 1437 and Case 2477, respectively (collectively, the "Motions to Compel Arbitration"). Secondary to those motions are the substantively identical motions of FAS and FCOS to stay Case 2477 pending the final outcome of the Motions to Compel Arbitration and the arbitration proceedings they seek to compel (collectively, the "Motions to Stay"). After careful consideration, the Court GRANTS the Subject Motions. Its reasoning is set forth below.

I.

BACKGROUND

The Facility is a skilled nursing facility. With the help of her son and daughter-in-law, William Haynes ("William") and Kim Haynes ("Kim"), respectively, Elizabeth Varner ("Ms. Varner") was admitted as a resident of the Facility on May 20, 2019. Kim handled the paperwork in conjunction with Ms. Varner's admission, which included an Admission Agreement and an Arbitration Agreement that Kim signed on Ms. Varner's behalf.

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[3] "Case 2477" is *Haynes v. Fundamental Administrative Services, LLC*, Case No. 2021-CP-10-02477.

[4] "Ms. Montgomery-Smalls" is Jerrolyn Montgomery-Smalls, one of the defendants in Case 2477.

[5] "FAS" is Fundamental Administrative Services, LLC, one of the defendants in Case 2477.

[6] "FCOS" is Fundamental Clinical and Operational Services, LLC, one of the defendants in Case 2477.

By her signature on the Arbitration Agreement, Kim expressly "represent[ed] that . . . she ha[d] authority to sign on [Ms. Varner's] behalf so as to bind [her] as well as [herself]." And, indeed, pursuant to a Durable Financial Power of Attorney executed March 25, 2018 (the "Power of Attorney"), Kim was Ms. Varner's secondary agent. The Power of Attorney, which was effective "[i]mmediately upon [its] execution" and expressly included the power to "[s]ubmit to alternative dispute resolution," authorized Kim to exercise the powers it conferred to Ms. Varner's primary agent, William, in the event he was "unable or unwilling to serve." According to the affidavits they filed on February 8, 2022, on the day Ms. Varner was admitted to the Facility, Kim and William were initially together with the Facility's representative Chandra Bryant ("Ms. Bryant") in the room that was being assigned to Ms. Varner until Kim went with Ms. Bryant to another location (within the Facility) to sign the paperwork while William stayed behind to await Ms. Varner's arrival.

Plaintiff[7] filed Case 1437 and Case 2477 on March 25, 2021, and June 11, 2021, respectively, asserting claims arising out of alleged deficiencies in Ms. Varner's care/treatment at the Facility. As for the relationship between the subject matter of the two cases, although Plaintiff ended up withdrawing the motion, his motion to consolidate (filed in Case 2477 on August 16, 2021) states that Case 1437 and Case 2477 "concern the same underlying facts and have factual and legal questions in common."

Defendants[8] timely answered the respective lawsuits, subject to and without waiving any right to compel the matter to arbitration, denying the liability Plaintiff alleged and raising a number of affirmative defenses.

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[7] "Plaintiff" is William in his capacity as personal representative of Ms. Varner's estate, who is the plaintiff in both Case 1437 and Case 2477.

[8] "Defendants" are the Facility, FAS, FCOS, and Ms. Montgomery-Smalls, collectively.

Citing the Arbitration Agreement, the Motions to Compel Arbitration ask the Court to compel Plaintiff's claims against the Facility and Ms. Montgomery-Smalls to arbitration. Citing the Motions to Compel Arbitration, the Motions to Stay ask the Court to stay Case 2477 pending the ultimate outcome of the Motions to Compel Arbitration, i.e., until arbitrability is finally determined and any arbitration proceedings resulting from that determination are themselves finally concluded.

II.

ANALYSIS

A. Re: the Motions to Compel Arbitration

The core question here is this: Is the Arbitration Agreement (which Kim signed for Ms. Varner) enforceable against Ms. Varner's estate (i.e., Plaintiff) even though it was not signed by Ms. Varner herself? For two reasons, the Court answers this question in the affirmative: (1) the Arbitration Agreement was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney, and (2) the Arbitration Agreement is enforceable against Plaintiff—or, more precisely, Plaintiff is estopped to deny that the Arbitration Agreement is enforceable—by virtue of merger and equitable estoppel. Thus, since Plaintiff's claims against the Facility and Ms. Montgomery-Smalls are clearly within the scope of the Arbitration Agreement, they should proceed in arbitration, not litigation. The Court's findings/analytical steps in reaching this conclusion follow.

1. Both state and federal policy favor arbitration.

There is a "strong South Carolina and federal policy favoring arbitration . . . ." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 877 (Ct. App. 2020); *see also Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 131 (2016) ("The policy of the United States and of South Carolina is to favor arbitration of disputes."). Indeed, "arbitration agreements are *presumed valid*." *Doe*, 430 S.C. at 607, 846 S.E.2d at 877 (emphasis added).

2. The Arbitration Agreement is governed by the FAA[9].

The Arbitration Agreement is governed by the FAA, not South Carolina's Uniform Arbitration Act, S.C. Code Ann. §§ 15-48-10 to -240 (the "SCAA"). 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.

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

9 The "FAA" is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

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).

3. 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"[10] 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.*

[10] *Allied–Bruce*, 513 U.S. at 270.

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).[11]

4. 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 Kim's signature on behalf of Ms. Varner, along with her express representation that she is authorized to sign for her.[12] It is countersigned by Ms. Bryant 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

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[11] To be clear, what the FAA requires is for arbitration agreements to be placed on *at least* equal footing with all other contracts under state law. As explained above, both state and federal policy *favor* arbitration. The FAA prohibits arbitration agreements from being singled out for *disfavored* treatment relative to other contracts, but it does not prohibit the *favored* treatment of arbitration agreements relative to other contracts.

[12] By virtue of her signature, Kim 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 her authority to act on Ms. Varner's 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 Kim is no less bound by this covenant than the Facility.

defined scope of disputes to binding arbitration[13] before an arbitrator who is either agreed upon by the 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.[14] 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 first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . 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 undermined by the fact that the Arbitration Agreement itself was not required for admission to the Facility.

[13] 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 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.").

[14] In this regard, the Court would note that the South Carolina ADR Rules, which do apply to the conduct of arbitration proceedings under the Arbitration Agreement, should not be confused with the SCAA, which, as addressed above (in explaining the applicability of the FAA), does not apply here.

But even assuming, *arguendo*, the first part of the test were somehow met, the second part (unreasonably oppressive terms) certainly is not. The Arbitration Agreement simply binds the parties (both sides) to resolve disputes via arbitration, which is something that is expressly favored as a matter of both state and federal policy. *Parsons*, 418 S.C. at 6, 791 S.E.2d at 131; *Doe*, 430 S.C. at 607, 846 S.E.2d at 877. 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. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668 ("In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is 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."

5. Plaintiff's claims are within the scope of the Arbitration Agreement.

Without question, Plaintiff's claims against the Facility and Ms. Montgomery-Smalls 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.").

6. The Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

The Arbitration Agreement expressly states that it not only covers the Facility itself but also the Facility's "agents, employees, and servants." Plaintiff's complaint in Case 2477 alleges that, "at all times relevant herein [Ms. Montgomery-Smalls] was the Administrator of [the Facility]." Accordingly, the Arbitration Agreement covers Plaintiff's claims against both the Facility and Ms. Montgomery-Smalls.

7. The Arbitration Agreement is valid and enforceable because it was properly signed by Kim for Ms. Varner pursuant to Kim's authority under the Power of Attorney.

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) ("A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.") (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). "[T]he holder of

[the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor." *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

The Power of Attorney was duly executed on March 25, 2018, and became effective immediately upon its execution. The Power of Attorney expressly included the power to "[s]ubmit to alternative dispute resolution." And while, as secondary agent, Kim's authority under the Power of Attorney was contingent upon William being "unable or unwilling to serve," this contingency came to pass due to William's desire to wait in Ms. Varner's room for her arrival. Accordingly, when she signed the Arbitration Agreement for Ms. Varner in May of 2019, Kim was properly acting within the scope of her authority under the Power of Attorney.

8. Plaintiff is precluded from denying the enforceability of the Arbitration Agreement because of merger and equitable estoppel.

Even though Ms. Varner is a nonsignatory to the Arbitration Agreement, i.e., even though she did not actually sign the Arbitration Agreement herself, it is nonetheless enforceable against her/her estate (i.e., Plaintiff).

"South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel." *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (confirming the validity of the general proposition of law on which the appellants based their merger/equitable estoppel argument: "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.").

Conceptually, the Facility and Ms. Montgomery-Smalls' merger/equitable estoppel argument is not about showing that the Arbitration Agreement is enforceable but about showing that Plaintiff is estopped to deny that the Arbitration Agreement is enforceable. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and, Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in place of Ms. Varner in bringing these actions as the personal representative of her estate) is estopped to deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged. Accordingly, counterarguments aimed at denying the Arbitration Agreement's enforceability (e.g., arguments based on a supposed lack of authority to sign the Arbitration Agreement on behalf of Ms. Varner) are beside the point and unavailing.

