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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-489 and 490

Linda Johnson, as Personal Representative of the Estate of Inez Roberts.....Respondent,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation .....Appellants.

Final Brief of Respondent

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I. Whether the Circuit Court correctly refused to compel arbitration by following the controlling authority of *Grant v. Magnolia Manor-Greenwood*, and when an essential term of the agreement at issue here – the choice of the arbitral forum of the American Arbitration Association – failed and was unavailable?

II. Whether the Circuit Court correctly refused to compel arbitration when the Appellant HHE waived any rights to pursue arbitration?

III. Whether the Circuit Court correctly determined that the Arbitration Agreement at issue was unenforceable because it failed as a matter of contractual formation and did not involve interstate commerce?

STATEMENT OF THE CASE

This appeal stems from the trial court's denial of a motion to compel arbitration. On August 14, 2008, Plaintiff/Respondent Linda Johnson filed a Summons and Complaint in the Hampton County Court of Common Pleas. Respondent's Complaint was filed as an *Ex Parte* Motion for Temporary Restraining Order Pursuant to Rule 65(b), SCRCP. Respondent Linda Johnson is the daughter of Inez Roberts, who at the time was 86 years old, in poor health, and a resident of the Appellant's nursing home facility in Estill, South Carolina.

Inez Roberts was admitted to the Appellant's facility in September of 2007 and subsequently, on or about January 8, 2008, Mrs. Roberts developed serious health concerns while in the Appellant's custody. (R. pp. 20-89). At the time of the TRO, Linda Johnson and her counsel were informed and believed that the negligence of the Appellant and its staff were the cause of the incident of January 2008. In an effort to investigate the cause of Mrs. Roberts' injuries and pursue possible legal remedies, the Respondent sought to review the nursing chart and medical records of Ms. Roberts, which were in the control and possession of Appellant.

The TRO further alleged that the Respondent was the Personal Representative of Mrs. Roberts upon her admission to Appellants' facility and that throughout Roberts' stay the Respondent was consulted by the facility concerning the treatment and care of her mother. However, upon request by Johnson, Appellant refused to provide the Respondent with a copy of Mrs. Roberts' chart pursuant to 42 C.F.R. 483.10. Respondent brought the TRO action seeking to restrain Appellant from in any way changing, altering, destroying, or manipulating Mrs. Roberts' nursing home chart or other

evidence related to the care of Roberts, and she requested that the she or her representatives be allowed to enter upon Appellant's premises for the purpose of inspecting, viewing, and copying the same nursing chart, or in the alternative, that she be provided a color copy of the chart.

On September 5, 2009, Judge Carmen Mullen granted Respondent's *Ex Parte* Motion for a Temporary Restraining Order. Upon being served with the Court's Order Granting the *Ex Parte* Temporary Restraining Order, Appellant HHE immediately filed a Motion to Dissolve Temporary Restraining Order, Objection to Injunctive Relief, and Memorandum in Support. Appellant argued at that stage that production of chart at issue would violate certain provisions of the Health Insurance Portabilty and Accountability Act and the *Standards for Privacy of Individually Identifiable Health Information* codified at 45 C.F.R. §164.500, collectively referred to as HIPAA.

Thereafter, Respondent Johnson petitioned and was appointed by the Court as Mrs. Roberts' Guardian ad Litem. Again Appellant refused to produce the nursing chart of Mrs. Roberts after the request by Mrs. Johnson as her duly appointed Guardian ad Litem. A final hearing was held on December 3, 2008. Thereafter, on December 16, 2008, the Court issued an Order for Appellant to produce the nursing chart of Mrs. Roberts based upon the inherent power of the court to control the litigation. Appellant filed a notice of Appeal and sought review by this Court. The parties briefed the issues and while on appeal, the dispute was resolved and the appeal was dismissed by the consent of the parties.

On July 3, 2009, Mrs. Inez Roberts died in Hampton County, South Carolina.

