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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2022-CP-10-00483
Appellate Case No. 2025-000070

Fernesha Mazyck,
as Personal Representative of The Estate of Ida Braggs,

Respondent,

v.

THI of South Carolina a Charleston, LLC
d/b/a Riverside Health and Rehab,

Appellant.

RECORD ON APPEAL

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1 The "Facility" refers to Defendant/Appellant, THI of South Carolina a Charleston, LLC d/b/a Riverside Health and Rehab.

2 "Plaintiff" refers to Plaintiff/Respondent, Fernesha Mazyck, as Personal Representative of The Estate of Ida Braggs.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2021-CP-15-00516
FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,	)	
Plaintiff,	)	**ORDER**
v.	)	
THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,	)	
Defendants.	)	

This matter came before the Court on January 10, 2024, on a Motion to Compel discovery responses filed by Plaintiff and a Motion to Compel Arbitration filed by Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab 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. Present at the hearing and arguing on behalf of Defendant was Russell G. Hines. Appearing and arguing on behalf of Plaintiff was Grahame E. Holmes. After reviewing the submissions of the parties, the pleadings, and hearing the arguments of counsel, the Court denies Defendant's Motion to Compel Arbitration and grants Plaintiff's Motion to Compel for the reasons set forth below.

Plaintiff filed this action in the Charleston County Court of Common Pleas alleging Ida Braggs ("Decedent") received substandard care at Defendant's nursing home facility. Plaintiff has alleged wrongful death and survival claims as a result of the care and treatment provided to decedent.

Decedent was admitted to Defendant's facility on August 6, 2010. Plaintiff signed an Admission Agreement on August 6, 2010. That same day, she also signed the subject Arbitration Agreement. At the time the Arbitration Agreement was signed, Plaintiff did not have any form of power of attorney for Decedent. Plaintiff alleges that Decedent was suffering from schizophrenia at the time she was admitted to Defendant's facility.

1. <u>South Carolina Adult Health Care Consent Act S.C. Code Ann. § 44-66-10 *et seq*.</u>

In an affidavit signed by Plaintiff and filed in opposition to Defendant's Motion to Compel Arbitration, Plaintiff attested that at the time the Admission Agreement was signed, Decedent had three living children. A majority of Decedent's three children did not sign the Admissions Agreement as required by § 44-66-10 *et seq*. and there is no evidence that a majority of Decedent's three children were consulted regarding the Admissions Agreement. Therefore, based on the evidence before the Court, it appears Plaintiff did not have authority to make health care decisions on behalf of Decedent at the time of admission, much less the authority to waive her estate's right to a jury trial.

Even if Plaintiff had authority under the Act to enter the Admission Agreement as an act in furtherance of Decedent's health care needs, it does not necessarily follow that she had authority to enter a separate Arbitration Agreement under the Act. 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. *Solesbee v. Clinical,* 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023). Therefore, even if Plaintiff had authority to act on behalf of Decedent under the South Carolina Adult Health Care Consent Act, this authority does not extend to an Arbitration Agreement.

2. <u>Merger.</u>

Defendant argues that because the Admission Agreement and Arbitration Agreement were signed at the same time and in the course of Decedent's admission, the Admission Agreement and Arbitration Agreement merge into one agreement.

In determining whether an arbitration agreement and admission agreement are separate, stand alone agreements or if they merge, our courts have considered whether the agreements are separately paginated, whether they are both controlled by state or federal law, whether they contain similar conditions for termination, and whether they are addressed as one document. *Solesbee v. Clinical,* 438 S.C. 638, 885 S.E.2d 144 (Ct.App. 2023); *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018); *Coleman v. Mariner Health Care, Inc.,* 407 S.C. 346, 755 S.E.2d 450 (2014).

Here, the Arbitration Agreement and Admission Agreement are separately paginated. The Arbitration Agreement is controlled by federal law while the Admission Agreement is controlled by state law. The resident may terminate the Admission Agreement but cannot terminate the Arbitration Agreement. The agreements are referred to as separate agreements: "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." Therefore, the Admission Agreement and the Arbitration Agreement are separate agreements that shall not be merged.

3. <u>Estoppel.</u>

Defendant argues that even if Plaintiff did not have authority to enter into the Arbitration agreement through the South Carolina Adult Health Care Consent Act or a valid power of attorney, Plaintiff should be estopped from asserting the Arbitration Agreement is unenforceable.

Defendant has not met its burden to establish these elements of estoppel. As to the person to be estopped, the focus is on the intentional actions of the principal, ie. Decedent. The only evidence put forth as to Decedent's condition at the time of her admission is that she was suffering from schizophrenia. Defendant has put forth no evidence as to any intentional actions of Decedent, much less intentional, calculated actions made with knowledge of the real facts.

4. Apparent Authority.

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). As stated above, Defendant has offered no evidence of any actions taken by Decedent, consciously or impliedly, to represent Plaintiff to be her agent and has failed to prove Plaintiff had apparent authority to act on Decedent's behalf. Therefore, Defendant's Motion to Compel Arbitration is denied.

As Defendant's Motion to Compel Arbitration is denied, Plaintiff's Motion to Compel discovery responses is granted. Defendant shall provide full and complete responses to Plaintiff's discovery requests within 45 days of the date of this Order.

IT IS SO ORDERED.

____
The Honorable J. Cordell Maddox, Jr.
Presiding Judge
Ninth Judicial Circuit

________, 2024
Anderson, South Carolina

Charleston Common Pleas

Case Caption:	Fernesha Mazyck , plaintiff, et al VS Thi Of South Carolina At Charleston Llc , defendant, et al
Case Number:	2022CP1000483
Type:	Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2022CP1000483

Fernesha Mazyck et al
PLAINTIFF(S)

Thi Of South Carolina At Charleston Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Defendant THI of South Carolina at Charleston, LLC.'s Motion to Reconsider, filed on 11/15/24, is hereby denied.

ORDER INFORMATION

This order ☐ ends ☑ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/13/2024 .

Fernesha Mazyck Personal Representative
Ida Braggs Estate

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Charleston Common Pleas

Case Caption:	Fernesha Mazyck , plaintiff, et al VS Thi Of South Carolina At Charleston Llc , defendant, et al
Case Number:	2022CP1000483
Type:	Order/Electronic Form 4

So Ordered

s/ J. Cordell Maddox Jr.

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2022-CP-10

FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,

Defendant.

SUMMONS
(Wrongful Death and Survival Action)
(Jury Trial Requested)

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at their office, 123 S. Walter Street, Post Office Box 1164, Walterboro, South Carolina 29488, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in this Complaint.

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

BY: s/Grahame E. Holmes
Grahame E. Holmes
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P.O. Box 1164
Walterboro, SC 29488

(843) 549-9544

ATTORNEYS FOR THE PLAINTIFF

February 2, 2022
Walterboro, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2022-CP-10

FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,

Defendant.

COMPLAINT
(Wrongful Death and Survival Action)
(Jury Trial Requested)

Plaintiff alleges:

1. Plaintiff is a citizen and resident of Charleston, South Carolina and brings this action as the Personal Representative of the Estate of Ida Braggs, pursuant to S.C. Code Ann. §15-51-10 for wrongful death, and S.C. Code Ann. §15-5-90 for survival, and other applicable statutory and/or common law other applicable statutory and/or common law.

2. Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (herein after referred to as "THI"), is an entity organized under the laws of Delaware with its principal place of business in the county of Charleston, South Carolina. At the time of the acts complained of, THI was a skilled nursing facility.

3. Ida Braggs was admitted to THI on August 6, 2010. Ms. Braggs was 53 years old. Ms. Braggs had a past medical history of basal ganglia hemorrhage, cryptosporidiosis, CVA, diabetes mellitus, PVD, sickle cell trait, hypotension, and thromboembolism.

4. On November 27, 2018 Ms. Braggs was sent to MUSC for pneumonia and hypoxia. She was also suffering from sacral spine/coccyx wound and an unstageable ulcer to sacrum.

5. Ms. Braggs was readmitted to THI on December 3, 2018. She was placed on an increased diet of protein and medications for wound healing.

6. On January 11, 2019, Ms. Braggs was transferred back to MUSC for abdominal pain and wounds. She was noted to have bilateral coccyx, left lateral ankle, left posterior thigh and right heel wounds that were unstageable.

7. Ms. Braggs was readmitted back to THI on January 15, 2019.

8. On February 8, 2019 she is sent to MUSC. She is noted to have MRSA (methicillin resistant staphylococcus aureus), MSSA (methicillin sensitive staphylococcus aureus), morganella, and Proteus. She was also noted to have large sacral decubitus ulcers along with bilateral lower extremity ulcers felt to be the source of her bacteremia.

9. She was readmitted to THI on February 14, 2019 with comfort care only.

10. Ms. Braggs expired on February 21, 2019.

FOR A FIRST CAUSE OF ACTION
(Negligence/ Negligence Per Se, Gross Negligence)

11. While in Defendant's care, custody and control, Ida Braggs did suffer grave, permanent and severe injuries, pain and suffering, humiliation, and death as a direct and proximate result of the following negligent, reckless, willful, careless, negligent per se and grossly negligent acts of Defendant:

a. Failing to provide timely and comprehensive monitoring of the resident's condition and any changes thereof;

b. Failing to timely evaluate and assess Ms. Bragg's risk factors with which she presented in order to design an appropriate plan of care;

c. Failing to implement and follow an appropriate plan of care and act on changes in condition;

d. Failing to provide appropriate and timely assessments and treatment for signs and symptoms of infection; and

e. Failing to provide appropriation care related to skin integrity and pressure ulcers.

12. That as a direct and proximate result of the aforesaid negligent, reckless, willful, careless, negligent per se and grossly negligent acts of Defendant, Ida Braggs suffered severe conscious pain and suffering, humiliation, anxiety, and death; the deceased Plaintiff's beneficiaries have suffered grief, sorrow, mental anguish and all of the damages which accompany the loss of a loved one; the beneficiaries have suffered pecuniary loss, all to the Plaintiff's actual and punitive damages.

Wherefore, having fully pled, Plaintiff prays for a trial by jury, an award of actual and punitive damages against Defendant in an amount to be determined by a jury, attorney fees, the costs and disbursements of this action, and such other and further relief as the Court deems proper.

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

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ATTORNEYS FOR THE PLAINTIFF

February 2, 2022
Walterboro, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON) CIVIL ACTION NO.: 2021-NI-10

FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,

Defendant.

AFFIDAVIT OF MERIT OF
AUDREY RABON HOLMES, MSN-Ed., BSN, RN

Personally appeared before me Audrey Rabon Holmes, MSN-Ed, BSN, RN who, having been duly sworn, deposes and states:

1) That I am over the age of 18 years and am qualified and competent to issue this Affidavit.

2) That I qualify as an "expert", as defined in S.C Code§ 15-36-1 00(A).

1) That my professional qualifications are accurately set forth in my curriculum vitae, which is attached hereto.

2) This Affidavit is made pursuant to§ 15-36-100 of the South Carolina Code of Laws, which requires that this Affidavit must specifically name at least one negligent act or omission claimed to exist in the factual basis for each claim based on the available evidence at the time of the tiling of the Affidavit.