As explained below, the Court finds that the Arbitration Agreement is also enforceable against Plaintiff based on merger and equitable estoppel.

Merger

In *Coleman*, even though our Supreme Court found against merger on the *particular facts* then before it, the Court 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 AA under the Act, she is nevertheless equitably estopped to deny the AA'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 AAs 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).

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,"[15] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[16] evidence exists to upset the presumption in favor of merger, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties' 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," 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.

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15 *Id.* at 355, 755 S.E.2d at 455.

16 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 [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).

It must be remembered that, where, as here, the instruments in question (i.e., the Admission Agreement and the Arbitration Agreement) 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 this presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the circumstances that gave rise to the merger presumption in the first place (same time, parties, purpose, and transaction)—can support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *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.

Although the Admission Agreement does contain an "Entire Agreement" clause, it does not refer to the Arbitration Agreement as a separate contract but rather expressly states, "other Admissions materials . . . are made a part of this Agreement by reference herein." Clearly, 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) (recognizing "admission documentation" to include an arbitration agreement: "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). This directly contradicts the notion of any intended "separatedness" (in the parlance of the *Coleman* Court[17]) between the Admission Agreement and the Arbitration Agreement.

[17] 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).

While the Arbitration Agreement was not required for Ms. Varner's admission to the Facility, 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, which, without question, it was—and under the very circumstances (same time, parties, purpose, and transaction) that give rise to the presumption of merger. In other words, even though the Arbitration Agreement was not a *condition* of admission, it was certainly 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. Varner'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.

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). 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. Unlike the Admission Agreement, which theoretically could have stood on its own in the absence of the Arbitration Agreement—and, of course, had the Arbitration Agreement not been executed, it simply would not exist and no question of merger would have arisen to begin with—the Arbitration Agreement could not have stood on its own: It only makes sense together with, i.e., connected to, the Admission Agreement, which is its sole reason for being.

That the Admission Agreement and the Arbitration Agreement have their own titles and are separately paginated and signed admits of no reasonable inference of an intent contrary to merger. To point to such things is to do no more than to observe 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.

And even assuming, *arguendo*, there is some ambiguity in this regard, to fall back on the idea that it should be construed against the Facility as the drafter is uncalled for in this context. *Merger is the <u>default</u> position*, i.e., it is presumed, and this is so because of the confluence of a particular set of circumstances—the instruments at issue were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these stars align—same time, same parties, same purpose, same transaction—our law instructs the Court to consider and construe the instruments 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.

Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Plaintiff is equitably estopped from denying the validity of the Arbitration Agreement by virtue of the direct benefits test our Supreme Court endorsed in *Wilson*. *See* 426 S.C. at 340, 827 S.E.2d at 175 ("Under direct benefits estoppel, '[a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when [the nonsignatory] receives a direct benefit from a contract containing an arbitration clause.''") (quoting *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, 418 (4th Cir. 2000)); *id.* ("'In the arbitration context, the doctrine [of direct benefits estoppel] 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*.'") (emphasis in original) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601) (quoting *Int'l Paper*, 206 F.3d at 418).

The *Wilson* Court favorably discussed the application of the direct benefits test in the arbitration agreement context—the Court of Appeals having applied the test in the decision then before the *Wilson* Court on writ of certiorari, which test the Court of Appeals had earlier applied to find a nonsignatory estopped to deny the validity of an arbitration agreement in *Pearson*, 400 S.C. 281, 733 S.E.2d 597, and under which test the Facility and Ms. Montgomery-Smalls contend Plaintiff is estopped to deny the validity of the Arbitration Agreement here. *See 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).

Without question, Ms. Varner received direct benefits from the Admission Agreement throughout her residency at the Facility, including, without limitation, the room, board, care/treatment she received therein. To deny her receipt of such benefits is illogical and objectively unreasonable and would require wholly discrediting the entirety of her residency: every meal, every instance of care/treatment she received, essentially every moment at the Facility—even Plaintiff's complaints do not go nearly so far as that. Ms. Varner having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff cannot now deny the enforceability of the Arbitration Agreement with which the Admission Agreement merged.

9. Neither the Facility nor Ms. Montgomery-Smalls waived any arbitration rights.

Waiver is the voluntary relinquishment of a known right. When timely answering Plaintiff's complaints, the Facility and Ms. Montgomery-Smalls expressly reserved their arbitration rights. Moreover, Case 2477 was filed some three months after Case 1437, and by virtue of his now-withdrawn motion to consolidate, Plaintiff acknowledges that the cases "concern the same underlying facts and have factual and legal questions in common." There was no undue delay in moving to compel arbitration; nor was there any prejudice from any supposed delay; nor did either the Facility or Ms. Montgomery-Smalls make any use of the tools of litigation inconsistent with their arbitration rights.

B. Re: the Motions to Stay

The relationship between the Motions to Compel Arbitration and the Motions to Stay is such that the grant of the former requires the grant of the latter. *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 of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties."). But even assuming, *arguendo*, staying Case 2477 is not mandatory here, for the sake of judicial economy, of avoiding piecemeal litigation and the potential for inconsistent obligations, and of the orderly administration of its own docket, the Court exercises its discretion to impose such a stay. *See State v. Langford*, 400 S.C. 421, 435, 735 S.E.2d 471, 478 (2012) ("[A] court's power to hear and decide cases 'carries with it the inherent power to control the order of its business.'") (quoting *Williams v. Bordon's*, Inc., 274 S.C. 275, 279, 262 S.E.2d 881, 883 (1980)); *Episcopal Housing Corp. v. Federal 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 prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement."). Indeed, as stated in Plaintiff's now-withdrawn motion to consolidate Case 1437 with Case 2477, "[i]t is in the interest of efficiency and judicial economy to consolidate these actions as aforesaid and avoid duplicative discovery and trials." These interests likewise support staying Case 2477.

III.

CONCLUSION

The Subject Motions are hereby GRANTED. Case 1437 is stayed in favor of arbitration between Plaintiff and the Facility. Case 2477 is stayed in favor of arbitration between Plaintiff and Ms. Montgomery-Smalls, with Plaintiff's claims against FAS and FCOS stayed pending the ultimate outcome of arbitration between Plaintiff, the Facility, and Ms. Montgomery-Smalls.

IT IS SO ORDERED.

ROGER M. YOUNG, SR., Presiding Judge
Court of Common Pleas
Charleston County

Charleston, South Carolina

Dated:

Charleston Common Pleas

Case Caption:	William Haynes , plaintiff, et al VS Thi Of South Carolina At Charleston , defendant, et al
Case Number:	2021CP1001437
Type:	Order/Compel

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
James Boyd, Jr., Plaintiff, v. THI of South Carolina, LLC, d/b/a Magnolia Place-Greenville; Hunt Valley Holdings, LLC; THI of Baltimore, Inc.; Fundamental Clinical and Operational Services LLC; Fundamental Administrative Services, LLC; Fundamental Clinical Consulting, LLC; Leonard Grunstein Both Individually and as Owner/Operator of Magnolia Place; Murray Forman Both Individually and as Owner/Operator of Magnolia Place; and Rusty Flathmann Both Individually and as Employee/Manager of Magnolia Place, Defendants.	Case No: 2018-CP-23-01934 **ORDER**

This matter comes before the Court upon Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place of Greenville (misidentified in Plaintiff's Complaint and hereinafter referred to as "Defendants" or "Facility") Motion to Dismiss and Compel Arbitration. Defendants Fundamental Administrative Services, LLC ("Administrative Services") and Fundamental Clinical and Operational Services, LLC ("Operational Services") also filed motions to stay any requirement to file further responsive pleadings, motions, or discovery filed or served by Plaintiff until the Court has made a final decision regarding the validity of the arbitration agreement. The hearing was held June 13, 2018 in Greenville, South Carolina. Present on behalf of Plaintiff James Boyd, Jr. ("Boyd" or "Plaintiff" or "Mr. Boyd") was Stefan B. Feidler, Esq. of Anastopoulo Law Firm, LLC. Present on behalf of Defendant THI of South Carolina at Magnolia Place at Greenville d/b/a Magnolia Place of Greenville was Perry M. Buckner, IV, Esq. of Young Clement Rivers, LLP.

BACKGROUND

The Plaintiff was admitted to Defendants' nursing home facility on June 30, 2016 after he was rendered a quadriplegic in a car accident with an unidentified driver. Prior to his admission, Wilda Boyd – Plaintiff's Mother – entered into several contracts with the Defendants on behalf of the Plaintiff. The contracts were each signed by Wilda Boyd, as representative of the Plaintiff, during his admission. The executed contracts included an Admission Agreement and Arbitration Agreement. Both parties agree that the Plaintiff was oriented and competent at the time of his admission. During his stay at Defendants' facility, the Plaintiff developed a number of health problems which led to the filing of the present action.