Having received the nursing home chart of Mrs. Roberts, Respondent Linda Johnson filed a wrongful death and a survival action Notice of Intent on April 13, 2010. (R. pp. 20-65). Standard interrogatories and requests for production, along with Johnson's responses to the same, were served along with the Notices of Intent. (Id.) The parties convened for a pre-suit mediation on September 9, 2010. Following the declaration of impasse at mediation, on October 13, 2010, suits for wrongful death and survival were filed in the Court of Common Pleas. (R. pp. 643-644; R. pp. 66-89). Appellant timely served Answers to the Complaints on November 21, 2010. Each answer included a qualified general denial and numerous affirmative defenses. (R. pp. 90-137). Relevant to this appeal, Appellant claimed that the suits were barred and subject to arbitration. (Id.) Immediately after receiving the Answers, on December 2, 2010, Johnson moved to strike a number of defenses, including the arbitration defenses. (R. pp. 138-141). The trial court heard Johnson's Motions to Strike on February 11, 2011 and denied Johnson's motion to strike the arbitration defenses. (R. pp. 16-17).

After filing the lawsuits, Johnson served discovery upon the Appellant on November 8, 2010. Appellant HHE requested and received from Johnson an extension to respond to her discovery requests and partial responses. Defendant HHE responded partially to Respondent's first interrogatories and requests to produce on January 21, 2011. The same day defendants UHS Pruitt Corporation, United Rehab, and United Clinical responded to Johnson's first requests for production. Johnson served her First Supplemental Requests for Production on Defendant HHE on February 14, 2011. On July 26, 2011, Defendant HHE served its response to Johnson's First Supplemental Requests for Production.

During this process, Scott was forced to file a Motion to Compel certain discovery responses from the Appellant on February 16, 2011. (R. pp. 142-143). Appellant HHE appeared and defended Scott's motion to compel before the circuit court in a hearing on March 16, 2011. Plaintiff also filed a Motion to Compel responses from the various defendants on June 8, 2011. (R. pp. 144-145). At no time during this discovery process did Appellants object to producing the information on the grounds that it might waive any rights to seek arbitration.

Appellant HHE also actively took advantage of the discovery process afforded by the circuit court and the Rules of Civil Procedure. In February of 2011, HHE served Requests for Admission upon Johnson. HHE also engaged and participated in a course of discovery concerning the arbitration issues. Appellant HHE served written discovery upon Johnson. Johnson fully replied to these discovery requests in a timely fashion.

On May 5, 2011, Appellant participated in depositions related to the arbitration defense. HHE noticed and took the deposition of the personal representative of Ms. Roberts' estate, Ms. Linda Johnson. That same day Scott's counsel deposed Ms. Sally Dobson, the admissions director at HHE who participated in the admissions process for Mrs. Roberts at Appellant's facility.

Throughout the course of discovery in this matter, Appellant HHE has produced thousands of pages of discovery documents to the Plaintiff. Furthermore, Appellant HHE participated in a second, failed mediation on August 11, 2011.[1]

On August 2, 2011, HHE moved for an order dismissing Johnson's lawsuits and compelling arbitration. (R. p. 146). The trial court held a hearing on HHE's motion on

[1] In Hampton County, and across the 14th Circuit, mediation is mandatory pursuant to Court Order.

October 7, 2011, after which the court denied the motion by an Order of November 9, 2011. (R. pp. 1-13). Following the denial of its motion to compel arbitration HHE moved for reconsideration. (R. p. 447). The trial court denied HHE's motion for reconsideration by an Order entered January 17, 2012. (R. pp. 14). Appellant HHE's Notice of Appeal was filed on February 2, 2012. (R. p. 545).

STATEMENT OF THE FACTS

Mrs. Inez Roberts was admitted to the Heritage Healthcare of Estill LLC ("HHE") facility on August 22, 2007. (R. p. 69). At that time she was an eighty-five year old female who was in good physical condition and without any pressure sores. (R. p. 656). On January 20, 2008, Mrs. Roberts was first noted as having pressure sores. (R. p. 192). Throughout the remainder of Mrs. Roberts' residency, the pressure sores worsened. (R. pp. 194-230). Ms. Roberts eventually had to have her leg amputated. (R. p. 232).

Prior to her admission to HHE's Estill facility, her daughter Linda Johnson had a duly recorded, general Power of Attorney. (R. pp. 647-651). Johnson signed the Arbitration Agreement at issue as part of the process of admitting her mother to Appellant HHE's facility.