3) That I have reviewed various records pertaining to Ida Braggs and the care and treatment rendered. The medical records I have reviewed included the following:

a. Riverside Health and Rehabilitation, Charleston

b. Medical University of South Carolina, Charleston

4) Through my professional standing as set forth above, I am familiar with the applicable standard of care for the performance of a nursing home, physicians, nurses, and related staff for patients/residents such as Ida Braggs and applicable to the conduct of the Defendant Riverside Health and Rehabilitation (and all entities or individuals charged with operating and managing

Riverside Health and Rehabilitation which treated Ida Braggs). The standard of care requires the following:

a. Timely evaluation and assessment of Ida Braggs. outlining all risk factors with which she presented in order to design an appropriate plan of care;

b. Failure to implement an appropriate plan of care to promote optimal skin integrity and prevent pressure injuries;

c. Provision of timely and comprehensive monitoring and documentation of Ms. Bragg's condition and any changes thereto;

d. Timely and appropriate assessments and treatment for signs and symptoms of deterioration of skin integrity; and

e. Appropriation of consistent care related to skin integrity and pressure ulcers.

5) I have reviewed the evidence submitted to me, and based on my skill. expertise, and knowledge, it is my opinion that Riverside Health & Rehabilitation (and all entities or individuals charged with managing or operating the facility), committed the following negligent acts and omissions which constitute a failure to comply with the appropriate standards of care:

a. Failing to provide timely and comprehensive monitoring of the resident's condition and any changes thereto;

b. Failing to timely evaluate and assess Ida Bragg's risk factors with which she presented in order to design an appropriate plan of care;

c. Failing to implement and follow an appropriate plan of care and act on changes in condition; and

d. Failing to provide appropriate and timely assessments and treatment for signs and symptoms of infection.

6) These violations of the standards of care and the negligent treatment provided by the defendants resulted in a progressive decline of Ida Braggs' health, comfort, and well-being which were the

7) I specifically reserve the right to add to, amend, or subtract from this Affidavit as new evidence comes into discovery or as new opinions are formulated.

The Affiant further sayeth naught.

Audrey Rabon Holmes, MSN, MSN, RN

Audrey Rabon Holmes. MSN-Ed. BSN RN

Sworn to and subscribed before me this the
1st day of October 20 21

Sandra S. Todd

Notary Public for the State of SC

My commission expires: 12-31-22

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,	)	CASE NO. 2022-CP-10-00483
PLAINTIFF,	)	
vs.	)	**DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB'S ANSWER TO PLAINTIFF'S COMPLAINT**
THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB,	)	
DEFENDANT.	)	

TO: GRAHAME E. HOLMES, ESQ., ATTORNEYS FOR THE PLAINTIFF:

Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (hereinafter "this Defendant" or the "Facility"), by and through its undersigned counsel, *subject to and without waiving any and all rights to compel this matter to arbitration and any and all rights to have the claims dismissed*, responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations of Plaintiff's Complaint not hereinafter admitted, denied, qualified, or otherwise explained are hereby expressly denied and strict proof thereof is demanded.

2. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations contained in Paragraph 1 of Plaintiff's Complaint and, therefore, denies the same and demands strict proof thereof. To the extent those allegations call for legal conclusions, no response is required.

3. Responding to the allegations set forth in Paragraph 2 of Plaintiff's Complaint, this Defendant asserts that it is a limited liability company organized under the State of Delaware, and that it is the sole licensee of the skilled nursing facility located in Charleston County, South Carolina.

4. Answering the allegations set forth in Paragraph 3 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was admitted for skilled nursing care on August 6, 2010. Responding to the remaining allegations in Paragraph 3, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages are denied.

5. Answering the allegations set forth in Paragraph 4 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was transferred to MUSC on November 27, 2018. Responding to the remaining allegations in Paragraph 4, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages are denied.

6. Answering the allegations set forth in Paragraph 5 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was readmitted for skilled nursing care on December 3, 2018. Responding to the remaining allegations in Paragraph 5, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages are denied.

7. Answering the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was transferred to MUSC on January 11, 2019. Responding to the remaining allegations in Paragraph 6, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all

allegations intended to assert or imply liability or damages are denied. Further responding, this Defendant is without knowledge or information sufficient to respond to allegations regarding Ms. Braggs' status at MUSC, and therefore denies the same and demands strict proof thereof.

8. Answering the allegations set forth in Paragraph 7 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was readmitted for skilled nursing care on January 15, 2019. Responding to the remaining allegations in Paragraph 7, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages are denied.

9. Answering the allegations set forth in Paragraph 8 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was transferred to MUSC on February 8, 2019. Responding to the remaining allegations in Paragraph 8, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages are denied. Further responding, this Defendant is without knowledge or information sufficient to respond to allegations regarding Ms. Braggs' status at MUSC, and therefore denies the same and demands strict proof thereof.

10. Answering the allegations set forth in Paragraph 9 of Plaintiff's Complaint, this Defendant admits that Ms. Braggs was readmitted for skilled nursing care on February 14, 2019. Responding to the remaining allegations in Paragraph 9, this Defendant would crave reference to Ms. Braggs' facility records for their contents. Any allegations inconsistent with those contents and all allegations intended to assert or imply liability or damages are denied.

11. This Defendant admits the allegations set forth in Paragraph 10 of Plaintiff's Complaint, upon information and belief.

12. This Defendant denies the allegations in Paragraphs 11 and 12 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

13. This Defendant denies the Plaintiff's Prayer for Relief in full.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

14. This Court lacks jurisdiction with respect to the Facility and Plaintiff as to Plaintiff's claims because this matter should be compelled to arbitration pursuant to a valid arbitration agreement entered into between the Facility and Plaintiff, as well as to any intended third party beneficiaries. Pursuant to § 4 of the Federal Arbitration Act (the "FAA"), this action must be stayed until the validity of the arbitration agreement entered into by the Plaintiff and the Facility is determined by this Court. Further, pursuant to the South Carolina Rules of Civil Procedure and the FAA, this matter should be dismissed or stayed pending final resolution of all claims pursuant to the valid arbitration agreement. This Defendant hereby provides notice that a Motion to Compel Arbitration and associated Motion to Dismiss or Stay and/or Motion to Stay, as the case may be, is forthcoming.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

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

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

17. Plaintiff's recovery in the matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at S.C. 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

18. 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

19. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action. This Defendant reserves the right to withdraw this defense at a later time as discovery progresses.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

20. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease process over which the Defendant had no control and, as such, this Defendant plead such a natural disease process as a complete or partial bar to this action.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

21. This Defendant would assert that some, or all, of the state or federal laws cited by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

22. 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

23. A claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions 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, 15-32-540 *et seq.*

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

24. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

25. This Defendant hereby raises election of remedies as an affirmative defense to Plaintiff's claims.

FURTHER ANSWERING AND
FOR A FURTHER AFFIRMATIVE DEFENSE

26. This Defendant hereby asserts that the Plaintiff lacks legal standing to pursue the instant claims.

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 they be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE]

CLEMENT RIVERS, LLP

By: *s/D. Jay Davis, Jr.*
D. Jay Davis, Jr.
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James D. Gandy, III
SC State Bar ID No.: 11925
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab

Charleston, South Carolina

Dated: April 6, 2022

STATE OF SOUTH CAROLINA * COURT OF COMMON PLEAS
COUNTY OF CHARLESTON * TRANSCRIPT OF RECORD

FERNESHA MAZYCK, as Personal Representative of the Estate of Ida Braggs,

Plaintiff,

vs. Case No. 2022-CP-10-00483

THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,

Defendant.

January 10, 2024

B E F O R E:

The Honorable J. Cordell Maddox, Jr., Presiding Judge

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

Grahame E. Holmes, Esq.
Attorney for the Plaintiff

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Recorded by: WebEx Recording

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SC Official Court Reporter III

I N D E X

E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)	[Transcription] Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

THE COURT: Okay. Y'all have got two motions here: one to compel responses and one to compel arbitration. This is a nursing home case; is that right?

MR. HINES: Yes, Your Honor.

THE COURT: I'll be happy to hear from -- well, are you still arguing about the production of documents?

MR. HINES: Your Honor, I don't want to speak for Mr. Holmes, but there's a relationship between the motions because -- I think he would agree, but -- and he'll certainly let me know if he doesn't, but since we're moving to compel arbitration -- and that motion does include in it a request for the Court to stay any obligation to respond to the discovery while that issue of arbitration is pending, but that's the basis for the non-response to the discovery. So, I think, you know, that they do go together, and Gray, certainly, please let me know if I have got that, you know, wrong but, as I see it --

THE COURT: So, you haven't responded because you're waiting to decide whether it's going to be an arbitration or whether it's going to be --

MR. HINES: Yes, Your Honor.

THE COURT: Okay. I have had, quite frankly -- just so you know, in the last six months, I probably have had ten of these motions, and I'm old enough to remember when the State

Arbitration Act went in. I may have been on the legislature when we passed it. It was pretty simple back then. This has gotten to be a complicated issue. Just, I mean, so you know where I'm coming from, I have ruled -- the facts were just different in each contract. So, anyway, I'm happy to hear from you. Just giving you that I have had to hear this a lot.

MR. HINES: Well, thank you, Your Honor. May it please the Court?

THE COURT: Yes, sir.

MR. HINES: Russ Hines for the defendant, and we're the moving party in the motion to compel arbitration. And -- well, perhaps with the understanding that you have had to hear this a lot recently, and I don't mean to pile on because I know this ---

THE COURT: Oh, no, no. That’s okay.

MR. HINES: --- this argument is -- is -- well, it's got some nuance and it's a bit cumbersome even to make it candidly, and that's why, I guess, the first thing I'd mention is we filed a pretty extensive memo. And I do sort of want to have that in the background or to know that I'm happy to rely on it -- you know, rely on it greatly.

What I intend to do here is to give Your Honor the -- at least the broad strokes of our argument, and as you mentioned earlier, this is a nursing home case. This is a case of alleged nursing home malpractice. The nursing home resident is the late Ida Braggs. She was a resident of our facility beginning in -- well, August of 2010.

And, at the time of her admission, her daughter, Fernesha Mazyck -- I think that's how it's pronounced. Some folks around here at least pronounce it “Ma-zeek"; I don't know if everyone does. But Fernesha Mazyck, her daughter, signed -- handled the paperwork for her for her admission.

And, importantly, what she did when she did that was she signed an admission agreement and an arbitration agreement. And, Your Honor, the roadmap here that I'm really trying to lay out, we do have some arguments in here that's, I guess -- well, the main focus of my argument, Your Honor, and really our number-one argument is on the basis of merger and equitable estoppel, because we recognize that Ms. Braggs did not sign the arbitration agreement, did not sign the admission agreement. She signed -- those documents were signed on her behalf by her daughter, Ms. Mazyck.

We also recognized that Ms. Mazyck did not have authority by virtue of power of attorney to do that. We're not aware of that. I'm not yet ready to or in a position to flat out admit she didn't have authority through, for instance, an agency, because we do have a fallback position, Your Honor, where, if you are not able to or at this time don't agree with us on the merger and estoppel, we do ask for some limited discovery into the issues surrounding potential other means of authorization -- for instance, by virtue of an agency -- because it's not the case that you have to have a power of attorney to be able to sign -- to act on someone's behalf.

And the reason we ask Your Honor to allow us to do that in this fashion is because, the concern is, if we were to go ahead and try to use discovery, use the tools of litigation to pursue that and to investigate that, then we would open ourselves up to being accused of waiving the right to arbitration that we're trying to vindicate.

THE COURT: I gotcha.

MR. HINES: Thank you, Your Honor.

And that's just in the background as an alternative, because the main point here and the roadmap is merger, equitable estoppel. And my first hurdle that I have to get over to win this argument, as I acknowledge, there's certainly two hurdles that I have to overcome, and if I don't overcome the first one, I can't win it.

So, the first one is merger, and the idea is the merger of the arbitration agreement and the admission agreement. And the way that works is this, Your Honor, that the -- well, the case that I'd like to point out usually in explaining this first is a case called Coleman vs. Mariner Health Care. In that case -- I'll notice as an aside: The primary argument that was made in that case was arguing about the South Carolina Adult Health Care Consent Act, providing a statutory basis for authority to agree to arbitration. The Supreme Court in Coleman said, no, it doesn't, and we're not arguing that it does here.