FINDINGS

I. EQUITABLE ESTOPPEL

In its Motion, Defendants argue the Plaintiff should be estopped from denying the parties' mutual right to arbitrate. In the arbitration setting, the equitable estoppel doctrine estops a party from asserting 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." Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 557-78, 813 S.E.2d 292, 299 (Ct. App. 2018) (quoting Thompson v. Pruitt Corp., 416 S.C. 43, 59, 784 S.E.2d 679, 688 (Ct. App. 2016)). "Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause." Id. With regard to the party to be estopped, the elements of the doctrine of equitable estoppel are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. Id. (citing Thompson, 416 S.C. at 60, 784 S.E.2d at 688) (emphasis omitted).

In the present context, the Defendants' equitable estoppel argument is premised on the contention that the Admissions Agreement and Arbitration Agreement merged. Generally, "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) (quoting Klutts Resort Realty Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

However, merger does not occur where the documents recognize the "separatedness" of the arbitration agreement, which is indicative of an intent that the common law doctrine of merger not apply. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455. In Coleman, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed several documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. Id. The circuit court denied the motion to compel. Id. On appeal, the Coleman court found the language in the section titled "Entirety of Agreement"[i] "recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts." Coleman, 407 S.C. at 355, 755 S.E.2d at 455. The Court noted, in addition to the "Entirety of Agreement" clause, the [arbitration agreement] could be disclaimed within thirty days of signing while the admissions agreement could not…." Id. Furthermore, the court noted that the "Entirety of Agreement" clause creates an ambiguity as to merger, and "the law is clear that any ambiguity…is construed against the drafter…." Id. at 355-56, 755 S.E.2d at 455. The Coleman court ruled the circuit court properly denied [the health care facility's] equitable estoppel arguments because no merger occurred. Id. at 356, 755 S.E.2d at 455.

Additionally, merger does not occur where an arbitration agreement and admission agreement are governed by different law, reference each other separately, provide different mechanisms by which they can be revoked, are separately paginated, and have their own signature page. See Hodge, 422 S.C. at 562-563, 813 S.E.2d at 302. In Hodge, 422 S.C. at 550, 813 S.E.2d at 295, Mable Hodge entered a rehabilitation facility. Id. She was "'well developed' and 'in no real distress' and had a full range of motion in her extremities when she entered the [f]acility." Id. Mable's husband executed various documents related to her admission, including an arbitration agreement and an admission agreement. Id. Mable was not present at the time her husband signed these documents on the day before her admission because she was still in the hospital. Id. However, Mable was competent at the time of her admission. Id. 422 S.C. at 550, 813 S.E.2d at 296. Three weeks after her admission, Mable became paralyzed from the waist down and died one year later as a result of her paralysis. Id. 422 S.C. at 553, 813 S.E.2d at 297.

The circuit court denied [the facility's] motion to dismiss or compel arbitration. Id. The facility appealed arguing the circuit court erred in finding the arbitration agreement was separate from the admissions agreement because the two documents were merged. Id. 422 S.C. at 556, 813 S.E.2d at 299. The Court of Appeals upheld the circuit court, finding the admissions agreement and arbitration agreement did not merge. Id. 422 S.C. at 563, 813 S.E.2d at 302. The

Court based its rulings on the fact that the "Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law." Id. 422 S.C. at 562, 813 S.E.2d at 302. Additionally, similar to Coleman, the Arbitration Agreement recognized separatedness because 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. Furthermore, the arbitration agreement stated it could be revoked within thirty days, while the admission agreement did not contain such an indication; rather, it provided the admissions agreement could only be amended by the patient with written agreement executed by the facility and the patient. The Court noted that each document was separately paginated and had its own signature page. Finally, signing the arbitration agreement was not a precondition to admission. Id. 422 S.C. at 562-63, 813 S.E.2d at 302. Based on this, the Court of Appeals found the admissions agreement and arbitration agreement did not merge. Id. 422 S.C. at 563, 813 S.E.2d at 302. Therefore, because Mable received no benefit from the arbitration agreement, equitable estoppel did not bar Mable's claims. Id.

In contrast, merger would occur – and equitable estoppel would apply – when the admission agreement contains the arbitration provision. See THI of South Carolina at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. 2015). In that case, the District Court of South Carolina distinguished Coleman from the case before it, stating that "the admission agreement *contains* the arbitration provision." Id. at *2 (emphasis in original). Therefore, a signatory's authority to execute a separate, non-essential legal waiver was not implicated by the facts of that case. Id.

Counsel for Plaintiff cites McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-

02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). In that case, the plaintiff was the husband of a resident to a nursing home facility who executed a number of documents on his wife's behalf upon her admission to the facility, including an arbitration agreement. Id. The arbitration agreement was a separate document and not a condition of admission to the facility. Id. In that case, the District Court determined the arbitration agreement and admissions agreement, while separate documents, merged because they were executed by the same parties, at the same time, and regarded the same transaction. Id. at *3. The Court noted it would be inequitable to allow plaintiff to assert that husband had authority to sign the admissions agreement on behalf of the plaintiff, but lacked the authority to sign the arbitration agreement. Id. Based on this, the District Court found the plaintiff was estopped from denying enforceability of the arbitration agreement.

In the present case, the documents present the hallmarks of "separatedness" stated in Coleman and Hodge. Here, the document entitled "Addressing Decisional Capacity" indicates that the Plaintiff was competent to make decisions on behalf of himself. However, despite his competency, Wilda Boyd signed the Admission Agreement and Arbitration Agreement as "Representative" on his behalf. The Arbitration Agreement refers to itself and the Admission Agreement separately.[ii] Additionally, the Arbitration Agreement states that it is governed by federal law, while the admissions agreement states it is governed by state law. The Admissions Agreement states that it can be terminated at any time, upon written notice; however, the Arbitration Agreement does not provide a means of termination. Rather, the Arbitration Agreement "remain[s] in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement." The Arbitration Agreement also contains a "merger clause" entitled "Entire Agreement," which states that the Admissions Agreement "represents the entire agreement and understanding between the parties."

Furthermore, each document is separately paginated and has its own signature page, and the Arbitration Agreement is not contained within the Admissions Agreement. Finally, the Arbitration Agreement is not a precondition to admission.

While the McCutchen case presents a factually analogous scenario, the case was decided several years prior to the Coleman and Hodge. Moreover, the McCutchen case is only persuasive whereas the Coleman and Hodge cases are binding on this Court. In light of this, the Court finds the Admission Agreement and Arbitration Agreement did not merge. Since the Agreements did not merge, it cannot be argued that the Plaintiff received a benefit from the Arbitration Agreement. Therefore, the court finds that equitable estoppel does not bar the Plaintiff from denying the validity of the Arbitration Agreement.

II. AGENCY

Defendants argue Wilda Boyd possessed the actual or apparent authority to bind the Plaintiff under the Arbitration Agreement, and that Plaintiff should be estopped from denying the validity of the arbitration agreement. "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. Hodge, 422 S.C. at 564, 813 S.E.2d at 303 (quoting Froneberger v. Smith, 406 S.C. 37, 49, 748 S.E.2d 625 631 (Ct. App. 2013)). "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 parties. Hodge, 422 S.C. at 565, 813 S.E.2d at 303 (quoting Peoples Fed. Sav. & Loan Ass'n, 310 S.C. 132, 145-46, 425 S.E.2d 764, 773 (Ct. App. 1992)). "A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts."

Hodge, 422 S.C. at 565, 813 S.E.2d at 304 (quoting McCall v. Finley, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987).

"A true agency relationship may be established by evidence of actual or apparent authority." Id. (quoting R & G Constr., Inc. v. Lowcountry Reg'l Transp. Autho., 343 S.E. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000)). "To establish apparent authority, the proponent must show (1) 'the purported principal consciously or impliedly represented another to be his agent; (2) the proponent relied on the representation; and (3) there was a change of position to the [proponent's] detriment." Hodge, 422 S.C. at 571-72, 813 S.E.2d at 307 (quoting Thompson, 416 S.C. at 54, 784 S.E.2d at 685). "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." Hodge, 422 S.C. at 572, 813 S.E.2d at 307 (quoting Froneberger, 406 S.C. at 47, 748 S.E.2d at 630).

However, agency may not be established solely by the declarations and conduct of an alleged agent. Id. (quoting Cowburn v. Leventis, 366 S.C. 20, 39-40, 619 S.E.2d 437, 448 (Ct. App. 2005)). In fact, "[t]he law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." Id. (quoting Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990).

Furthermore, "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…." Id. (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). In Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308, the Court of Appeals upheld the circuit court's finding that Husband was not Mable's agent. In that case, the Court noted that "Husband's signing of the arbitration agreement, admissions agreement, and other forms does not make him Mable's agent." Hodge, 422 S.C. at 573-74, 813 S.E.2d at 308. While she was not present, the facility knew Mable was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. Hodge, 422 S.C. at 5774, 813 S.E.2d at 308. The record contained no evidence from the facility that Mable, as principal, represented Husband was her agent. Id. Furthermore, since Mable was competent, no argument could be made the Adult Health Care Consent Act gave Husband the right to sign medical forms. Id. The Court of Appeals noted that, "even if Husband had authority to handle finances or make health care decisions...'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....'" Id. (quoting Thompson, 416 S.C. at 55, 784 S.E.2d at 686). Accordingly, the Court of Appeals held the circuit court did not err in finding husband was not Mable's agent. Id.