I. THE TRIAL COURT PROPERLY DENIED APPELLANT HHE'S MOTION TO COMPEL ARBITRATION PURSUANT TO *GRANT V. MAGNOLIA MANOR-GREENWOOD.*

Appellant's arguments that the circuit court erred in denying its Motion to Compel Arbitration lack merit in light of well-settled law concerning the interpretation of arbitration agreements as matters of contract, particularly the Supreme Court decision of *Grant v. Magnolia Manor-Greenwood,* 383 S.C. 125, 678 S.E.2d 425 (2009). The trial court's denial of arbitration is founded primarily upon the failure of the Agreement's

chosen forum – the American Arbitration Association ("AAA") – to accept pre-dispute arbitration agreements in the field of health care disputes.

The court denied arbitration for three alternative reasons and found that: (1) pursuant to *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) the arbitration agreement itself does not involve interstate commerce; (2) the agreement fails as a matter of contract because there was no meeting of the minds between the parties; and, (3) that even if arbitration were available, by their conduct and participation before the court, Appellant HHE has waived any claim to arbitration.

The trial court's order is consistent with the Supreme Court's decision of *Grant, supra,* and no other issues must be addressed. However, even if review is expanded to the alternative grounds of denying arbitration, the Order should be affirmed. On each issue ruled upon, the trial court's findings and rulings conform to applicable principles of South Carolina law.

From the outset, it is important to note that the Appellant's reliance on the "presumption toward the arbitrability" of disputes is misplaced. As usually occurs when a party seeks to compel arbitration, the "presumption of arbitrability" phrase and the arguments that flow from it achieve talismanic importance in arguing for arbitration. In South Carolina, though, the presumption in favor of arbitration does not overcome the fact that such agreements are subject to common law rules of contract interpretation. Regardless of the Appellant's reliance upon the legislative and judicial presumption in favor of the arbitrability of disputes, South Carolina law clearly holds that our courts will not impose judicial re-writing of agreements to arbitrate. *Dobyns* v. *South Carolina Dept. of Parks, Recreation & Tourism,* 325 S.C. 97, 103,480 S.E.2d 81, 84 (1997) (citing

Patterson v. *Aetna Life Ins. Co.,* 248 S.C. 374, 378, 149 S.E.2d 915, 917 (1966)). Nor does the presumption of arbitration supplant common law notions of contractual interpretation such as the requirement of the meeting of parties' minds in forming an agreement.

The Federal Arbitration Act itself acknowledges the underlying contractual basis of any arbitration agreement. Under the Federal Arbitration Act, the party seeking arbitration must show two things in order to compel arbitration: (1) that a *written agreement to arbitrate exists*, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2 (2006) (emphasis added). Section 4 of the FAA reads, in part, as follows:

> The court shall hear the parties, *and upon being satisfied that the making of the agreement for arbitration or the failure therewith is not the issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added).

Here, under the first prong concerning the existence of an agreement, the trial court ruled correctly that there was no contract. While the issues need not be reached due to the failure of the first test of the validity of the arbitration agreement, the trial court also ruled correctly under the second prong that the contract does not involve interstate commerce pursuant to 9 U.S.C. §2. The Arbitration Agreement at issue fails on all grounds addressed by the trial court.

A. Standard of Review

Determinations of arbitrability are subject to *de novo* review. *Stokes v. Metropolitan Life Ins. Co.,* 351 S.C. 606, 571 S.E.2d 711 (2002). Unless the parties

provide otherwise, the question of arbitrability is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Furthermore, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc. v. Horton,* 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999).

B. While Arbitration is Favored as a Matter of Policy, Questions Concerning the Enforceability of Arbitration Agreements Are Nevertheless Subject to General Principles of Contract Law.

Respondent fully acknowledges that the arbitration of disputes is favored as a matter of both state and federal legislative and judicial policy. The Courts of South Carolina have noted a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor the arbitration of disputes." *Towles v. United Healthcare Corp.,* 338 S.C. 29, 34, 524 S.E.2d 839 (Ct. App. 1999); *Toler's Cove Homeowners' Ass'n. v. Trident Construction Co., Inc.* 355 S.C. 506, 612, 583 S.E.2d 581, 585 (2003). With respect to the breadth of arbitration clauses and questions of whether a dispute is covered by the clause, unless a court can say with assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, generally arbitration will be ordered. *Zabinski,* 346 S.C. at 597, 553 S.E.2d at 118.