But the second argument that was made in Coleman, that was ultimately lost by the arbitration or by the proponents of arbitration, it was lost on different facts. But the legal part of Coleman that addressed that argument is the springboard for where I'm trying to go with merger, because in that case -- but the Court recognized that, when you have multiple instruments that are signed at the same time by the same parties for the same purpose in the course of the same transaction, you have a merger unless -- and that merger means that those documents will be deemed and construed together as a single contract unless there is evidence of an intention contrary to merger.

Importantly in the Coleman case, the facts were different. Coleman, of course, said, Well, we recognize that, yes, there would be a merger because we do recognize that these documents -- and Coleman dealt with a case where it was a sister admitting her sister to a nursing facility, very similar to our case in that basic setup of talking about nursing home admissions and you're talking about an admission agreement and an arbitration agreement signed in conjunction with that admission, and the Court said, Yes, those documents, it checks off the boxes: parties, purpose, time, and transaction; and there is a merger unless there's evidence of an intention contrary to merger. And the Coleman Court went out to find out that, on those facts, there was such contrary evidence.

And a few things that the Court looked at is (1) the Court said that there is language in an entirety of agreement clause or provision in the admission agreement reflected a textual basis that the parties intended to keep these documents separate. And I don't think it's necessary in this case to get into the specifics on that, because unlike in Coleman, we have an entirety agreement clause in our admission agreement. But that agreement, unlike in Coleman, it specifically says -- and this is Exhibit 2 to our memo, and it specifically says, on page 12, in the entire agreement provision section, "The undersigned further acknowledges that he/she has read -- has received and read the admission handbook and other admissions materials and understand that these documents are made part of the agreement by reference herein."

So, unlike in Coleman where you had this textual basis that the Court pointed to for the documents being seen as intended to be separate, in ours, you have this expansiveness in our entirety agreement provision which talks about other admission materials being made part of the agreement.

And, of course, our position is that the arbitration agreement is an admission material. It was signed in conjunction with admission. That's where it comes in the process. And, in fact, there's two different cases I know of; one case is called Stott vs. White Oak Manor; the other case is Hodge vs. UniHealth Post-Acute Care of Bamberg, both -- and we have cited these in our memo -- where the Court -- the Court of Appeals in both of those cases, just in reciting the facts, refers to the arbitration agreement as part of the admissions documentation.

Now, I would be clear to note, it was not the case in either of those cases that the Court was holding that as a matter of law; that an arbitration agreement is always part of the admission materials. My point is simply to say that, if we're talking about the plain language that was used -- and in our admission agreement, it talks about a reference to admission materials -- and just the plain language that the Court of Appeals used in those cases in very matter-of-factly referring to these documents -- the arbitration agreement, in particular, as admissions documentation or material or words to that effect -- that I'm making just a plain language argument that, of course, that includes it. Because one of the arguments that we get -- that we hear in response to this is, "Well, there's some ambiguity in this regard. There's ambiguity about whatever -- what 'other admissions materials' mean."

And my argument is that there's not reasonably any ambiguity. It was obvious to the Stott Court and the Hodge Court just in common -- just in explaining -- reciting the facts of those cases that that was an admissions document, and I submit that -- we submit that that's just an obvious connection there between those two agreements, and it is not enough to say that there's -- to just conjure up and ambiguity unreasonably.

So, Your Honor, the other part of the Coleman case that was different is that the Coleman Court noted that, in that case, the arbitration agreement had a provision that allowed it to be disclaimed within 30 days. We don't have that here. It seemed to be important to the Coleman Court. And there's also some subsequent case law -- the cases of Coleman, Hodge already mentioned, and Thompson. Those three cases, we discussed them in our brief.

Coleman was a case that dealt with arbitration agreements in this nursing home context, signed -- you know, non-signatory trying to go with merger and equitable estoppel. And the proponent of arbitration lost every one of those cases. But we've explained that the facts are different. For instance, in every one of those cases, you had this disclaimer provision where you had the ability for the arbitration agreement just to disappear, while our position -- you know, it seemed noteworthy to the Coleman Court, and I can understand this. It's hard to argue that there's an intent, that there's not an intent. Well, it cuts against merger, so those courts found, that these two documents that were supposed to be merged and joined together, that one of them could sort of evaporate within 30 days and just go away by virtue of this disclaimer provision. We don't have that.

So, in addition to not having that, we also have this expressed language about other admissions materials being included.

And Your Honor, I realize it's a mouthful to say and it probably is more than that to try to sit there and receive, and that's why I refer back to our brief, because I've said a lot, and I still have -- well, a decent amount more to say, to at least be clear and candid with the Court on this point. Up to now, all the cases that I've discussed with Your Honor -- Coleman, Hodge, Thompson -- and we do explain in our brief the differences -- those cases all dealt with different arbitration and emission agreements.

There is another case that our Court of Appeals has decided within the last year roughly. It's called Solesbee and we address Solesbee. In Solesbee, our client -- we were involved with the case, and we had the very same form documents, same arbitration agreement and admission agreement that are at issue in the case before Your Honor, were also in front of Solesbee, and we lost Solesbee. Now, that case is still -- cert is pending.

THE COURT: I didn't hear that, did I?

MR. HINES: No, Your Honor, that one was -- oh, gosh. I think it was in Spartanburg County. I should remember which judge --

THE COURT: That was probably that Derham Cole. He's not real bright either, but yeah...

MR. HINES: I think it was Judge Cole or Judge Hayes or, heck, maybe it might have been Judge Knie. You know, I have been in front of all of them with this motion.

THE COURT: Yeah, those facts -- I mean, like I said, I've heard a lot of these, so...

MR. HINES: And I want to make -- well, I want to be just completely clear that Solesbee is absolutely my biggest impediment, and we explained -- because I want to make sure Your Honor knows that I'm not trying to hide Solesbee from the Court in any way. And we do argue in our brief why we distinguish it, but the short story is, is that we made a number of arguments today -- in fact, we made a number of arguments in Solesbee, candidly -- that just weren't addressed in the Court's opinion.

And so, that's why we -- you know, understanding that Solesbee is certainly a headwind for us and I understand that Solesbee certainly deals with the very same documents we're dealing with, is that we think there's breathing room between the analysis in Solesbee because, respectfully -- and we're trying to challenge this on cert -- that the analysis is short shrift and to the point of not actually addressing a number of the distinctions we make on the facts.

And we say this in our brief, but just -- I could give you a flavor of it. For instance, one of the things that the Solesbee Court says is, "Well, the reason why there's an intent contrary to merger is because, in the admission agreement, you say that it's governed by South Carolina law, and the arbitration agreement says, well, it's governed by the Federal Arbitration Act, and there's an inconsistency there."

And we say, Well, even if the arbitration agreement was simply a clause in a single document, it would still be governed by the FAA if it affects or the evidence is a transaction involving interstate commerce, which is -- that's just the way the FAA works.

So, it's not a valid basis on which to find some intention contrary to merger when you have the very same situation, even if it was just in one single, undeniably, you know, merged document because it was one instrument. So, it doesn't make sense as to why that's being used as -- called an intention contrary to merger.

Furthermore, I think, you know, respectfully, the Court of Appeals in Solesbee was -- did not -- well, it's not accurate to say that the governing law, that one is state and one is federal. This is actually what the governing law says on the provision on page 10 of the admission agreement: "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."

Well, our position is that all that is saying is we applied the law of the state in which you're located except where that's displaced by federal law in the form of applicable federal regulations. Well, that is, in effect, exactly what the arbitration agreement says, because I'd also note, the FAA simply applies in the same way those federal regulations would apply when it's -- in terms of the reference to the admission agreement.

The FAA applies when you're talking about an arbitration agreement evidencing a transaction involving interstate commerce. And there's no question that's what we have here. There's a case called Dean vs. Heritage Healthcare that explains that, in the context of these nursing homes, that that's -- you're dealing with interstate commerce.

The other thing I would note is, by its very design, the FAA sort of boomerangs right back around to state law, because what the FAA really says is that arbitration agreements have to be placed on equal footing with all the contracts on state law. The history of the FAA was designed to keep -- you know, there was apparently some disinclination on the part of state courts over -- you know, back in -- I guess historically to compel cases to arbitration, you know, just as a general matter, that the state courts were found to be somewhat hostile to arbitration. And the FAA says you can refuse to enforce an arbitration agreement under any ground that's available in state law for the revocation of any contract but nothing else. You can't have a specific role.

So, ultimately, what I'm saying is, you boomerang back to state law contract principles. So, that's an example of -- and we get into this -- and I realize I don't want to take up any more of Your Honor's time than -- well, I don't want to be unduly gluttonous with imposing on Your Honor's time, but we do say this in our brief. It begins on page 33 and goes on in some detail.

But, yes, Solesbee is certainly against us, and I wanted to certainly mention that. I know, understandably, Mr. Holmes will certainly mention it, as he ought to. But we do think there's breathing room between Solesbee and in this case because -- even though we're still dealing with the same documents, the Solesbee Court has not answered the questions that we're raising to you here about how the governing law doesn't -- the Solesbee Court just said it as a matter of fact, that the governing law was an indicia of an intent to maintain a separatedness --

THE COURT: Can I -- and I appreciate your point. You have no idea how much that means when someone points out something against them. I mean, I'm just telling you that it means a lot.

Let me ask you this -- and of course -- and I will rely on the brief, and I have not had a chance to read it over because I've been getting -- I mean, I had people emailing me affidavits yesterday at 3:00 for 4:00 hearings, but this -- the daughter that signed -- and this has come up in almost the last three I've had -- she didn't have any power of attorney or any legal right to sign for her mother?

MR. HINES: Your Honor --

THE COURT: That's an issue every time.

MR. HINES: As I sit here today, I'm not aware of any power of attorney, and I certainly can't represent to the Court that there was.

And the only little caveat I would make is -- and this goes back to our alternative request for some discovery -- I don't believe that a power of attorney exists. I don't think that's something that we can even hold out any reasonable hope for, you know, finding in discovery.

But there is this issue of -- just of a common-law agency. You know, for instance it's possible for there to be. Again, that's our alternatives, our fallback argument, the idea that we would like to have the ability to take some discovery, take the deposition of Ms. Mazyck and perhaps it's conceivable there could be some other limited ones, but the main one would be Ms. Mazyck, find out about how she was operating for her mother at the time.

I understand Ms. Mazyck -- excuse me, Ms. Bragg is no longer living, but Ms. Mazyck should be able to testify as to the way she was handling her mother's affairs or what authority did she have, and that could potentially open the avenue to argue that there is -- that there was, in fact, authority by virtue of an agency.

Now, barring that discovery, as I sit here today, I don't have the ability to argue to Your Honor that that was the case, and I certainly have no evidence of power of attorney. So --

THE COURT: No discovery really has been completed in this at all.

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

THE COURT: Okay.

MR. HINES: And, I guess, let me -- and I'll finish up by -- these arguments, I always -- one of the best CLEs I ever went to, and I don't know if I've put it to good use, but -- it was on legal writing -- and I guess argument could go for this too -- but it was trying to have some sympathy for the plight of the poor judge who receives all this paperwork. And I realize this is one of those ones where there's just some ground that has to be covered, and it's hard, you know, to do it in a real streamlined way.

But what I have argued to you so far really has to do with the merger concept, and it is in our briefs. And then I would just say, on the other side of it is the equitable estoppel. If you will go with us on merger and say, "All right, okay, I can agree that we have a merger," then our argument, the second prong of it is what is called direct benefits estoppel, and that one is shorter and sweeter.