In the present case, the Defendant claims that it relied on the affirmative representations of Wilda Boyd and the Plaintiff in admitting Plaintiff to the its health care facility. Defendant further states that Wilda Boyd possessed sufficient inherent agency to render the agreement enforceable. However, "statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." Hodge, 422 S.C. at 572, 813 S.E.2d at 307 (quoting Klippel v. Mid-Carolina Oil, Inc., 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990). Here, there is no evidence that Wilda Boyd possessed actual authority to sign the documents on behalf of the Plaintiff. Nor is there evidence that the Plaintiff explicitly represented to the Defendant that Wilda Boyd was authorized to sign the documents on his behalf. However, at the hearing, counsel for Defendants mentioned that the Plaintiff may have been in the room while Wilda Boyd signed the papers for him.

In light of this and the lack of record regarding the agency relationship in this case, the Court will allow discovery on the issue of the agency relationship between the Plaintiff and Wilda Boyd at the time the Arbitration Agreement and Admissions Agreement were signed and executed.

III. SOUTH CAROLINA BILL OF RIGHTS

Defendant argues Wilda Boyd possessed statutory authority under the South Carolina Bill of Rights for Residents of Long-Term Care Facilities to Bind the Plaintiff under the Arbitration Agreement. South Carolina provides certain rights to residents of long-term care facilities under South Carolina's "Bill of Rights for Residents of Long-Term Care Facilities" ("Bill of Rights"). S.C. Code Ann. § 44-81-10 et seq. S.C. Code Ann. § 44-81-30 defines "resident" as a person who is receiving treatment or care in a long-term care facility, and "representative" as a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian. S.C. Code Ann. § 44-81-30(2)-(3). The Act defines "long-term care facility" as an intermediate care facility, nursing care facility or residential care facility subject to regulation and licensure by the State Department of Health and Environmental Control.

South Carolina's Bill of Rights provides residents and their representatives with certain rights, including written and oral explanations of: rights and grievance procedures, available services and related charges, refund policies, change in services, ability to choose attending physician, participate in treatment or changes in care, receive the physician's complete diagnosis, refuse to participate in experimental research, relocate if desired, manage personal finances, keep personal possessions, be treated with respect and dignity, and a number of other rights related to the autonomy and self-determination of the resident. See S.C. Code Ann. § 44-81-40. However, South Carolina's Bill of Rights does not confer upon representatives the ability to enter into contracts, aside from those relating to sitter services. See S.C. Code Ann. § 44-81-10 et seq. But see S.C. Code Ann. 44-66-10 et seq. ("Adult Health Care Consent Act").

Here, Defendant argues that the Plaintiff falls within the definition of "resident" and Wilda Boyd within the definition of "representative." As such, the Defendant argues Wilda Boyd had the authority to contract with the Defendant on behalf of Mr. Boyd. However, the Defendant has not pointed to a specific statute prescribing the representative's authority to contract on behalf of a competent resident. In fact, the statute does not confer such a right aside from contracting individuals to perform sitter services. The fact that the Bill of Rights provides that a "resident's representative must be given by the facility a written and oral explanation of the rights, grievance procedures, and enforcement provision...at the time of admission to a long-term care facility[, and] [w]ritten acknowledgement...must be made part of the resident's file" is of no consequence. Therefore, the Court finds South Carolina's Bill of Rights does not provide a basis to enforce the Arbitration Agreement against the Plaintiff.

IV. THIRD-PARTY BENEFICIARY

Defendant argues the Arbitration Agreement is enforceable because the Plaintiff was a third-party beneficiary. Where an arbitration agreement has not merged with the admissions agreement, a third-party beneficiary cannot be required to arbitrate when he has not attempted to enforce the contract containing the arbitration agreement. See Thompson v. Pruitt Corp., 416 S.C. 43, 57, 784 S.E.2d 679, 784 (Ct. App. 2016); see also Hodge, 422 S.C. at 574, 813 S.E.2d at 308. "A third-party beneficiary is a party that the contracting parties intend to directly benefit." Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (quoting Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005)). 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. Id.

In Thompson, 416 S.C. at 48, 784 S.E.2d at 682, Son signed an admission agreement and arbitration agreement on behalf of Mother when admitting Mother to a nursing home facility due to her dementia. Mother was not present at the time of the signing. Id. After Mother died as a result of falling out of a bed, Daughter brought suit for wrongful death against the nursing home facility. Id. The nursing home facility moved to compel arbitration, which the circuit court denied on the grounds that Son did not have authority to execute the arbitration agreement on Mother's behalf. Id. 416 S.C. at 48-49, 784 S.E.2d at 682. The Court of Appeals affirmed the circuit court, ruling that because Daughter was not attempting to enforce the arbitration agreement on behalf of Mother's estate, Mother's estate should not be required to arbitrate the claim. Thompson, 416 S.C. at 57, 784 S.E.2d at 687.

In this case, as discussed above, the admissions agreement and arbitration agreement did not merge. The Plaintiff has not attempted to enforce the arbitration agreement; rather, he has asserted claims against Facility arising out of the separate admissions agreement. Therefore, the Court finds the arbitration agreement cannot be enforced against the Plaintiff as a third-party beneficiary because he has not attempted to enforce the arbitration agreement.

V. UNCONSCIONABILITY

The Plaintiff, in his Response in Opposition to Defendant's Motion to Dismiss and Compel Arbitration, argues the Arbitration Agreement is unenforceable because it is unconscionable. "Arbitration is a matter of contract law and is available only when the parties involved agreed to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d

839, 844-45 (Ct. App. 1999). Accordingly, a party may seek revocation of a contract under such grounds as exist at law or equity, including fraud, duress, and unconscionability. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). South Caroline defines unconscionability "as the absence of a meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Id. at 24-25, 644 S.E.2d at 668 (citing Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004)). In analyzing a claim of unconscionability in the context of arbitration agreements, courts should focus on whether the arbitration clause is geared toward achieving an unbiased decision by a neutral decision-maker. Id. at 25, 644 S.E.2d at 668-69.

i. Meaningful Choice

"Absence of a meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." Id. at 25, 644 S.E.2d at 669. In determining whether a contract was "tainted by an absence of a meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. Furthermore, under general principles of state contract law, an adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 541, 542 S.E.2d 360, 356 (2001). However, adhesion contracts are not per se unconscionable. Simpson. at 26, 644 S.E.2d at 669.

Here, the Plaintiff, already in a bad state of health, suffered severe injuries including sepsis, sacral wounds, and a stage IV pressure ulcer. It is unclear whether the Plaintiff and Wilda

Boyd are sophisticated; however, it is clear Mr. Boyd did not read the contract and it is not unfair to assume that there is a relative disparity in sophistication between the Plaintiff and Defendant. However, the arbitration agreement at issue is not complex, nor would it have come at a surprise to Wilda Boyd or the Plaintiff. The arbitration agreement is on its own separate page, and the entire agreement constitutes one page composed of four or five paragraphs. The arbitration agreement contains an express provision that he or she is not required to use the facility, and that there are numerous other healthcare providers. Moreover, the arbitration agreement states in conspicuous bolded letters "**I understand and agree that I am giving up and waiving my right to a jury trial.**" In light of this, it seems the Plaintiff was left with a meaningful choice regarding whether to sign the arbitration agreement. Therefore, the arbitration agreement is not unconscionable based on lack of a meaningful choice.

ii. Oppressive and one-sided terms

In considering whether terms are oppressive and one-sided, courts typically assess whether the contract requires waiver of rights, and whether there is a lack of mutuality of remedy. See York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 88-90, 749 S.E.2d 139, 150-151 (Ct. App. 2013). Here, the arbitration agreement provides that "the parties shall select an arbitrator from a panel having experience and knowledge of the health care industry." On its face this clause recognizes the benefit of an arbitrator who has experience with the health care industry. The neutrality of the arbitrator is bolstered by the fact that both parties must reach a mutual decision. If the parties cannot reach a mutual decision, the arbitration agreement provides that the arbitrator shall be selected by the Court. Based on the mutuality of the provision and absence of waiver of rights, the arbitration agreement is not unconscionable due to oppressive or one-sided terms.

CONCLUSION

In conclusion, the Court finds equitable estoppel does not prevent the Plaintiff from denying the validity of the Arbitration Agreement. The Court also finds that the South Carolina Bill of Rights does not provide Wilda Boyd with the authority to contract on behalf of the Plaintiff. Furthermore, the Court does not find the arbitration agreement unenforceable under the doctrine of unconscionability. However, the Court will allow discovery on the issue of agency to determine whether Wilda Boyd had actual or apparent authority to sign the arbitration agreement on behalf of Mr. Boyd. Finally, the Court will hold Defendants Administrative Services and Operational Services Motion to Stay in abeyance until final ruling on the Motion to Compel Arbitration.

IT IS SO ORDERED.