Yet, despite the existence of this presumption of favoring arbitration, courts are bound to interpret arbitration clauses within the familiar strictures of contractual interpretation. "Although [South Carolina Courts] are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 172,644 S.E.2d 718,720

(2007). Arbitration agreements are still required to satisfy the basic tenets and requirements of contract law. *Towles*, 338 S.C. at 37, 534 S.E.2d at 844 (Ct. App. 1999).

"Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia Manor-Greenwood, Inc., supra* (citing, *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 542 S.E.2d 360 (2001). In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.' " *Towles,* 338 S.C. at 37, 524 S.E.2d at 844 (citing, *Johnson v. Circuit City Stores,* 148 F.3d 373 (4th Cir. 1998) (quoting, *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)). "Arbitration is a matter of contract and controlled by contract law." *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky) Inc.,* 312 S.C. 559, 437 S.E.2d 22 (1993) (citing, 5 *Am.Jur.2d Arbitration and Award* §11 (1962)). "The Federal Arbitration Act recognizes that arbitration is strictly a matter of contract and that the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Dowling v. Home Buyers Warranty Corp., II,* 311 S.C. 233, 236 428 S.E.2d 709, 710 (1993) (citing *Volt Info Sys., Inc. v. Board a/Trustees of Leland Stanford Jr. Univ.,* 489 U.S. 468,479, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488, 500 (1989)). General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 542 S.E.2d 360 (2001).

In fact, strict construction of the plain terms of arbitration agreements was confirmed days ago by the United States Supreme Court. In *American Express*

Company, et al., v. Italian Colors Restaurant, et al., 570 U.S. ___ (Slip Opinion No.12-133, June 20, 2013), Justice Scalia, writing for the majority, wrote:

> This text [9 U.S.C. § 2] reflects the overarching principle that arbitration is a matter of contract. (Citation omitted). And consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U. S. 213, 221 (1985), including terms that "specify *with whom* [the parties] choose to arbitrate their disputes," (citation omitted), and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989).

(Slip Opinion, p. 3.).

Under South Carolina common law, in order to have a valid and enforceable contract there must be a meeting of the minds between the parties to all essential and material terms of the agreement. *Player v. Chandler,* 299 S.C. 101, 108, 382 S.E.2d 891 (1989) (citing *Hughes v. Edwards,* 265 S.C. 529, 220 S.E.2d 231 (1975)). Moreover, the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling,* 311 S.C. at 236, 428 S.E.2d at 710.

Respondent does not ask this Court to ignore state and federal policies in favor of arbitration. Rather, Respondent asks this court to interpret the agreement between the parties based upon the plain language of the arbitration agreement itself and to resist HHE's invitation to judicially rewrite and author the contract beyond the terms chosen by the parties in the Arbitration Agreement. Respondent requests that this Court "rigorously enforce" the plain meaning of the Arbitration Agreement at issue. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns* v. *South Carolina Dept. of Parks, Recreation & Tourism,* 325 S.C. 97, 103,480

S.E.2d 81, 84 (1997) (citing *Patterson* v. *Aetna Life Ins. Co.,* 248 S.C. 374, 378, 149 S.E.2d 915, 917 (1966)).

C. Even if the Arbitration Agreement Were Valid, the Parties to the Agreement Agreed To A Specific Arbitration Clause Stating That Any Arbitration "Shall Follow the Rules of the American Arbitration Association."

The Arbitration Agreement signed by Ms. Johnson on behalf of her mother is not enforceable as a matter of contract. There is no dispute that the agreement at issue was prepared by HHE and calls for any "claim or claims" between the resident and HHE to be handled under the auspices of the American Arbitration Association (AAA). In this case, Appellant HHE drafted a standard form Arbitration Agreement which was executed at the same time of the larger packet of admissions documents to the facility. This Arbitration Agreement was provided to the decedent's daughter to sign in the process of the decedent's admission to HHE's Estill facility.

Although this Court recognizes that parties are free to contract away their rights, it cannot be ignored that this "take-it-or-leave-it" contract was drafted by the superior party, the Appellant HHE. Appellant HHE, as the superior party and the drafter of this Agreement, chose the American Arbitration Association's rules as the governing guidelines for any arbitration with the resident. More importantly, Appellant was free to include any terms it desired concerning arbitration in their Arbitration Agreement and to present those same "take-it-or-leave-it" terms to all potential residents.