The idea is that, when you have someone who has received -- directly benefitted -- and the key is direct benefits versus indirect -- directly benefitted by virtue of a contract, they can't accept -- you know, having received those benefits directly from the contract and then deny other provisions that they don't like.

And the way that works here is that, if you would agree that there's a merger of admission and arbitration agreement, then they're all one. And certainly there were direct benefits that were received by virtue of the contract. There was room, there was board, there was various activities, care, treatment, all sorts of things that were unquestionably direct benefits by virtue of the admission agreement.

And, anyway, so that's the one-two punch. Merger, I think, is the most heavy lifting, and then the second part is direct benefits. But I will concede: If there's no merger, then my argument loses, so I have to win on both points.

THE COURT: Well, that -- like I said, I appreciate the honesty. It means more -- if I could go to law school, that's what I would tell every kid, just, you know -- because the best way to think -- I have always thought about -- and my job is like tag-team wrestling except I just have to wrestle everybody. They just tag out -- come and throw stuff in my lap, and then tag out and go home, and there's, you know, Mr. Wrestling I and II and Blackjack Mulligan right behind him.

Okay. Mr. Holmes, anything you want to -- I mean, I know you-all -- I am going to read the briefs. I know you both are relying on it, so -- but I'd be happy to hear anything you have to say.

MR. HOLMES: Yes, Your Honor. And I have provided a copy of the Solesbee decision, a copy of the Hodge decision, a copy of the affidavit of Fernesha Mazyck, as well as some unpublished orders from the Court of Appeals in an email, I believe, yesterday. The affidavit's been timely filed, but the other -- I didn't provide an actual brief. So I'm just going to go kind of briefly through.

But the -- our argument mainly is relying on Solesbee and what the state of the law is today. Of course, before finding that FAA controls here today, we have to show that there's a valid contract and -- or the defendant has to show that there's a valid contract, and the Court would look to state law principles to determine that.

The defendant bears the burden of proof on the issue, and it's basically a summary judgment standard has to be applied by the Court. And the contract in this case was drafted by the defendant, Riverside, and so, it's to be construed against them.

In the affidavit, some questions that you had that were addressed by the affidavit, (1) Ms. Mazyck did not have a power of attorney or a healthcare power of attorney at the time that these documents were executed. So, the only way that there could be an enforceful arbitration agreement here today is for them to show that there was some sort of representation of something done by Ms. -- actually, the focus is to be on Ms. Bragg's conduct -- not on Ms. Mazyck but Ms. Bragg and her conduct when you look to estoppel. Of course, when she was admitted, she had schizophrenia, so it would be very hard for her to make any sort of representation (indiscernible) ---

THE COURT: Oh, okay.

MR. HOLMES: --- would rely on.

But looking at Solesbee and Hodge, Your Honor, and the language of those two opinions when you're addressing merger, those state that, "In the absence of anything indicating a contrary intention, that these contracts signed at the same time by the same parties should be merged together in one contract."

You know, here we have got several different differences between these two contracts that show an intention that they not be merged together. And, again, any sort of ambiguity or difference between the two contracts is to be construed against the drafter, who, in this case, is the defendant.

(1) The admission agreement, as Russ talked about -- and he doesn't agree with the Court of Appeals' decision in Solesbee, but just as in Solesbee here, you have an admission agreement that states on page 10 that it's to be controlled by state law; whereas, the arbitration agreement, which is a one-page document -- I won't be able to give you the page number -- the arbitration agreement is controlled by the FAA, federal law. So, that's one of the factors that was considered by Solesbee.

The language of the arbitration agreement itself makes a distinction between the arbitration agreement and the admission agreement. It states this -- in the arbitration agreement it states, "This agreement," referring to the arbitration agreement or the admission agreement. The use of the word "or" there clearly shows that you're talking about two separate documents.

The arbitration agreement in this case -- and Russ talked about this, and the focus on -- in Solesbee was that the arbitration agreement had a 30-day revocation period but that the admissions agreement did not. Well, we have the reverse of that here.

Here, the arbitration agreement is silent on revocation, but the admission agreement says, on page 6, that you may terminate the admissions agreement. So, while it's the opposite, it's the same factor to be considered and those -- having one that can be terminated and one that is silent after termination shows that they're different agreements. They're separately paginated, which the Solesbee Court looked to. They had their own signature lines, as the Solesbee Court looked to.

And, finally, Your Honor, there's nothing in the arbitration agreement in this case that says that it is a precondition to admission; whereas, the agreement itself states that -- the admissions agreement states that there is not an admission until it has been completed.

So, those two -- Your Honor, following the factors that Solesbee considered, this case clearly falls within Solesbee, and there's no merger.

Now, the case is on appeal -- Solesbee is on appeal, but at the time, this is the law as it stands, and I provided orders that are unpublished not because they have any additional precedential value -- obviously, they do not -- but just to show that the Court of Appeals has had many opportunities to change its holding in Solesbee, and essentially, it's providing the same form order in all those cases where it is essentially ruling against the proponent of arbitration in affirming the Solesbee holding.

As far as the estoppel argument, Your Honor, as Russ was candid, you first have to get past the merger argument in order to make it to the third-party beneficiary. Here, we think it's very clear under Solesbee that you don't get there.

And, lastly, the fallback position on discovery, Your Honor. Solesbee addressed that as well and said that it wasn't to be provided here as there. They have had -- the defendants had over a year to participate in discovery and has actually refused to participate in discovery, not only to serve discovery but to answer discovery, and to say, Well, we need more time and we need to delay this even further so that we can conduct discovery, when you refuse to participate in it, would be just unfair to the plaintiff, Your Honor. This case has been pending since 2002 [sic]. There's been this motion as well as our motion to compel have been outstanding for, I believe, nine months. So, to further delay it for that --

THE COURT: Do you both agree that some discovery would help you both to determine the factual basis -- (1) the daughter's understanding and any authority she had, plus the merger issue? I mean --

MR. HOLMES: We have [indiscernible], Your Honor. We would --

MR. HINES: And from our part, Your Honor, I certainly think it would help on the -- with regard to the daughter's understanding and the daughter's actions. You know, for instance -- and I don't know this to be the case, but if the daughter is in the habit of making decisions, signing things for her mother at that time, you know, it seems to me that we certainly could -- it's hard to -- well, we don't know what we don't know but, obviously, the daughter signed for her mother.

I would also note that, when you sign something, that the presumption in South Carolina is that you read it, you understood it, and you agreed with it

Now, one thing she does say in her affidavit, Ms. "Ma-zeek" or Ms. "May-zik" -- I want to get it right, but -- is that she was never asked if she had the authority. Well, the one-page arbitration agreement itself reads, "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."

Now, I certainly don't suggest to Your Honor that that proves, in fact, there was authority, but it does prove that she represented to us that she had it. And so, yes, for our part, I would appreciate the opportunity to have very limited targeted discovery only on that issue.

THE COURT: Your concern is you don't want to allow the plaintiff to allege later on that, by participating in discovery, you've waived any rights you may have; right?

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

THE COURT: I mean, that's really where you are.

MR. HINES: It is, Your Honor.

THE COURT: You need some protection there.

MR. HINES: Because you find yourself between a rock and a hard place, because if you go and you do the discovery, then you've been opened up to say, "Well, heck, you just went and used the tools of litigation, and you're the one who's claiming you have arbitration rights." And so, it's a bit of a catch-22 there. That's our concern, and that's why we have asked the Court, you know, for discovery like that.

THE COURT: What I have done in the past in some of these cases is I have denied the motion for -- to compel arbitration without prejudice, ruled favorably on the discovery motion -- limited discovery, and made it real clear that I'm not -- that I'm affirmatively finding that you're not waiving any rights. That seems to help you both.

Am I right there, Mr. Holmes? Do you agree with that?

MR. HOLMES: No, Your Honor, I -- I think that that would be contrary to what the law is today. Solesbee specifically addressed this issue and said that the defendant did not have a right to conduct any sort of -- they made this exact same request in Solesbee, and the Court said no, and this is why.

Your Honor, there's a couple of reasons, too, in this case, why it wouldn't be needed. (1) when you're -- this merger issue that they are discussing, you're looking to the actual documents themselves, the four corners of those documents, and discovery is not going to change anything about those documents.

And under Solesbee, in the four corners of those documents, merger is not appropriate. So, then you go to estoppel and these authority arguments. Well, for those, you look to the principal's actions. And in this case, Ms. Braggs, she's passed (1), and (2), she had schizophrenia. And that's in the medical records. They have made no argument that she made any sort of -- any sort of representations herself.

And they have full access to their staff. They have access to the people that would be claiming, "Hey, I relied on this." So, all they had to do was go and get those people and provide them an affidavit saying this was -- this representation was made, and then there would be an issue of fact and then you might want to consider it if the Solesbee decision wasn't out there saying that they're not entitled to it. So --

THE COURT: But her schizophrenia -- there had been no finding of incompetency at all. I mean, unfortunately, I live this everyday with my wife that, you know, just because you're schizophrenic -- that makes me sound like my wife is schizophrenic. Since she's a psychiatrist -- a forensic psychiatrist, I live it everyday.

She can still be competent and schizophrenic, but I understand.

What I'll do is -- let me take this -- I'm leaving for Nashville tomorrow for a pretty important funeral, and then I come back on Monday and I'm leaving for Washington D.C. for my youngest son's wedding the next weekend.

So, I have got about three files that I'm going to take the briefs with me and read while I'm in Nashville because I'm going to have some free time. I'll take both of these under advisement and give you a decision. It's probably going -- it's not going to be within two weeks. I don't want to keep too many things on the “under advisement” list.

And I said yesterday out loud, I mean, I know what I'm doing on most of these that I have taken under advisement. There are two that I really want to read everything, but I almost take everything under advisement just to give everybody a chance, if they think of something later, and I give people ten days to update in writing their argument.

So, I'll read everything and get back with you, and if you come up with some thought that, because of the compact nature of these hearings, that you want to bring to my attention, you can just do it in a letter. Just make sure you share it with the other party and do it within 10 or 15 days.

MR. HINES: Thank you, Your Honor.

THE COURT: Does that work?

MR. HINES: Yes, Your Honor.

THE COURT: Thank y'all. Be safe.

(This concludes the hearing.)

CERTIFICATE OF TRANSCRIBER

CASE NAME/NUMBER: Mazyck v. THI of SC
2022-CP-10-00483
DATE OF HEARING: 1/10/24
COURT REPORTER/MONITOR: Webex

****

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

Bobbi Fisher

_/s/ Bobbi Fisher________________

Bobbi Fisher, RPR and Certified Transcriber

Date Submitted: 1/25/25

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF $1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT (FORM 800) FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO THIS REPORTER AT BFISHER@SCCOURTS.ORG.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,	)	CASE NO. 2022-CP-10-00483
PLAINTIFF,	)	
vs.	)	**DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB'S MOTION TO COMPEL ARBITRATION**
THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB,	)	
DEFENDANT.	)	

TO: Grahame E. Holmes, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (hereinafter referred to as "this Defendant" or "the Facility") by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying or dismissing this action and compelling arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq. and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Ida Braggs' admission to the Facility. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on the Plaintiff and this Defendant and requires that Plaintiff's claims against this Defendant be submitted to arbitration.