____

Perry H. Gravely
Presiding Judge

Greenville, South Carolina

July ______, 2018

Electronic Signature Page of Judge Gravely to Follow

[i] "This [a]greement, including all Exhibits hereto, and the [a]rbitration agreement between Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this agreement acknowledges that no

representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in the [a]greement or in the [a]rbitration [a]greement. This [a]greement may be amended only by a written agreement signed on behalf of the Facility and the Resident."

[ii] "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.*" (emphasis added).

Greenville Common Pleas

Case Caption: James Boyd Jr vs. Thi Of South Carolina Llc , defendant, et al

Case Number: 2018CP2301934

Type: Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755

Electronically signed on 2018-07-06 15:24:28 page 17 of 17

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
PRISCILLA BROWN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES E. BROWN, PLAINTIFF, vs. THI OF SOUTH CAROLINA AT COLUMBA, LLC, D/B/A MAGNOLIA MANOR, D/B/A MIDLANDS HEALTH AND REHABILITATION AND JOHN AND JANE DOES 1-10, WHOSE TRUE NAMES ARE UNKNOWN , DEFENDANTS.	)	DOCKET NO. 2019-CP-40-00516 **ORDER**

This matter came before the Court on August 13, 2019 for a hearing on a Motion to Compel Arbitration and Stay State Court Proceedings filed by THI of South Carolina at Columbia, LLC ("the Facility") and any John or Jane Does' (collectively the "Defendants"). Present at the hearing were Jenkins Mann, Esq. on behalf of Priscilla Brown ("Plaintiff"). Perry Buckner, IV, Esq., appeared on behalf of THI of South Carolina at Columbia LLC ("Defendants").

<u>FACTUAL BACKGROUND</u>

On January 16, 2017, James E. Brown ("Mr. Brown") was transferred from Palmetto Health Richland Hospital to Defendant THI of South Carolina at Columbia, LLC for treatment consistent with his diagnoses. Plaintiff, Mr. Brown's wife, alleges that Mr. Brown was transferred without his consent or his family. Immediately upon arrival at the Facility, Mr. Brown's family asked that he be transferred to another nursing facility. Plaintiff alleges no efforts were made by the Facility to transfer Mr. Brown.

As part of Mr. Brown's admission to the Facility, Plaintiff was presented with an Admission Agreement to be completed by the resident or his representative for admission to the Facility. The Admission Agreement states, "all information provided, including her authority to bind her husband to certain agreements, is truthful and correct." Mrs. Brown was also presented with an Arbitration Agreement, the completion of which was not a condition for admission to the Facility. Mrs. Brown executed the Arbitration Agreement.

On January 16, 2017, Mr. Brown was transferred from Palmetto Health Richland Hospital to the Facility; he subsequently died. Plaintiff brought this wrongful death and survival action on January 25, 2019 alleging negligent acts and omissions by the Defendants. Defendant filed a motion to compel arbitration. Plaintiff opposes the Motion on the basis that Mrs. Brown was not an agent of Mr. Brown for the purpose of executing the Arbitration Agreement.

LEGAL STANDARD

There is a strong presumption in favor of the validity of arbitration agreements because of the policy favoring arbitration. *O'Neil v. Hilton Head Hosp*., 115 F.3d 272, 273 (4th Cir. 1997). Both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.,* 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted). "A party seeking to compel arbitration under the FAA must establish that: (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement. *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 173 (2019) (citation omitted).

DISCUSSION

Defendants moved to compel arbitration arguing Mrs. Brown possessed the authority to sign the Arbitration Agreement on her husband's behalf, or alternatively, she is estopped from denying she had the authority to do the same. Plaintiff opposed the motion to compel arbitration arguing that Mrs. Brown did not have authority to execute the Arbitration Agreement on her husband's behalf.

"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. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC.*, 422 S.C. 544, 564, 813 S.E.2d 292 (Ct. App. 2018). 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. *Hodge,* 422 S.C. at 565. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties. *Id*.

The doctrine of apparent authority provides that a principal may be bound by the acts of his 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). "While actual authority is that which is expressly conferred upon the agent by the principal, apparent authority is that which, though not actually granted, the principal knowingly permits the agent to exercise, or which the principal holds the agent out as possessing." *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as 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., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000)(emphasis added).

At the hearing, the Facility stated it relied on the conduct and representations of Mr. Brown and the Plaintiff during the admission process and over the course of Mr. Brown's residency. The Facility asserted Mr. Brown allowed his wife to participate in the admission process and to sign documents on his behalf, including the Arbitration Agreement and the Admission Agreement, when he was admitted to the Facility. Further, Mrs. Brown represented to the Facility that she was his representative by signing the Arbitration and Admission agreement on Mr. Brown's behalf. Defendants contend that Mr. Brown never repudiated this authority.

Plaintiff argued Mrs. Brown does not possess actual or apparent authority to sign the Arbitration Agreement on behalf of Mr. Brown and that the Court should deny Defendant's Motion to Compel Arbitration. Defendant then requested permission to conduct limited discovery on representations made by Mrs. Brown and her husband and conduct relating to their authority as well as the Facility's understanding of that conduct. Defendants asserted that if the record is incomplete regarding its authority or agency then discovery on these issues is necessary.

Arbitration is appropriate only if Mrs. Brown possessed the authority to execute the Arbitration Agreement and bind her husband to its terms. The record is incomplete and limited discovery on the issues of the agency relationship between the Plaintiff and Mr. Brown at the time the Arbitration Agreement and Admissions Agreement were signed and executed is necessary to a resolution of the motion. The Court further finds that any such discovery conducted by the Defendants must be limited and relevant only as to Mrs. Brown's agency and authority to execute the Admission Agreement and the Arbitration Agreement and to act for Mr. Brown during the admissions process. Limited discovery on these issues will not constitute a waiver of Defendant's claim that it is entitled to arbitration.

The Court also finds that all of the remaining issues, raised in the motion to compel and in opposition thereto, are contingent upon the authority to execute the Arbitration Agreement and the Admission Agreement. Therefore, this Court makes no findings or rulings on the remaining arguments of counsel regarding arbitration. All other arguments are held in abeyance until the parties complete discovery on the actual or apparent authority to execute the documents on behalf of Mr. Brown and may be raised prior to the final ruling on the Motion to Compel Arbitration.

ORDER

Based upon the foregoing, **IT IS ORDERED**, that the Court will allow discovery on the issue of agency to determine whether Priscilla Brown had actual or apparent authority to sign the arbitration agreement on behalf of her husband, James E. Brown.

AND IT IS SO ORDERED.

Signature page to follow

Richland Common Pleas

Case Caption: Priscilla Brown , plaintiff, et al vs Thi Of South Carolina At Columbia Llc , defendant, et al

Case Number: 2019CP4000516

Type: Order/Other

IT IS SO ORDERED!

s/ Alison Renee Lee

Electronically signed on 2019-11-07 15:32:59 page 5 of 5

EXHIBIT

11

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	CASE NO. 2022-CP-38-00525

BEVERLY VAUGHN)
as Personal Representative of the)
Estate of Loris Paris,)
)
Plaintiff,)
)
v.)
)
SAINT MATTHEWS HEALTHCARE, LLC;)
MELISSA KIZER; MELISSA DAVIS; and)
ANGELA SMITH TELIHA,)
)
Defendants.)
)

ORDER CONTINUING MOTIONS AND ALLOWING LIMITED DISCOVERY

THIS MATTER came before the Court on January 4, 2023, for a hearing on the motion, filed August 9, 2022, of Defendant Saint Matthews Healthcare, LLC (the "Facility"), to compel Plaintiff's claims against it to arbitration (the "Motion to Compel Arbitration") and the corresponding motions, both also filed August 9, 2022, of Defendants Melissa Kizer and Melissa Davis to stay this case pending the ultimate outcome of the Motion to Compel Arbitration and any resulting arbitration (the "Motions to Stay") (collectively, the Motion to Compel Arbitration and the Motions to Stay are the "Subject Motions"). As explained below, the Court has decided to continue the Subject Motions and allow limited discovery to be conducted before the Subject Motions are reset for hearing.

The Facility is a skilled nursing facility. Plaintiff's claims against it are based on allegedly deficient care/treatment that the decedent, Loris Paris ("Ms. Paris"), received while she was a resident of the Facility. The Motion to Compel Arbitration is based on an Arbitration Agreement

DEFENDANT'S EXHIBIT

10

that George Paris, Ms. Paris's son, signed on behalf of Ms. Paris in conjunction with her admission to the Facility.[1]

As an alternative to deciding the Motion to Compel Arbitration on the present record, the Facility argues that, if the Court is not inclined to grant the motion at this time, the Court should continue the Subject Motions and allow—without risk to the Facility of waiving any arbitration rights—certain limited discovery (confined to matters relevant to the issues raised by the Motion to Compel Arbitration) to be conducted before the Subject Motions are reset for hearing. After careful consideration, the Court has decided that this is the prudent course.