The arbitration agreement, entitled "Resident and Facility Arbitration Agreement," states in pertinent part as follows:

> It is hereby understood and agreed by Heritage of the Low Country and _____ and or "Authorized Representative," together referred to as the "Resident") that, regardless of any

> other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**. This means the parties are waiving their right to a trial before a jury or a judge.
>
> * * *
>
> Any arbitration proceeding that takes place under this **Arbitration Agreement** shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The **arbitration** shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

(R. p. 653) (emphasis in original).

"Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Warner v. Weader,* 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). Courts are "not at liberty to consider the undisclosed or secret intentions of the patties but must be governed by their outward expressions." *Kable v. Simmons,* 217 S.C.161, 60 S.E.2d 79, 81 (1950). The Court is "without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n,* 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper,* 283 S.C. 83, 86,320 S.E.2d 445 (1984)). "The court's duty is to enforce the contract made by the parties regardless of

its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." *Blakeley v. Rabon,* 266 S.C. at 73, 221 S.E. 2d at 769 (citing *McPherson v. J.E. Sirrine & Co.,* 206 S.C. 183, 33 S.E.2d 501, 509 (1945)).

Here, the agreement unambiguously and clearly states that any dispute arising between the parties shall be resolved in accordance with "the rules of the American Arbitration Association." The Appellant could have included conditional language or provided alternate administrators, rules, or forums but it did not. The Appellant could have added language providing for "fall back" procedures if the chosen forum would not allow arbitration. It did not.

Effective January 1, 2003, the AAA published a notification that it would not accept administration of cases involving individual patients without a post-dispute agreement to arbitrate such cases as the one before this Court. *See*, AAA Healthcare Policy Statement, January 1, 2003. This occurred *over four years* before HHE's form take-it-or-leave-it Arbitration Agreement was presented to the decedent's sister. The agreement drafted unilaterally by HHE includes the forum selection provision requiring adherence to the AAA rules. HHE knew or should have known the AAA's position on arbitrating health care cases involving individual patients long before the Agreement at issue was entered into. Because the AAA no longer arbitrates healthcare disputes arising under pre-injury arbitration agreements, the arbitration clause is therefore unenforceable.

D. The Appellant's Choice of Arbitral Forum Requiring Adherence to the AAA Rules is an Integral Part of the Agreement and the Failure of This Forum Nullifies the Arbitration Agreement.

The Arbitration Agreement in this case should not be enforced because there has been a failure of the arbitral forum. The Appellant's choice of the AAA as a forum was an essential term of the arbitration agreement and the failure of the AAA to accept this type of case voids the Agreement. Appellant attempts to argue that the choice of "the rules of the" AAA does not constitute the failure of the arbitration forum and that another arbitrator could administer the arbitration under the chosen AAA rules. This argument is unavailing under applicable law and the plain language of the AAA rules and procedures.

Rule R-2 of the Commercial Arbitration Rules and Administrative Procedures of the American Arbitration Association provides as follows:

> **When parties agree to arbitrate under these rules,** or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, **they thereby authorize the AAA to administer the arbitration. The authorities and duties of the AAA are prescribed in the agreement of the parties and in these rules,** and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its officers.

(Emphasis supplied). *See*, http://www.adr.org/sp.asp?id=22440. Thus, by the plain and unmistakable language of the AAA – which the Appellant chose – "the agreement to arbitrate under these rules" directly appoints the AAA as the arbitral forum. The choice of these rules "authorize[s] the AAA to administer the arbitration." *Id.*

Rule R-3 refers to the National Roster of Arbitrators. This Rule provides:

> The AAA shall establish and maintain a national roster of commercial arbitrators (National Roster) and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

See, Rule 3, AAA.

Rule R-49 addresses administrative fees and provides that "[a]s a Not-For-Profit Organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the costs of providing administrative services." Sub-paragraph C of Rule 51 addresses the neutral Arbiter's compensation and provides that: "Any arrangement" for the compensation of a neutral arbiter shall be paid through the AAA and not directly between the parties and the arbitrator. The American Arbitration Association Rules conclude by stating that:

> These rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Unauthorized use or modification of these rules may violate copyright laws and other applicable laws.