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

CLEMENT RIVERS, LLP

By: *s/D. Jay Davis, Jr.*
D. Jay Davis, Jr.
SC State Bar ID No.: 12084
James D. Gandy, III
SC State Bar ID No.:11925
Gaillard T. Dotterer, III
SC State Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
tgandy@ycrlaw.com, gdotterer@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab

Charleston, South Carolina

Dated: ___________________

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between Driftwood Rehab + Nursing Center ("Facility"), its agents, employees and servants, and Ida Braggs ("Resident") or Ferneisha MAZYCK ("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.

x Ferneisha B Mazyck 8/6/10
Resident/Representative Signature Date

Ferneisha B Mazyck
Printed Name of Resident/Representative

Leslie Solomon 8/6/10
Authorized Agent of Facility Date

leslie Solomon AA
Printed Name & Title

DEFENDANT'S EXHIBIT

A

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2021-CP-10-00483
FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS, Plaintiff, v. THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB, Defendant.	)	***NOTICE OF MOTION AND MOTION TO COMPEL***

TO: D. JAY DAVIS, JR, ESQUIRE, ATTORNEY FOR DEFENDANT, THI OF SOUTH CAROLINA AT CHARLESTON , LLC D/B/A RIVERSIDE HEALTH & REHAB:

YOU WILL PLEASE TAKE NOTICE that the undersigned as attorneys for Plaintiff will move before the court at a time and date set by the court for an order compelling Defendant, THI of South Carolina at Charleston , LLC d/b/a Riverside Health & Rehab to provide full and complete answers to Plaintiff's First Interrogatories and full and complete responses to Plaintiff's First Requests for Production without objection dated March 1, 2023. A copy of Defendant's Responses to Plaintiff's Interrogatories and Requests for Production are attached as Exhibit A.

Plaintiff hereby certifies that consultation with opposing counsel would serve no useful purpose.

PARKER LAW GROUP, LLP

BY: s/Grahame E. Holmes
Grahame E. Holmes
Post Office Box 110
Walterboro, SC 29488
(843) 782-5101

ATTORNEYS FOR PLAINTIFF

May 2, 2023
Walterboro, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,

Plaintiff,

vs.

THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C/A NO.: 2022-CP-10-004483

DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB'S ANSWERS TO PLAINTIFF'S FIRST SET OF INTERROGATORIES

PLAINTIFF'S EXHIBIT
A

TO GRAHAME E. HOLMES AND THE PARKER LAW GROUP, ATTORNEYS FOR THE PLAINTIFF

Pursuant to Rules 26 and 33 of the South Carolina Rules of Civil Procedure, the Defendant, THI of South Carolina at Charleston, LLC, d/b/a Riverside Health and Rehab (hereinafter "This Defendant"), hereby responds to Plaintiff's Interrogatories as follows:

RESERVATION OF RIGHTS

1. This Defendant specifically reserves and does not waive any rights to pursue and be heard on any and all defenses set forth in its Answer to the Complaint.

2. This Defendant specifically reserves and does not waive any objections which may be appropriate to the Interrogatories.

3. This Defendant specifically reserves and does not waive any objections which may otherwise be available to it and further states that no response should be deemed as an admission

of relevancy, materiality or admissibility of any response or document produced. It further reserves the right to amend or supplement its response, if appropriate.

GENERAL OBJECTIONS

1. This Defendant objects to responding to any Interrogatory or Request for Production that seeks information which constitutes confidential attorney-client communication or which falls within the scope of Rule 26(b)(3) or which exceeds the scope of discovery otherwise provided by the *South Carolina Rules of Civil Procedure* or by statute or common law.

ANSWERS TO INTERROGATORIES

1. If Defendant is improperly identified, give the proper identification and state whether counsel will accept service of an amended summons and pleading reflecting the correct identification.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

2. If you contend that some other person or legal entity is, in whole or in part liable to you or the party asserting a claim against you in this matter, identify such person or entity, describe the basis of said liability and identify the name and current address of each witness who can testify to each fact you rely upon for said contention.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

3. Give the name and address of each person known to the parties or counsel to be a witness concerning the facts of the case and/or that you intend to call as a witness at the trial of this case.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

4. For each person known to the parties or counsel to be a witness, set forth a summary sufficient to inform the other party of the important facts known to be observed by such witness, indicate whether a statement has been taken from said party or witness, and provide a copy of any written or recorded statements taken.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

5. Set forth a list of photographs, plats, sketches, correspondence, memoranda, notes, minutes, or other prepared documents in possession of the party that relate to the claim or defense of the case, and produce a copy of each.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

6. Please state the name, address, place of employment and qualifications of each and every expert witness the Defendant plans to call at the trial of this case. As to each person named in this Interrogatory, state:

a. The subject matter on which the expert or experts are expected to testify;
b. The opinions each expert is expected to testify to at trial;
c. A factual summary of the foundation for each opinion;
d. Whether or not a written report, memorandum or other written document was prepared by each expert witness; and
e. Whether said expert has conducted any investigation, inspection, examination and/or testing in connection with the issues involved with this suit, and, if so, the nature of each such investigation, inspection, examination and/or testing, the results of same and the dates on which such work was performed; and
f. A complete list of any and all records, documents, journals, periodicals, texts, treatises, statements, photographs, videos, electronic information, and any other source of information which the expert reviewed in formulating his or her opinion(s) in this case.
g. List all documents reviewed and/or relied upon by the expert and/or expert's staff during the course of work on this file.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

7. Set forth the names and addresses of all insurance companies including captive and excess carriers that may have liability, excess or med pay coverage for the claims brought in this lawsuit. For each company identified provide:

a. Name and address;

b. Limits of coverage for each policy;

c. Policy number for each policy;

d. Named insured for each policy;

e. Identify any insurance company defending under a reservation of rights;

f. Identify any insurance company defending a policy that requires the consent of a named insured to settle any of the claims in this lawsuit.

g. Identify insurance company that issued a policy of insurance that provides the cost to defend is deducted from the coverage amount.

<u>ANSWER</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

8. Identify each person that had responsibility for investigating the cause and incidents of pressure sores at the facility from January l, 2018 to January 1, 2020. For each person provide:

a. Name;

b. Address;

c. Employer;

d. Title/Position, and;

e. Name of documents used to record investigation.

<u>ANSWER</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

9. Identify the manufacturer of the time card system and accompanying software used to store and/or analyze when employees clock in and out of work.

<u>ANSWER</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

10. If you have, within the past five (5) years, been involved in litigation and/or <u>had a claim</u> made against you or your representatives as a result of one of your residents being injured as a result of a pressure sores and/or complications thereof, set forth for each:

a. The claimant's or party's name and address;

b. The attorney's name and address;

c. The date of the underlying occurrence;

d. The date you were notified of the same;

e. The ultimate resolution; and

f. A copy of each Summons and Complaint and Answer served if suit was filed.

<u>ANSWER</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

11. Please state the total resident census and staff assignments for nurses, nurses' aides, medication aides and/or orderlies at Defendant's facility, as well as the resident census and staff assignments per shift for each employment category listed herein on each distinct wing, unit or hall in the facility from January l, 2018 to January l, 2020.

<u>ANSWER</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

12. From January l, 2018 to January l, 2020, the officers and/or Board of Directors of the corporate Defendant as well as any alleged parent company. For each person provide:

a. Name;

b. Address;

c. Employer for last 10 years to present; and

d. Any other duties, responsibilities and/or positions with any Defendant.

<u>ANSWER</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

13. From January' 1, 2018 to January l , 2020, state the name, most current or last known address, social security number, professional registration/license number, title, position and dates employed for the following:

a. Nursing Home Administrator;

b. Director of Nursing;

c. Assistant Director of Nursing;

d. Head, charge and/or floor nurse for the unit, wing, section or floor on which the resident resided;

e. Dietary consultant, Dietician and/or certified Dietary manager;

f. MDS Coordinator; and

g. Staffing Coordinator.

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

14. State the PPD for the facility for the following dates: January 1, 2018 to February 28, 2019?

ANSWER: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

CLEMENT RIVERS, LLP

By: J. D. Gandy, III

D. Jay Davis, Jr., SC State Bar ID No.: 12084
James D. Gandy, III, SC State Bar ID No.:11925
Gaillard T. Dotterer, III, SC State Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
tgandy@ycrlaw.com gdotterer@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab

Dated: 5/2/23
Charleston, South Carolina

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 2 day of May, 2023.

Amy Eversole

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS, Plaintiff, vs. THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB, Defendant.	C/A NO.: 2022-CP-10-004483 **DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB'S RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION OF DOCUMENTS**

TO GRAHAME E. HOLMES, THE PARKER LAW GROUP, ATTORNEYS FOR THE PLAINTIFF

Pursuant to Rules 26 and 34 of the South Carolina Rules of Civil Procedure, the Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab, (hereinafter "This Defendant") hereby responds to Plaintiff's First Requests for Production as follows:

RESERVATION OF RIGHTS

1. This Defendant specifically reserves and does not waive any rights to pursue and be heard on any and all defenses set forth in its Answer to the Complaint.

2. This Defendant specifically reserves and does not waive any objections which may be appropriate to the Requests.

3. This Defendant specifically reserves and does not waive any objections which may otherwise be available to it and further states that no response should be deemed as an admission of relevancy, materiality or admissibility of any response or document produced. It further reserves the right to amend or supplement its response, if appropriate.

GENERAL OBJECTION

1. This Defendant objects to responding to any Request for Production that seeks information which constitutes confidential attorney-client communication or which falls within the scope of Rule 26(b)(3) or which exceeds the scope of discovery otherwise provided by the *South Carolina Rules of Civil Procedure* or by statute or common law.

RESPONSES TO REOUEST FOR PRODUCTION

1. Produce all copies of all statements of ownership and management of each Defendant's nursing home, for 5 years prior to resident's admittance to present.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

2. Produce all documents of any budget planning and revision which were developed and/or implemented for a 5 year time period from the time of the Complaint in this matter. This request specifically includes, but is not limited to, any and all meeting minutes or notes, proposed budgets, amended and/or revised budgets, any other item(s) which describe how the final approved budget was developed and implemented.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

3. Produce a color copy of the entire "medical record" pertaining to the resident as that term is defined in the South Carolina Regulation 61-17. (Plaintiff will pay a reasonable fee to have the medical record duplicated in color.)

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

4. Produce any and all incident/accident reports, unusual occurrence reports, or variance reports made to any federal, state or local government agency and/or any licensing authority or board pertaining to Ms. Braggs made in compliance with 42 CFR 483.13(4), and South Carolina Department of Health and Environmental Control, Regulation 61-17, Standards for Licensing Nursing Homes.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

5. Produce all work schedules and time sheets showing identity, number (quantity), or classification (e.g., LPN, LVN, RN, certified nursing assistant, etc.) of any nursing personnel, (including nurses, nurses' aides, medication aides and orderlies) who worked on each unit or wing in Defendant's facility from January 1, 2018 to February 28, 2019 regardless of whether the resident resided on such unit or wing.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

6. Any records of any care rendered to the resident not otherwise kept in the resident's chart for a 5 year time period.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

7. Produce a complete copy of the admission records of the resident.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

8. For each expert identified in Interrogatory #6, please provide the following:

   a. Current CV;

   b. Deposition/trial testimony list for last 5 years;

   c. All literature referenced in Interrogatory #6 that has been relied upon in reaching any opinions held in this case.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

9. Produce weekly staffing reports for the facility for a time period of 5 years prior to date of incident.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

10. Produce copies of any and all documentation indicating how much you billed for the care of the resident.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

11. Please provide all care tracker documentation or similar documentation used by the facility to track resident care provided by CNAs. Please produce the requested information from January 1, 2018 to February 29, 2019.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

12. Any and all documents containing or reflecting all income, expenses, profits, salaries, etc. for Defendant from January 1, 2018 through January 1, 2020.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

13. Any documents referencing any internal investigation into the complaints made by the resident's family with regards to the care received by any employee of Defendant.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

14. Any and all policies and procedures in effect from January 1, 2018 through January 1, 2020 regarding:

a. Admission, assessment and initial treatment care plans and corresponding documentation for newly admitted or readmitted residents;

b. Obtaining, documenting and carrying out physicians' orders for treatment;

c. Emergency medical conditions, including but not limited to, traumatic injuries and falls;

d. Observing, documenting and reporting the condition of a resident;

e. Receiving and responding to resident's complaints and/or recommendations, and complaints for those speaking on behalf of residents;

f. Responding to and documenting an incident or unusual occurrence relating to a resident, including but not limited to falls, deterioration in status and behavioral emergencies;

g. Documenting treatment and response to treatment of skin conditions including, but not limited to, bedsores, lacerations, bruises and/or sores of any nature;

h. Transfer of a resident for Defendant's facility to a hospital for evaluation and/or treatment;

i. Chart audits for accuracy of information and completeness;

j. Assessing, evaluating and documenting a resident's nutritional status and dietary needs, including food and fluid intake;

k. The use of restraints including, but not limited to, mechanical, soft, and chemical restraints and documentation and response to use of restraints;

l. The development, updates and revisions of care plans including, but not limited to, notification of resident and family regarding care plan conferences;

m. Billing practice for physicians' care; (n) Billing to Medicare/Medicaid; and

n. Pressure sore prevention and treatment.