NOW, THEREFORE, for good cause shown, IT IS HEREBY ORDERED as follows:

(1) The Subject Motions are continued to allow for the Facility to take the depositions of Beverly Vaughn and George Paris and for Plaintiff to take the deposition(s) of Cindy Reck[2] and/or a representative of the Facility regarding the process for admitting Ms. Paris;[3]

(2) The Facility and Plaintiff shall proceed to take these depositions, at a time(s) mutually convenient for all involved, as soon as is reasonably possible;

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1 The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that the Motion to Compel Arbitration is the lead motion. By their nature, the Motions to Stay, the filing of which was premised on the filing of the Motion to Compel Arbitration and the success of which is dependent on the success of the Motion to Compel Arbitration, are secondary to, and tag along with, the Motion to Compel Arbitration.

2 Ms. Reck signed the subject Arbitration Agreement on behalf of the Facility.

3 The Facility represents to the Court that Ms. Reck is no longer an employee of the Facility and that it has already advised Plaintiff's counsel of the same and provided Plaintiff's counsel with the last known contact information it has for Ms. Reck. Provided a deposition of Ms. Reck is possible, Plaintiff may depose Ms. Reck, and whether or not Plaintiff is able to depose Ms. Reck, at Plaintiff's option, on reasonable notice to the Facility of Plaintiff's election to pursue this option, Plaintiff may depose a representative of the Facility (to be designated by the Facility) regarding the process for admitting Ms. Paris.

(3) The scope of these depositions shall be limited to matters relevant to the issues raised by the Motion to Compel Arbitration, i.e., the scope of the depositions shall be confined solely to what is relevant to the instant arbitrability dispute;

(4) By participating in these depositions, the Facility will not be subjecting itself to any claim of waiver of any arbitration rights it may have;

(5) After these depositions have been taken and counsel for the Facility and Plaintiff have received all transcripts ordered thereof, the Facility's counsel shall advise the Clerk of Court that the Subject Motions are ready to be reset for hearing; and

(6) The Subject Motions shall then be reset for hearing, and in making their respective arguments relative to the Motion to Compel Arbitration, the Facility and Plaintiff may utilize the transcripts of the depositions taken pursuant to this order as they see fit.

AND IT IS SO ORDERED.

____
MAITE MURPHY
Circuit Court Judge
First Judicial Circuit
Court of Common Pleas

____________________, South Carolina

Dated: _____________

Orangeburg Common Pleas

Case Caption:	Beverley Vaughn VS Saint Matthews Healthcare, Llc , defendant, et al
Case Number:	2022CP3800525
Type:	Order/Continuance

So Ordered

s/ Maite Murphy 2166

Electronically signed on 2023-01-17 13:02:33 page 4 of 4

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD	CIVIL ACTION NO.: 2023-CP-20-00268
THOMAS D. KILPATRICK AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF ANTHONY LEMON, Plaintiff, v. PRUITTHEALTH - RIDGEWAY, LLC F/K/A UNIHEALTH POST-ACUTE CARE - TANGLEWOOD, LLC, UNITED HEALTH SERVICES OF SOUTH CAROLINA, INC., PRUITTHEALTH CONSULTING SERVICES, INC., PRUITTHEALTH THERAPY SERVICES, INC. F/K/A UNITED REHAB, INC., PRUITTHEALTH, INC., NEIL PRUITT, JR., THI OF SOUTH CAROLINA AT COLUMBIA, LLC D/B/A MIDLANDS HEALTH AND REHABILITATION CENTER, THI OF SOUTH CAROLINA, LLC, FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL CLINICAL CONSULTING, LLC, FUNDAMENTAL LONG TERM CARE HOLDINGS, INC., FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC, AND HUNT VALLEY HOLDINGS, LLC, Defendants.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION COMPEL ARBITRATION AND STAY FURTHER PROCEEDINGS**

Defendant THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center (hereinafter "Defendant" or "Midlands") 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. As of two days prior to the hearing on this motion, Plaintiff counsel has not yet received any memorandum from Defendant in support of its motion to compel arbitration. Plaintiff counsel has prepared this memorandum based on the facts that are known in this matter, and based on an understanding of the anticipated arguments that Defendant will most likely raise. Defendant will likely argue that a valid and enforceable arbitration agreement exists between the parties, citing only to various unreported Circuit Court orders in support. In doing so, Defendant attempts to minimize and distract from the clear statutory law and the following well-established precedential decisions of the Supreme Court of South Carolina and the Court of Appeals, the facts of which are all nearly identical to the case at hand and define the current law of South Carolina with respect to arbitration agreements in the health care facility context: *Arredondo*, *Coleman*, *Thompson*, *Hodge*, *Solesbee* and *Stott*.[1]

Over the past few months, the Court of Appeals has issued several unpublished opinions addressing the same issues raised by the Defendant in this matter, citing to the well-established existing precedent. These unpublished opinions and the rulings contained therein are very similar, if not identical in many respects to this present case.[2] Despite the well-established precedent, Defendant and its affiliate business organizations file for arbitration in nearly every instance in which they claim to have an arbitration agreement to assert. Accordingly, there are several circuit court orders ruling on Defendants' arbitration demands. Although no circuit judge is bound by the precedent of another circuit judge's

[1] *Arredondo v. SNH SE Ashley River Tenant, LLC*, 433 S.C. 69 (2021); *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014); *Thompson*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016)(*rehearing denied* April 21, 2016, *certiorari denied* Dec. 2, 2016); *Hodge v. UniHealth Post-Acute Care of Bamberg LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)(*rehearing denied* May 2, 2018, *certiorari denied* August 21, 2018); *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023)(*rehearing denied* April 14, 2023); *Stott v. White Oak Management, Inc.*, 426 S.C. 568, 828 S.E.2d 82 (Ct. App. 2019)(*rehearing denied* June 6, 2019, *certiorari denied* Sept. 25, 2019).

[2] Should the Court desire to review, Plaintiff has attached unpublished Court of Appeals opinions based on nearly identical questions of law that find against compelling arbitration as Exhibit A-L. Plaintiff is not offering these Opinions as precedent; however, these unpublished opinions are illustrative of the precedents they contain that are repeatedly affirmed and upheld.

ruling, many of those rulings in nearly identical cases involving this Defendant, and others, are illustrative of the relevant analysis and the fatal flaws in Defendant's assertions for compelling arbitration[3].

The Arbitration Agreement relied upon by Defendant was signed by Ms. Minnie Gamble, who is the mother of the decedent. Ms. Gamble has never held power of attorney for the decedent, and is not a party to this litigation. Importantly, at the time when Ms. Gamble signed the purported arbitration agreement, she 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, such that 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 an agency relationship. Therefore, because Defendant lacks any valid basis for establishing the requisite authority of the signatory to the Arbitration Agreement that it seeks to enforce, Defendant's Motion should be denied by the Court.

FACTUAL BACKGROUND

The Plaintiff in this wrongful death and survival action is Thomas D. Kilpatrick, an attorney appointed by Probate who is an unrelated and uninvolved person in the underlying dispute. Mr. Kilpatrick commenced this action by filing a Notice of Intent on April 3, 2023, followed by a Summons and Complaint on August 31, 2023, alleging wrongful death and survival claims as a result of the care and treatment provided to Mr. Lemon while he was a resident at Defendant's assisted living facility. (*See generally* Compl.). Specifically, Mr. Lemon developed serious pressure injuries and bedsores between June and July of 2020 after being assessed as a high-risk for pressure injuries by Defendant. (Compl. ¶¶

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[3] Plaintiff has attached unreported Circuit Court orders based on nearly identical questions of law and supporting Plaintiff's arguments as Exhibits M-U.

22-28). Mr. Lemon passed away on July 30, 2021. On January 2, 2024, Defendant filed a Motion to Compel Arbitration, relying on an Arbitration Agreement that was signed individually by the mother of Mr. Lemon, Ms. Minnie Gamble dated January 9, 2012. (Mot. Compel Arbitration; Ex. A). As noted above, Ms. Gamble held no power of attorney for Mr. Lemon and is not a party to the present action.

BURDEN OF PROOF

The Arbitration Agreement at issue in this case is not a valid, enforceable agreement for the simple reason that Ms. Gamble did not have authority to execute the Arbitration Agreement. 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). There is no presumption or legal basis which would support the proposition that Ms. Gamble entered an arbitration agreement on behalf of Mr. Lemon or his Estate.

Moreover, it is anticipated that Defendant will argue its position based on the assumption, unsupported by any evidence, that Ms. Gamble was acting with apparent authority from Mr. Lemon. In that regard, the party seeking judicial enforcement of a contract bears the burden of persuasion, i.e. that a valid and enforceable agreement was signed in a knowing, voluntary and intentional capacity. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210 (Ct. App. 2008); *Hinson-Barr, Inc. v. Pinckard*, 292 S.C. 267, 268 (1986). "A motion to compel arbitration pursuant to the FAA is akin to the burden on summary judgment." *Thomas v. Progressive Leasing*, Civ. No. 17-1249, 2017 WL 4805235, at *2 (D. Md. Oct. 25, 2017) (internal quotation marks omitted). Therefore, the burden is on the moving party to demonstrate the absence of any genuine dispute of material fact, *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970), and that the movant is "entitled to judgment [compelling arbitration] as a matter of law." *Burrell v. 911 Restoration Franchise Inc.*, 2017 WL 5517383, at *3 (D. Md. November 17, 2017) (*citing* Fed. R. Civ. P. 56(a). Thus, in this instance, the burden lies on Defendants to prove that there are no questions of fact relating to the formation of this contract, i.e. the arbitration agreement. There is no evidence that Ms. Gamble had actual or apparent authority to act on Mr. Lemon's behalf at the time he entered the Arbitration Agreement, as there is no evidence that Mr. Lemon ever consciously represented or implied to Defendant that Ms. Gamble was his agent for the purposes of entering an arbitration agreement.

Promptly upon notice of this motion to compel arbitration, Plaintiff served Defendant with limited interrogatories pertaining directly to Defendants' motion.[4] The intent of those interrogatories was to provide Defendant with an opportunity to come forward with responses that may be supportive of and pertinent to Defendant's burden of persuasion with this motion. Plaintiff also served Defendant with limited requests for production with the same intention of providing Defendant with the opportunity to provide evidence that may be relevant to this motion.[5] As of the filing of this memorandum, Defendant's deadline to provide responses to these discovery requests has expired, and Defendant has not provided responses or filed a motion for a protective order. Defendant's counsel did provide an email to Plaintiff's counsel indicating that Defendant is refusing to answer discovery on the basis that participation in such discovery may result in waiver; however, this response from Defendant's counsel is inadequate and overlooks their burden of supporting their motion.[6] At this point in time, the only evidence that Defendant has produced is the Arbitration Agreement that is in question, and Defendant has failed to establish the absence of any genuine dispute as to Plaintiff's challenge to the authority of the signatory to execute the agreement. Moreover, the failure and reluctance of Defendant to respond to the aforementioned discovery requests is probative that there has already been ample opportunity for both parties to perform discovery relating to this motion; that Defendant has no willingness to engage in

[4] Exhibit V – Plaintiff's Limited Interrogatories to Defendant
[5] Exhibit W – Plaintiff's Limited Requests for Production to Defendant
[6] Exhibit X – February 26, 2024 Emails between Defendant's counsel and Plaintiff's counsel.

discovery; and that, any further discovery is unnecessary and unduly burdensome under SCRCP Rule 26(c).

Furthermore, at no point in the arbitration agreement at issue is actual consideration referenced, or even mentioned. Defendant's entire argument for compelling arbitration overlooks the inexorable fact that this arbitration agreement is unenforceable under the basic tenets of contract law. To the extent that Defendant maintains 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. For these and the following reasons, Defendant's motion should be denied.

ARGUMENT

I. Ms. Gamble Did Not Have Legal Authority to Give Away Mr. Lemon'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. Lemon was admitted to Defendant's facility, he had the mental capacity to consent to enter Defendant's Admission Agreement.[7] In fact, a psychiatry evaluation in the week following Mr. Lemon's admission revealed that he had "no past known psychiatric history" and that he was "orientated x person, situation, time, place" and that "short term memory is intact as evidenced by exam."[8] Therefore, any authority that subverts Mr. Lemon's capacity to act on his behalf, may only be derived from a durable power of attorney, of which there is none, or by common law agency principles.

[7] Exhibit Y – Anthony Lemon's Annual Physical Exam dated January 11, 2012 indicates that he is "A&O x 3" which means he is alert and oriented to person, place, and time.
[8] Exhibit Z – Psychiatry evaluation by Dr. Jeffrey Bradenburg on February 6, 2012.

A. <u>A Familial Relationship and the Adult Health Care Consent Act only grants authority to make health care decisions, not the decision to waive Mr. Lemon's (and his Estate's) right to a jury trial.</u>

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). By its own definition, the Act may only be invoked when a person lacks the mental capacity to make their own informed decisions. In this instance, the Act is not applicable because Mr. Lemon had mental faculties at the relevant time period.

Nonetheless, it is anticipated that Defendant may argue that Mr. Lemon was incapacitated, and that Ms. Gamble was his Healthcare Power of Attorney under the Act. Even under that assumption, Defendant's arguments still fail. 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).

Independently of any valid and effective power of attorney, if Mr. Lemon was incapacitated, then the Act gave Ms. Gamble the authority to consent on behalf of Mr. Lemon 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. Lemons 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 that 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 Ms. Gamble could have authority to make health care decisions on Mr. Lemon's behalf under the Act, she did not have authority to sign an arbitration agreement waiving his right to a jury trial such that a person would later be bound to the agreement as the Personal Representative of his Mr. Lemon's Estate. Upon seeking the admission of Mr. Lemon to Defendant's facility, Ms. Gamble 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. Lemon, nor does it require any financial commitment to pay for such services.[9]

The arbitration agreement in question is separately titled "Facility – Resident/Representative Arbitration Agreement", paginated as "Page 1 of 1" and contains its own signature lines. Further, the Arbitration Agreement by its own language distinguishes itself from 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 "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. In *Coleman*, the circuit court refused to

[9] 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.

compel arbitration where 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 Ms. Gamble lacked any legal authority under the Act to enter a contract not necessary to Mr. Lemon's healthcare, 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, Jollev & 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. Lemon's estate made any false representations as far as authority is concerned because Ms. Gamble was acting in her individual capacity at the time she signed the Arbitration Agreement.

Since Ms. Gamble did not have authority to sign the Arbitration Agreement under the Adult Health Care Consent Act, the fact that Ms. Gamble signed the Arbitration Agreement in her individual capacity 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. In *Coleman*, the Supreme Court 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 appears to hinge on a direct benefits theory of estoppel, i.e., that since Mr. Lemon benefited from the terms of an Admission Agreement signed by Ms. Gamble in her individual capacity, the Estate should be estopped from denying the validity of the Arbitration Agreement. *See Wilson v. Willis*, 426 S.C. 326, 340, 827 S.E.2d 167, 175 (2019).

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 non-signatory 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, 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 his 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).

This case involves two separate agreements that 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 from the Admissions Agreement via 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. Furthermore, 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 a 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*. Accordingly, 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 Into 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 Ms. Gamble had authority to enter the Arbitration Agreement on Mr. Lemon's behalf or to waive Mr. Lemon's right to a jury trial. For the reasons mentioned above, there are not any executed powers of attorney, nor is the Adult Health Care Consent Act applicable, and thus, there is no probative evidence that infers that Ms. Gamble had the authority to enter the Arbitration Agreement. The simple fact that Ms. Gamble signed the agreements so that her son could be admitted to Defendant's facility and receive health care in no way indicates a manifestation of authority by Mr. Lemon to waive his right to a jury trial or agree to arbitration. There is no evidence that Mr. Lemon ever manifested any form of assent establishing Ms. Gamble as his agent. 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. Lemon to Defendant that his mother had authority to act on his behalf. Instead, it is a representation made by Ms. Gamble in her 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 Ms. Gamble held "inherent agency powers" to act on behalf of Mr. Lemon 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 Ms. Gamble held herself out as an agent for her son, there is no evidence that at any point Mr. Lemon himself made representations, or voluntarily placed Ms. Gamble in a position, which would indicate a conscious or implied representation that she was specifically authorized to enter arbitration agreements on Mr. Lemon's behalf. Ms. Gamble's authority, if she had any, could only have been derived from a durable power of attorney if he had his mental capacity or if he was lacking capacity, then from the Adult Health Care Consent Act, a statutory construct which did not bestow authority to enter arbitration agreements for the reasons described above. Despite Defendant's contentions, Mr. Lemon never consciously and personally held Ms. Gamble out or represented to Defendant that Ms. Gamble was authorized to act on Mr. Lemon's 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 Ms. Gamble had actual or apparent authority to enter the Arbitration Agreement.

IV. <u>The Scope of the Arbitration Agreement Does Not Cover Wrongful Death Actions by Mr. Lemon's Statutory Beneficiaries.</u>

Even if Ms. Gamble had authority to sign the Arbitration Agreement and it was valid, the wrongful death claims of Mr. Lemon's 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 non-signatories 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. 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. Lemon. 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. Lemon 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 non-consenting, 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.

V. <u>The Arbitration Agreement Fails the Basic Tenet of Consideration in Contract Law.</u>

The necessary elements of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. Of S.C.*, 354 S.C. 397, 406 (2003). To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. *Benya v. Gamble*, 282 S.C. 624, 628 (Ct. App. 1984). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'' *Plantation A.O., LLC v. Gerald Builder of Conway, Inc.*, 386 S.C. 198, 206 (Ct. App. 2009). Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. An arbitration agreement is simply a contract and therefore, is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties. These essential contract formation requirements are not met here.

The S.C. Supreme Court and Court of Appeals have reviewed nearly identical admission and arbitration documents as exist in this present matter and held resoundingly that the admission agreements and arbitration agreements do not merge. *See Coleman v. Mariner Health Care, Inc.* 407 S.C. 346, 352 (2014); *Thompson*, 416 S.C. at 55; *Hodge*, 422 S.C. at 563. Thus, any consideration that is afforded through the admission agreement is not applicable, nor credited to the arbitration agreement. Therefore, the arbitration agreement must have specific consideration attributed to its formation.