<u>RESPONSE</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

15. Provide the punch detail for documenting when all employees clocked in and out of work from January 1, 2018 through February 28, 2019.

<u>RESPONSE</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

16. Produce any logbooks or data contained within a computer system/software that tracks the call light system used by residents and staff from January 1, 2018 through February 28, 2019.

<u>RESPONSE</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

17. All documents including, but not limited to, staffing schedules, time cards, duty rosters, and other employment records which contain the employees signatures and which indicate the employees assigned to the care, treatment, supervision and monitoring of the resident for the time period of January 1, 2018 through February 28, 2019.

<u>RESPONSE</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

18. Produce all 24 hour reports in reference to the resident from January 1, 2018 through February 28, 2019.

<u>RESPONSE</u>: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

19. Any and all documentation, whether written or electronically stored, received by Defendant and/or its counsel in response to any subpoena issued in this case.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

20. A copy of all time cards for all staff working for the Defendant from January 1, 2018 through February 28, 2019 and identify their job title.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

21. Produce a copy of the CMS payroll based journal for the three years prior to the Date of Accident to the present.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

22. Produce a copy of the Facility PPD reports for the three years prior to the Date of the Accident to the present.

RESPONSE: Objection. See Defendant's Motion to Compel Arbitration filed March 6, 2023 with the Court.

CLEMENT RIVERS, LLP

By: J. D. Gandy, III
D. Jay Davis, Jr., SC State Bar ID No.: 12084
James D. Gandy, III, SC State Bar ID No.:11925
Gaillard T. Dotterer, III, SC State Bar ID No.: 103620
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com,
tgandy@ycrlaw.com gdotterer@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab

Dated: 5/2/23
Charleston, South Carolina

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 2 day of May, 2023.

Amy Eversole

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
FERNESHA MAZYCK, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF IDA BRAGGS,	)	CASE NO. 2022-CP-10-00483
PLAINTIFF,	)	
vs.	)	**DEFENDANT THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ARBITRATION**
THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,	)	
DEFENDANT.	)	

TO: GRAHAME E. HOLMES, ATTORNEY FOR PLAINTIFF:

Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Defendant" or the "Facility"), submits this memo in support of its motion, filed March 6, 2023, 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, Fernesha Mazyck, has sued Defendant alleging deficiencies relating to care/treatment Ida Braggs ("Ms. Braggs") received while she was a resident of the Facility. In conjunction with Ms. Braggs' admission to the Facility (then known as Driftwood Rehab & Nursing Center)[1], her daughter, the Plaintiff, executed an Arbitration Agreement on behalf of Ms. Braggs 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.

[1] The nursing facility changed ownership after Ms. Braggs' admission to THI of South Carolina at Charleston, LLC and began operating as Riverside Health and Rehab.

BACKGROUND

With the help of Ms. Mazyck, Ms. Braggs, was admitted to Driftwood Rehab & Nursing Center in August of 2010 for skilled nursing care. Ms. Mazyck handled the paperwork in conjunction with her mother's admission, and in so doing, Ms. Mazyck executed an Admission Agreement and an Arbitration Agreement on Ms. Braggs' behalf. (See **Exhibits 1** and **2**, respectively, attached hereto).

Based on the Admission Agreement and pursuant to the terms thereof, Ms. Braggs was admitted to the Facility and received skilled nursing care and treatment. She remained at the Facility on and off until February 2019, almost eight years after she was admitted. During her stay at the Facility, Ms. Braggs received and accepted the benefits of the Admission Agreement, which included the Facility furnishing Ms. Braggs 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 Ms. Braggs entered the Facility unwillingly or without consent.

The Plaintiff explicitly represented that she was authorized to admit Ms. Braggs to the Facility and execute the documents she executed on her behalf, including the Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that *all information provided to the Facility* is truthful and correct, which would, of course, include Ms. Mazyck's authority to bind Ms. Braggs (See **Ex. 1**). Ms. Mazyck signed the Admission Agreement on behalf of her mother as her 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. Mazyck's authority to sign on behalf of her mother, 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**). The Arbitration agreement is also expressly binding on the Facility as the successor to Driftwood Rehab & Nursing Center. (See **Ex. 2** "it is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns…).

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 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,

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

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. Mazyck's signature on behalf of Ms. Braggs, along with Ms. Mazyck's express representation that she is authorized to sign for Ms. Braggs.[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 enforceable in a court of competent jurisdiction. To require more just because an

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[3] By virtue of her signature, Ms. Mazyck 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 Ms. Braggs' 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. Mazyck 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.").

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 1 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. Mazyck, acting on behalf of Ms. Braggs, 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. Mazyck did not have to agree to it on behalf of Ms. Braggs for her to be admitted to the Facility. Plaintiff had the option not to enter into the Arbitration Agreement on behalf of her mother, yet she voluntarily did so, voluntarily did not retract her agreement thereto, and her mother stayed at the Facility and received skilled nursing care after admission.

Defendant offered the option of entering into the Arbitration Agreement. Ms. Mazyck 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. <u>The Plain Language of the Agreement Binds Plaintiff.</u>

According to the plain language of the Arbitration Agreement and consistent with her actions during the admissions process, Ms. Mazyck represented herself to admissions personnel at Driftwood as her mother's representative with the authority to sign documents and enter agreements on her behalf.[5] It was clearly Ms. Mazyck's intention to bind her mother according to the terms of the Admission Agreement and Arbitration Agreement. Moreover, Ms. Mazyck evinced no intentions or directions to the contrary. Accordingly, the plain language of the Arbitration Agreement confirms that Ms. Mazyck was authorized to enter this Agreement binding her mother to arbitration, and the Agreement directly applies to the instant dispute. The

[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…")

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. Mazyck'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. Mazyck in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of his mother. She has not submitted an affidavit or other evidence disclaiming her authority to enter such an agreement on her 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. Mazyck Possessed the Apparent and Inherent Authority to Execute and Bind Ms. Braggs to the Arbitration Agreement and/or Plaintiff Should be Estopped to Deny her own Authority.</u>

1. Agency Relationship

In addition to representing herself as authorized to enter the Arbitration Agreement on her mother's behalf by the plain language of the Arbitration Agreement, Ms. Mazyck 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. Mazyck held herself out as an agent for her mother without any indication to the contrary when she executed various admission documents on her behalf, including the Arbitration Agreement. Based on Plaintiff's and Ms. Braggs' conduct and explicit representations, facility representatives were justified in believing she possessed the authority to execute all admissions documents on her mother's behalf, including the Arbitration Agreement.

Moreover, by allowing Ms. Mazyck to procure her admission to the Facility and, thereafter, by accepting the benefits of the contracts entered into in connection with that admission, Ms. Braggs represented that Ms. Mazyck 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. Mazyck to sign the admissions paperwork, including the documents providing for her mother's stay and the skilled nursing care provided at the Facility, Ms. Braggs cloaked Plaintiff with the authority to execute those documents. Further, Neither Ms. Braggs nor any other family member repudiated or invalidated Ms. Mazyck's actions. Instead, Ms. Braggs accepted the benefits of the contracts with the Facility by remaining at the Facility for almost eight years and receiving skilled nursing care and services, thereby ratifying her daughter's actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, the Facility was further justified in believing Ms. Mazyck 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. Mazyck lacked the actual or apparent authority to enter into the terms of the Arbitration Agreement, he 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. Mazyck was authorized to admit her mother to the Facility. To the extent Plaintiff takes issue with her own authority to bind her mother to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to Plaintiff's authority to admit her 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 that she 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 Plaintiff was not her mother'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 (including this Defendant as a successor) 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, Ms. Braggs having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff (who stands in Ms. Braggs 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 Plaintiff on behalf of Ms. Braggs. 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. Mazyck on behalf of Ms. Braggs on the same day, at the same time, for the same purpose, and in the course of the same transaction—Ms. Braggs' 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 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

[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).

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 Ms. Braggs received direct benefits (in the form of her 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]

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

[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).

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, Ms. Braggs effectively embraced all aspects of the Admission Agreement with the Facility. Indeed, her receipt of direct benefits under the Admission Agreement (with which the Arbitration Agreement merged) cannot reasonably be denied. Undoubtedly, Ms. Braggs received direct benefits (in the form of room, board, various amenities/services, and the care/treatment she received at the Facility). To deny her 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, Ms. Braggs 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, Ms. Braggs 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.

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

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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.").

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. Mazyck, on her mother's behalf and were both countersigned by the representative of Driftwood on August 6, 2010. The documents were signed by the exact same people: Ms. Mazyck as representative for her mother and by Leslie Solomon for Driftwood. The documents were signed for the same purpose and transaction of establishing Ms. Braggs' residency at the skilled nursing facility.

While the Admission Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* 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

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[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).

[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).

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 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,

[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).

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 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,

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

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 default position*, i.e., it is *presumed,* and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The *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 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

[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.

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 Ms. Braggs' 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.

During the pendency of this case, the Court of Appeals decided *Solesbee*, wherein it affirmed the denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as the Facility's here. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the denial of the motion to compel arbitration in *Solesbee*, the Court of Appeals likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").)[16] Most respectfully, the *Solesbee* Court's merger analysis is itself erroneous—and *Solesbee* should not control the disposition of the instant motion.[17]

[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.

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 "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.

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[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.

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 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

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

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. Mazyck on Ms. Braggs' 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. Mazyck'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. Mazyck'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. Mazyck had the authority to execute the Arbitration Agreement on behalf of her mother. Nevertheless, neither Plaintiff, Ms. Braggs nor any other family member 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 Ms. Mazyck'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

By: *s/ Russell G. Hines*

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Attorneys for the Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab

Dated: January 5, 2024
Charleston, South Carolina

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: Ida Braggs

RESIDENT NUMBER: 300160

DATE OF ADMISSION: 8/6/10

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Driftwood Rehab + Nursing Center ("Facility"), Ida Braggs ("Resident") and/or Ferneisha, Mazyck ("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.

DEFENDANT'S EXHIBIT
1

Original: Business File • Photocopy: Resident/Representative

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.

2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.

3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.

4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.

5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.

6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative 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 $ 165.00 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.

2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services**.

a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.

b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative 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.

VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.

b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (*e.g.,* a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.

c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative 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:

Driftwood Rehab + Nursing Center
2375 Baker Hosp Blvd
Charleston, SC 29405

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:

Ida Braggs
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

X Fernessha B Mazyck 8/6/10
Signature of Representative, if any Date

X Fernosshia B Mazyck
Printed Name of Representative

____
Witness Signature Date

____
Printed Name of Witness

____
Representative Social Security No. (Voluntary Info.)

Leslie Solomon
Signature of Facility Official

leslie Solomon Admissions Asst.
Printed Name of Facility Official & Title

8/6/10
Date

Original: Business File • Photocopy: Resident/Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2022-CP-10-00483
FERNESHA MAZYCK, AS PERSONAL REPRESNTATIVE OF THE ESTATE OF IDA BRAGGS.	)	
Plaintiff,	)	**AFFIDAVIT OF FERNESHA MAZYCK**
v.	)	
THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a RIVERSIDE HEALTH AND REHAB,	)	
Defendant	)	

I, Fernesha Mazyck, having been duly sworn, make the following declarations under penalty of perjury:

1. I am over eighteen years of age and make this affidavit of my own free will and my own personal knowledge.

2. I am the duly appointed Personal Representative of the Estate of Ida Braggs.

3. I am the daughter of Ida Braggs.

4. On August 6, 2010, Ida Braggs had three living children, including me.

5. On August 6, 2010, I did not have a power of attorney for Ida Braggs.

6. On August 6, 2010, I did not have a health care power of attorney.

7. Ida Braggs was not present when the Arbitration Agreement was signed.

8. No one at Riverside Health and Rehab asked me if I had authority to sign the Arbitration Agreement.

9. Ida Braggs suffered from schizophrenia on August 6, 2010 which led to the

FBM FM

10. Ida Braggs did not represent to anyone at Riverside Health and Rehab that I had authority to sign the Arbitration Agreement.

FURTHER AFFIANT SAYETH NAUGHT

I SWEAR UNDER PENALTY OF PERJURY THAT THE ABOVE STATEMENT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Fernesha B Mazyck
Fernesha Mazyck

Sworn to and subscribed before me this
5 day of January, 2024

Notary Public for South Carolina
My Commission expires 4/7/51

#2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO. 2022-CP-10-00483

FERNESHA MAZYCK, as Personal Representative of the Estate of Ida Braggs,	)	
Plaintiff,	)	**MOTION TO ALTER, AMEND, AND/OR RECONSIDER ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION**
vs.	)	
THI OF SOUTH CAROLINA AT CHARLESTON, LLC d/b/a Riverside Health and Rehab,	)	
Defendant.	)	

TO: THE HONORABLE J. CORDELL MADDOX JR., Presiding Judge, and PLAINTIFF'S COUNSEL OF RECORD

NOW COMES Defendant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab (the "Facility"), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby most respectfully moves this Honorable Court to alter, amend, and/or reconsider its order filed November 15, 2024 (the "Subject Order"), denying the Facility's motion to compel Plaintiff's[1] claims to arbitration (the "Underlying Motion"), and, in turn, granting Plaintiff's motion to compel discovery.

[1] "Plaintiff" refers to Fernesha Mazyck ("Ms. Mazyck"), as Personal Representative of the Estate of Ida Braggs ("Ms. Braggs").

I. Contending, most respectfully, that the Underlying Motion should have been (and should now be) granted, the Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Underlying Motion, i.e., each and every distinct issue/argument set forth in the Underlying Motion itself; in the Facility's memo in support of the Underlying Motion; and via oral argument at the hearing on the Underlying Motion, all of which is/are hereby incorporated herein by reference.

See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

II. Without waiving or otherwise lessening the all-encompassing scope of the foregoing (i.e., I. above), the Facility most respectfully asks the Court to (re)consider and expressly rule on/address the following particular points.

A. The Court should have found (and should now find) that the Admission Agreement and the Arbitration Agreement merged and that, because Ms. Braggs effectively embraced and directly benefitted from the Admission Agreement, she and, in turn, Plaintiff (her estate) is estopped to deny the enforceability of the Admission Agreement and the Arbitration Agreement merged therewith.

1. The Court's merger analysis is erroneous.

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:

> Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless equitably estopped to deny the [arbitration agreement's] enforceability. The circuit court held there was no estoppel here, and we agree.

> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged. In South Carolina,
>
>> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

407 S.C. 346, 354–55, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, the Court erred in rejecting the Facility's merger argument, failing to recognize material differences between the facts and arguments involved in the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and, as addressed separately below, in *Solesbee v. Fundamental Clinical and Operational Services, LLC*, 438 S.C. 638, 885 S.E.2d 144 (Ct. App. 2023).

The Court wrongfully concluded that the Admission Agreement and the Arbitration Agreement are separate contracts that do not merge. The merger question examines whether, "where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,"[2] as undoubtedly the Admission Agreement and the Arbitration Agreement were here,[3] there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the instruments were intended to be construed together as effectively one contract. This is a question of intention. *Id.* at 355, 755 S.E.2d at 455 ("in the absence of anything indicating a contrary *intention* . . .") (emphasis added). And "in attempting to ascertain th[e] [parties'] intention," our courts "endeavor to determine the situation of the parties, as well as their purposes, at the time the contract was entered into." *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

It must be remembered that, where, as here, the instruments in question were executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, merger is *presumed*. For the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only by actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 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. Indeed, under the circumstances, the idea that there would have been an intention contrary to merger does not make sense.

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

[3] To be clear, *Coleman* unequivocally answers the question of whether the instant Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction: they were. As the *Coleman* Court expressly observed regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), "the documents *were* executed at *the same time, by the same parties, for the same purposes, and in the course of the same transaction*." 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

Unlike the arbitration agreement at issue in *Coleman*—and, for that matter, the arbitration agreements at issue in *Coleman's* progeny *Thompson* and *Hodge*, all of which cases involved arbitration agreements that contained a provision allowing them to be disclaimed or revoked within 30 days of signing while the corresponding admission agreements did not—the instant Arbitration Agreement has no disclaimer/revocation provision. (Arbitration Agreement.) Moreover, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agreement p. 12.) Indeed, directly contradicting the idea of "separatedness" (in the parlance of the *Coleman* Court[4]), the "Entire Agreement" clause in the instant Admission Agreement expressly states that "other Admissions materials" are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed "separatedness." (Admission Agreement p. 12.) Without question, the Arbitration Agreement is among these other materials. *See Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 571–72, 828 S.E.2d 82, 84 (Ct. App. 2019) ("The same day as Decedent's admission to White Oak, Stott, acting as Decedent's authorized representative, signed White Oak's *admission documentation—including the Arbitration Agreement*.") (emphasis added) (internal footnote omitted); *Hodge*, 422 S.C. at 550, 813 S.E.2d at 295 ("Her husband . . . executed various documents *related to her admission*, including an *Arbitration Agreement* and an *Admission Agreement*.") (emphasis added)).[5]

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[4] 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).

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

To be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required as a precondition of Ms. Braggs's residency at the Facility. But all this means is that the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become part of the admissions materials once it was in fact executed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

Moreover, while it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: The Admission Agreement *is* necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with—but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time, parties, purpose, and transaction—but unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (Arbitration Agreement

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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).

(providing for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Ms. Braggs's] stay at [the] Facility, or to the provisions of care or services to [Ms. Braggs] . . . ."); *id.* ("This [Arbitration] Agreement shall remain in effect for all care rendered at [the] Facility . . . ."").)[6]

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Braggs's relationship with the Facility, the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth the terms of Ms. Braggs's admission to the Facility) *with* Arbitration Agreement (providing for arbitration of disputes arising out of Ms. Braggs's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 ("This Agreement will be governed by and construed in accordance with applicable Federal regulations and those

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[6] Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement, the plain language of which calls for arbitration of "any controversy or dispute between the parties arising out of or relating to [the] Facility's Admission Agreement, or breach thereof, or relating in any way to [Ms. Braggs's] stay at [the] Facility, or to the provisions of care or services to [Ms. Braggs] . . . ." (Arbitration Agreement.) But even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001) ("[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered.").

laws of the State in which Facility is located.") *with* Arbitration Agreements (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action," but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the survival of the Arbitration Agreement is no evidence of "separatedness." Again, the only reason for the Arbitration Agreement is the Admission Agreement, as the point of the Arbitration Agreement is to cover disputes relating to/arising out of the Admission Agreement. So yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still connected to the Admission Agreement even after the termination of the Admission Agreement. This is simply how arbitration agreements work. *See Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582, 612–13 (D.S.C. 1998) ("Under South Carolina arbitration law, the duty to arbitrate under an arbitration clause in a contract survives termination of the contract.").

The fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intention contrary to merger. To point to such things, is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about whether they are intended to be construed together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger. The very nature of *merger* is to *merge* separate documents.

And—besides the fact that there is indeed no ambiguity in regard to the merger of the Admission Agreement and the Arbitration Agreement—to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention.

The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." 407 S.C. at 355, 755 S.E.2d at 455. While it is true that the *Coleman* Court also cited the rule that ambiguity is construed against the drafter, (a) it did so in dicta[7] and (b) it never addressed the logical inconsistency—which thus remains fair game as an argument in this case[8]—in recognizing

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[7] *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).

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

a rule of law creating a presumption in favor of merger (i.e., in recognizing the occurrence of a set of circumstances (same time, parties, purpose, and transaction) as sufficiently probative to affirmatively tip the scales in favor of merger) while at the same time allowing that presumption to be completely overturned by evidence that is merely ambiguous, i.e., evidence that does not even go so far as to clearly indicate a contrary intention and, indeed, is actually still susceptible to a reasonable conclusion in favor of merger. *See S.C. Dep't of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are *reasonably* susceptible of more than one interpretation.") (emphasis added).

Respectfully, the Court's finding against merger relies on improper speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding intent. The presumption of merger arises from the concurrence of the four elements of time, parties, purpose, and transaction. *Coleman*, 407 S.C. at 354–355, 755 S.E.2d at 455. This is why for the merger presumption to mean anything in practice it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties' intention was contrary to merger. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130 ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). The merger presumption is "earned," so to speak, by the fact that for it even to arise in the first place there must be, as there is here, a concurrence of particular circumstances (same time, parties, purpose, and transaction). It is the very rarity of this concurrence that both safeguards against the overzealous application of the merger doctrine and justifies ascribing to it (the concurrence) the presumptive intent of merger.

The Court should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Braggs's admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent.

(a) Most respectfully, the merger analysis in *Solesbee* is erroneous and incomplete, and it should not control the disposition of this case.

In *Solesbee*, 438 S.C. 638, 885 S.E.2d 144, our Court of Appeals affirmed the circuit court's denial of a motion to compel arbitration in the face of a merger/equitable estoppel argument substantially the same as at present. Indeed, the Arbitration Agreement and Admission Agreement in issue in the instant case are the same form documents as in *Solesbee*.

In affirming the circuit court's denial of the motion to compel arbitration, the *Solesbee* Court likened that case to *Coleman* and *Hodge* and found that the circuit court had correctly determined that there was no merger of the Admission Agreement and the Arbitration Agreement and, in turn, had properly denied the Facility's equitable estoppel argument. *Solesbee*, 438 S.C. at 649, 885 S.E.2d at 149 ("Thus, like the *Coleman* and *Hodge* courts, we find there was no merger in this case and [the Facility's] equitable estoppel argument was properly denied.").) Most respectfully, the merger analysis in Solesbee is erroneous and incomplete, and it should not control the disposition of this case.

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." It is not true that "the Admission Agreement provides it is governed by South Carolina law, and the Arbitration Agreement provides it is governed by federal law."

Regarding governing law, what the Admission Agreement actually states is this: "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which the Facility is located." (Admission Agreement.) And what the Arbitration Agreement actually states is this:

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

(Arbitration Agreement.)