Standing on its own, there is no mention of consideration anywhere in the arbitration agreement. Defendants have argued that the arbitration agreement is a bilateral contract and consideration is provided through the exchanging of promises to enter into arbitration. However, the S.C. Supreme Court held long ago:

> A promise may constitute the consideration for another promise. But a promise is not a good consideration for a promise unless there is absolutely ***mutuality of the engagement***, so that each party has the right to hold the other to a positive agreement. ***In case the promise of one of the parties impose no legal duty upon the party making it, such promise furnishes no consideration for a promise***.

Int'l Shoe Co. v. Herndon, 135 S.E. 202, 205 (1926) (emphasis added) (*citing* Elliott on Contracts, vol. 1, § 231). Although Defendants have stated that "each of the parties is waiving the right to trial by jury, and instead, any dispute between the parties shall be resolved through binding arbitration," the reality is that the obligation and detriment falls almost exclusively on the resident, i.e. Mr. Lemon. *Id.* It is virtually inconceivable that Defendants would bring suit against a resident relating to Defendant's provision of care or the resident's receipt of such care. This is particularly evident in the legal conclusion and fact that **no duty is owed by the resident to the nursing home facility** other than to pay one's bills which happens to be exclusively related to the admission agreement, not the arbitration agreement; the two agreements do not merge. Simply put, a resident has no duty to the facility in a nursing home context. Taking this point one step further, in essence, an arbitration agreement is simply a contract in which the parties agree to an alternative forum for determining and exercising judgment of a legal duty or obligation. An essential term of the arbitration agreement is that the parties must owe each other some kind of legal duty or obligation. Since a resident at a nursing home does not possess a legal duty or obligation, then such resident also may not be judged within the confines of any legal forum, let alone arbitration. Whereas, Defendants have a legal duty to provide care and treatment. There are not mutually exchanged promises in this arbitration agreement because the parties do not have mutual obligations or duties to each other. Thus, Defendants exclusively benefit from this contract and no consideration was offered to Mr. Lemon. Defendants are unable to provide this court with any evidence of consideration, and therefore, the arbitration agreement fails as a matter of contract and law.

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 Ms. Gamble, 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. As previously mentioned and offered in Exhibit V and Exhibit W, Defendant was promptly provided with discovery which they have failed and/or refused to respond to. If Defendant's request for further discovery was made in earnest, then they should have engaged in prompt discovery just as Plaintiff did. That opportunity for discovery has come and gone, and any further discovery would be oppressive and unduly burdensome according to SCRCP Rule 26(c). The Court should deny any potential request for additional discovery.

Mr. Lemon is deceased – he can offer no further testimony as to his manifestations of authority. Defendants have failed to offer any articulable discovery that would benefit the specific contractual or legal inquiries that are presented to this Court. To be clear it is anticipated that Defendants' Memorandum in Support of their motion categorically requests "limited jurisdictional discovery" with no specificity. This discovery request is in essence a motion to compel, yet Defendants have offered no explanation of what discovery they are seeking or how such discovery would answer the factual inquiries in this case. This vague assertion by Defendants is unsupported by the facts of this case.

Moreover, any deposition or discovery pertaining to Ms. Gamble would be unsupportive, irrelevant, and a waste of resources. This is consistent with the holding in *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 130-31 (Ct. App. 1990), in which the circuit court granted summary judgment to respondents who, along with the alleged agent, had denied in their affidavits an alleged agent was actually their agent. The court held that even though the purported agent stated in a deposition he was respondents' agent, because no other affidavits or depositions corroborated that claim, no question of fact was presented as to agency, and the court affirmed the grant of summary judgment to respondents. *Id*. at 130. The court observed "statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." *Id*. In *Snell*, 273 S.C. 317, 322-23 (1979), the S.C. Supreme Court determined "[t]he testimony of [a purported agent who signed an agreement on behalf of ten relatives] that she was acting as the agent of her ten nonresident relatives is entitled to some weight but is insufficient without more to establish an agency relationship." Furthermore, "it is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *Hodge*, 422 S.C. at 565-566.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Compel Arbitration.

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February 28, 2024
Ridgeland, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Case No. 2023-CP-20-00268

Thomas D. Kilpatrick
as Special Administrator for the Estate of Anthony Lemon,

Respondent,

v.

Pruitthealth - Ridgeway, LLC f/k/a Unihealth Post-Acute Care - Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Clinical Consulting, LLC, Fundamental Long Term Care Holdings, Inc., Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC,

Defendants,

Of whom THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC, are

Appellants.

NOTICE OF APPEAL

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Defendants/Appellants THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC (collectively, "Appellants"), hereby appeal the following order of the Honorable Patrick C. Fant, III, Circuit Court Judge:

- **Order Denying Motion to Compel Arbitration & Motions to Stay,** filed March 14, 2024.

A copy of the appealed order is attached hereto and incorporated herein by reference. Appellants received written notice of entry of the order on March 14, 2024.

Respectfully submitted,

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April 12, 2024

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Fairfield County
Court of Common Pleas

Patrick C. Fant, III, Circuit Court Judge

Case No. 2023-CP-20-00268

Thomas D. Kilpatrick
as Special Administrator for the Estate of Anthony Lemon,

Respondent,

v.

Pruitthealth - Ridgeway, LLC f/k/a Unihealth Post-Acute Care - Tanglewood, LLC, United Health Services of South Carolina, Inc., Pruitthealth Consulting Services, Inc., Pruitthealth Therapy Services, Inc. f/k/a United Rehab, Inc., Pruitthealth, Inc., Neil Pruitt, Jr., THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Clinical Consulting, LLC, Fundamental Long Term Care Holdings, Inc., Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC,

Defendants,

Of whom THI of South Carolina at Columbia, LLC d/b/a Midlands Health and Rehabilitation Center, THI of South Carolina, LLC, Fundamental Clinical and Operational Services, LLC, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC, are

Appellants.

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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 (and the other Defendants besides Appellants) on April 12, 2024, by emailing (see attached email) a copy of the same to counsel of record:

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I also certify that a copy of Appellants' **NOTICE OF APPEAL** was today, April 12, 2024, 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,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines
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Charleston, South Carolina

April 12, 2024

From:	Hines, Russell
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Cc:	Davis, Jay; Brown, Stephen L.; Riddle, Matthew; Dotterer III, Gaillard T. (Gilly); Bell, Pollyana (Polly); Justman, Aimee; Peterson, Susan; Preiser, Skyla; Wakeham, Rebecca (Becky)
Subject:	Kilpatrick (Case No. 2023-CP-20-00268) -- Notice of Appeal
Date:	Friday, April 12, 2024 1:32:30 PM
Attachments:	image001.png Kilpatrick v. THI (Case No. 2023-CP-20-00268) -- Notice of Appeal.pdf Appealed Order -- Order Denying Motion to Compel Arbitration and Motions to Stay -- filed 3-14-24.pdf

Attached for service in the above-referenced matter please find Appellants' **Notice of Appeal**, including a copy of the **appealed order** attached thereto.

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****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2023CP2000268

Official File Stamp:	04-12-2024 01:40:27 PM
Court:	CIRCUIT COURT Common Pleas Fairfield
Case Caption:	Thomas D Kilpatrick , plaintiff, et al VS Pruitthealth Ridgeway L L C , defendant, et al
Event(s):	Notice/Notice of Appearance
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals - 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:

Matthew Oliver Riddle for Fundamental Administrative Services L L C, Fundamental Clinical Consulting L L C, Fundamental Clinical And Operational Services L L C, Thi Of South Carolina L L C, Midlands Health And Rehabilitation Center, Thi Of South Carolina At Columbia L L C, Hunt Valley Holdings L L C

Neil Edward Alger for Thomas D Kilpatrick

Donald Jay Davis, Jr. for Fundamental Administrative Services L L C, Fundamental Clinical Consulting L L C, Fundamental Clinical And Operational Services L L C, Thi Of South Carolina L L C, Midlands Health And Rehabilitation Center, Thi Of South Carolina At Columbia L L C, Hunt Valley Holdings L L C

Gaillard Townsend Dotterer, III for Fundamental Administrative Services L L C, Fundamental Clinical Consulting L L C, Fundamental Clinical And Operational Services L L C, Thi Of South Carolina L L C, Midlands Health And Rehabilitation Center, Thi Of South Carolina At Columbia L L C, Hunt Valley Holdings L L C

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Joshua Steven Whitley for United Health Services Of South Carolina Inc, Unihealth Post Acute Care Tanglewood L L C, United Rehab Inc, Pruitthealth Ridgeway L L C, Neil Pruitt, Jr, Pruitthealth, Inc, Pruitthealth Therapy Services Inc, Pruitthealth Consulting Services Inc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Anthony Lemon

Fundamental Long Term Care Holdings Inc

RECEIVED
Apr 28 2025
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. The undersigned also certifies 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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April 28, 2025