Without question, the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. (the "FAA"), applies to the Arbitration Agreement. The FAA applies "to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001); *see also Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995) (holding that the reach of the FAA extends to the broadest permissible exercise of Congress's power under the Commerce Clause); *Allied-Bruce*, 513 U.S. at 273–77 (explaining that, unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce). And our Supreme Court has expressly held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

The rule that the FAA applies whenever an arbitration agreement involves interstate commerce of course applies even where an arbitration clause is included in a single instrument that is otherwise governed by South Carolina law. *See Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (The FAA "create[d] a body of federal substantive law," which is "applicable in state and federal courts."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) ("[A]s a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract."); *see also Allied-Bruce*, 513 U.S. 265, 270–77. Moreover, even under the FAA, the general state law of contracts continues to apply. *Allied-Bruce*, 513 U.S. at 281 ("States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.' What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes *any* such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent.") (emphasis added) (internal citations omitted). Further still, the Arbitration Agreement expressly calls for the arbitration proceedings to be conducted pursuant to the South Carolina ADR Rules. (Arbitration Agreement.)

Essentially, the provisions of the Admission Agreement and the Arbitration Agreement regarding governing law are to the effect that South Carolina law applies except where displaced by federal law, and indeed, even if the Arbitration Agreement had been included as a provision within the Admission Agreement itself, the FAA would still apply separately to the Arbitration Agreement. In other words, any difference between the governing law as to the Arbitration Agreement and the governing law as to the Admission Agreement would still exist even if the

Arbitration Agreement had been included as a provision within the Admission Agreement itself. Accordingly, the supposed difference in the governing law does 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 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger here. Unlike in *Coleman* and *Hodge*, the supposed textual recognition of the Admission Agreement as being separate from the Arbitration Agreement is not included in any "Entire Agreement" provision. Rather, the "Entire Agreement" provision of the Admission Agreement expressly states, "other Admissions materials . . . are made a part of this Agreement by reference." (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 concept of "revocation" and that of "termination." A "revocation" is an annulment (i.e., to make something a nullity),[9] whereas "termination" is to put or bring something to an end. *Id.* at p. 1482. And, again, that the Arbitration Agreement survives the termination of the Admission Agreement is simply how arbitration agreements work—and would be so even were the agreement to arbitrate in the form of a clause included within a single instrument. *See Phillips*, 39 F. Supp. at 612–13.

Fourth, the *Solesbee* Court erroneously found against merger on the basis that "the Admission Agreement and Arbitration Agreement were separately paginated and had their own signature pages." 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and the Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of

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

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.

Finally, the *Solesbee* Court erroneously found against the Facility on merger on the basis that Arbitration Agreement was voluntary. 438 S.C. at 649, 885 S.E.2d at 149. This provides no reasonable inference of an intent contrary to merger. Again, to be sure, the Arbitration Agreement was optional, i.e., agreeing to arbitration was not required to gain admission to the Facility. But all this means is that it did not have to be agreed to for the resident to be admitted, i.e., the Arbitration Agreement did not have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was signed. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

To say that the Arbitration Agreement was not required for admission, which it was not, is not to say that it was not intended to be part of the admissions materials in the event it was agreed to, which it was, by Mr. Dover on Ms. Solesbee's behalf in *Solesbee* and by Ms. Mazyck on Ms. Braggs'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 . . . .").)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission, whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of the resident's relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agreement (setting forth the terms of the admission) *with* Arbitration Agreement (providing for arbitration of disputes arising out of the admission).)

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

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

The Facility's merger/equitable estoppel argument is a standalone argument that does not depend on any showing of authority (actual or apparent or otherwise) on the part of Ms. Mazyck or otherwise on the existence of any per se valid and enforceable agreement between the parties. *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) ("South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including . . . estoppel."); *see also Coleman*, 407 S.C. at 354–55, 755 S.E.2d at 455 (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel); *id.* (explaining that "Appellants' equitable estoppel argument," which "[wa]s premised on [Appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged," as follows: "Appellants contend that even if Sister lacked capacity to execute the [arbitration agreement] . . . , she is nevertheless *equitably estopped to deny the [arbitration agreement's] enforceability*.") (emphasis added).

Conceptually, the Facility's merger/equitable estoppel argument is *not* an argument *for the enforceability* of the Admission Agreement/Arbitration Agreement *but rather* an argument *for Ms. Braggs and, in turn, Plaintiff (her estate) to be estopped to deny the enforceability* of the Admission Agreement/Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. Braggs having effectively embraced and directly benefitted from the Admission Agreement, her estate is now estopped to deny the enforceability not only of the Admission Agreement but also the Arbitration Agreement merged therewith.

Accordingly, as to the Facility's merger/equitable estoppel argument, any contrary analysis regarding the Admission Agreement/Arbitration Agreement's supposed lack of enforceability—e.g., that Ms. Mazyck lacked authority (whether actual or apparent or otherwise) to sign the Admission Agreement/Arbitration Agreement on behalf of Ms. Braggs under the law of agency and/or under the South Carolina Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, and/or because Ms. Mazyck lacked power of attorney over Ms. Braggs—is beside the point and unavailing to refute The Facility's merger/equitable estoppel argument, which, again, turns not on the question of whether the Arbitration Agreement is enforceable but whether Ms. Braggs and, in turn, Plaintiff (her estate) is estopped to deny its enforceability.

In *Wilson*, our Supreme Court favorably discussed the framework of the direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which The Facility contend Ms. Braggs and, in turn, Plaintiff (her estate) is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Braggs received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added).

Wilson supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, and it instructs that the key to determining when direct benefits estoppel may be applied is not whether the claims at issue rely on contract terms to impose liability but whether benefits to the nonsignatory are direct or indirect. *Wilson*, 426 S.C. at 340–41, 827 S.E.2d at 175 ("Under direct benefits estoppel, [a] nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause. In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him. Stated another way, [u]nder the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement . . . .") (internal citations and quotation marks omitted); *id.* at 343, 827 S.E.2d at 176 ("It is important to distinguish direct benefits from indirect benefits because when the benefits to a nonsignatory are merely indirect, arbitration cannot be compelled. A benefit is direct if it flows directly from the agreement. In contrast, any benefit derived from an agreement is indirect where the nonsignatory exploits the contractual relationship of the parties, but does not exploit (and thereby assume) the agreement itself.") (internal citations omitted).

Direct benefits estoppel simply recognizes, and remedies, the patent inequity that would result if a party were able to enjoy direct benefits under an agreement containing an arbitration clause (which is the case here because the Admission Agreement and the Arbitration Agreement merge) while at the same time denying that the arbitration clause is enforceable. *See Pearson*, 400 S.C. at 290, 733 S.E.2d at 601 ("To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.") (citation and internal quotation marks omitted).

Here, Ms. Braggs was a direct beneficiary. To deny her receipt of such benefits is illogical and objectively unreasonable, as it would require wholly discrediting the entirety of her residency:

every night's stay, every meal, every amenity/service provided, every instance of care/treatment, essentially every moment at the Facility—even her complaint does not go nearly so far as that. (*See* Compl.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged—and properly applying the correct test, i.e., the direct benefits test, which, most respectfully, the Court did not[10]—Ms. Braggs received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment he received therein. Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement and that Ms. Braggs and, in turn, Plaintiff (her estate) is estopped to deny the Admission Agreement/Arbitration Agreement's enforceability, Ms. Braggs having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof.[11]

WHEREFORE, for the foregoing reasons (and, again, for that matter, for all of the reasons previously advanced to the Court in and in support of the Underlying Motion (both those advanced in writing and those advanced via oral argument), all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon in full), the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Underlying Motion.

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[10] Without citing legal authority, the Subject Order states that the test "focus[es] . . . on the intentional actions of the principal" (Subject Order p. 4), but this is not consistent with the direct benefits test.

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

PLEASE NOTE: the Facility reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
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Charleston, South Carolina

November 25, 2024

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J. Cordell Maddox Jr., Circuit Court Judge

Case No. 2022-CP-10-00483

Fernesha Mazyck,
as Personal Representative of the Estate of Ida Braggs,

Respondent,

v.

THI of South Carolina a Charleston, LLC,
d/b/a Riverside Health and Rehab,

Appellant.

NOTICE OF APPEAL

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Attorney for Respondent

Defendant/Appellant, THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab ("Appellant"), hereby appeals the following orders of the Honorable J. Cordell Maddox Jr., Circuit Court Judge:

- **Order filed November 15, 2024, Denying Appellant's Motion to Compel Arbitration and, in turn, Granting Plaintiff's Motion to Compel Discovery Responses; and**

- **Order filed December 13, 2024, Denying Appellant's Motion to Alter, Amend, and/or Reconsider Order Denying Appellant's Motion to Compel Arbitration.**

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellant received written notice of entry of the most recent order on December 13, 2024.

Respectfully submitted,

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Attorneys for Appellant

Charleston, South Carolina

January 13, 2025

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

J. Cordell Maddox Jr., Circuit Court Judge

Case No. 2022-CP-10-00483

Fernesha Mazyck,
as Personal Representative of the Estate of Ida Braggs,

Respondent,

v.

THI of South Carolina a Charleston, LLC,
d/b/a Riverside Health and Rehab,

Appellant.

PROOF OF SERVICE

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Attorneys for Appellant

I, Russell G. Hines, of Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on Respondent on January 13, 2025, by emailing (see attached email) a copy of the same to Respondent's counsel of record:

Grahame E. Holmes, Esquire
PARKER LAW GROUP, LLP
gholmes@parkerlawgroupsc.com

Attorney for Respondent

I also certify that a copy of Appellant's **NOTICE OF APPEAL** was today, January 13, 2025, 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
Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellant

Charleston, South Carolina

January 13, 2025

From:	Hines, Russell
To:	gholmes@parkerlawgroupsc.com
Cc:	Brown, Stephen L.; Davis, Jay; Gandy, III, James D. (Tripp); Bell, Pollyana (Polly); Justman, Aimee; Peterson, Susan; Preiser, Skyla; Eversole, Amy R.
Subject:	Mazyck v. Riverside (Case No. 2022-CP-10-00483) -- Notice of Appeal
Date:	Monday, January 13, 2025 12:08:09 PM
Attachments:	image001.png Mazyck v. Riverside (Case No. 2022-CP-10-00483) -- Notice of Appeal.pdf Appealed Order 1 -- 2024 11-15 -- Order Denying MTCA.pdf Appealed Order 2 -- 2024 12-13 -- Order Denying MTR.pdf

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Attached for service in the above-referenced matter please find our **Notice of Appeal** and copies of the **appealed orders** 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: 2022CP1000483

Official File Stamp:	01-13-2025 12:10:33 PM
Court:	CIRCUIT COURT Common Pleas Charleston
Case Caption:	Fernesha Mazyck , plaintiff, et al VS Thi Of South Carolina At Charleston Llc , defendant, et al
Document(s) Submitted:	Appeal/Notice of Appeal to Court of Appeals - Exhibit/Filing of Exhibits - Exhibit/Filing of Exhibits
Filed by or on behalf of:	Russell Grainger Hines

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Donald Jay Davis, Jr. for Thi Of South Carolina At Charleston Llc et al
James D. Gandy, III for Thi Of South Carolina At Charleston Llc et al
Russell Grainger Hines for Thi Of South Carolina At Charleston Llc et al
Grahame Ellison Holmes for Fernesha Mazyck, Ida Braggs

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Fernesha Mazyck Personal Representative
Ida Braggs Estate

CERTIFICATE OF COUNSEL

The undersigned counsel for Appellant 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.

RECEIVED
Aug 05 2025
SC Court of Appeals

Respectfully submitted,

CLEMENT RIVERS, LLP

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Attorneys for Appellant

Charleston, South Carolina

August 5, 2025