Rule R-49, AAA.

The American Arbitration Association also has a specific fee structure upon which the AAA charges the parties to administer the claims based on the amount of the claim and counterclaims. Initial filing fees range from Seven hundred fifty ($750.00) dollars to Ten thousand ($10,000.00) dollars, and the case service fee ranges from Two hundred ($200.00) dollars to Four thousand ($4,000.00) dollars. For any claims above Ten million ($10,000,000.00) dollars, then the base fee is Twelve thousand, five hundred ($12,500.00) dollars, plus .01% of the amount of the claim above Ten million ($10,000,000.00) dollars, as well as a case service fee of Six thousand ($6,000.00) dollars. Nothing in the AAA Rules addresses, authorizes, or even contemplates the application of its rules outside the scope of its own administration of arbitrations.

Finally, the specific, in-depth rules of the AAA apply to all disputes before it. AAA rules apply to the "initiation" of arbitration, service, and answering. AAA rules and procedures direct the parties concerning the production of evidence, the production ("sharing" in AAA-speak) of documents before a hearing, the parties' ability to obtain discovery, communications with the AAA, form and manner of award, and every aspect involved in the arbitration process from the filing of an award through post award procedures. Therefore, a review of the AAA's Rules and Procedures weighs heavily against any argument by the Appellant that the application of the AAA's rules, based on the language of the Arbitration Agreement, do not rise to the level of selecting a failed forum for arbitration.

An understanding of the detailed, all-encompassing nature of the AAA rules is important to consider in light of *Grant v. Magnolia-Manor* and its analysis of whether the failure of the chosen arbitral forum voided a similar pre-injury arbitration agreement. In *Grant*, the Court's analysis centered upon whether the selection of a named arbitrator constituted an integral part of the arbitration agreement. "To determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the 'essence' of the arbitration agreement." *Grant*, (citations omitted). Under the Supreme Court's analysis, the rules of the forum chosen in *Grant* (the American Health Lawyers Association ("AHLA")) were not merely ancillary and logistical, but rather essential to the agreement. In arriving at the conclusion that the selection of the AHLA was an essential term of the arbitration agreement the Court stated:

> Under the AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHLA "has wide-ranging substantive implications that may affect, *inter alia,* the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." (Citations omitted). Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither "logistical" nor "ancillary". (*See Smith v. Barney, Inc. v. Critical Health Systems of North Carolina, Inc.,* 212 F.3d 858, 862 (4th Cir. 2000) ("It is far better to interpret the agreement based on what is specified, rather than attempt to incorporate other remote rules by reference.")

See, Grant. Simply put, the Supreme Court's analysis in *Grant* directly squares with the issues of the AAA before this Court. The detailed, intricate Rules and Procedures of the AAA cannot be deemed to be merely ancillary and logistical. These rules and procedures affect the substantive outcome of the resolution of the issues. Appellant HHE, the drafters of the Arbitration Agreement at issue, should have been aware that for approximately four (4) years prior to the decedent's sister's signature of this agreement, the rules and forum that it chose were no longer available as a means of dispute resolution. Furthermore, in choosing that forum, it is inconceivable that Appellants can now argue that the application of the intricate rules of the AAA to disputes do not have real, substantive effects on the rights of the parties. If not, why choose the AAA specifically? Because the AAA no longer accepts such pre-injury

arbitration agreements, the failure of the arbitral forum renders the Arbitration Agreement at issue unenforceable.

Under the binding precedent of *Grant,* the circuit court's Order Denying Appellants' Motion to Compel Arbitration should be affirmed without the necessity of reaching the question of the application and effect of the Federal Arbitration Act. However, even if the FAA applies, the Court's refusal to appoint a substitute arbitrator is proper.

E. Due to the Failed Forum Selection Clause, No Substitute Arbitrator Can Be Appointed.

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreements regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz,* 343 S.C. at 538, 542 S.E.2d at 363. Even if the FAA applied to this arbitration clause and interstate commerce were involved, the trial did not err in refusing to designate a substitute arbitrator pursuant to § 5 of the FAA, because the arbitration agreement is void and unenforceable as a matter of law for the reasons previously stated.

Appellant relies on the mandatory language of §4 of the FAA to argue that the trial court was bound and required to enforce the Arbitration Agreement at issue despite the failure of an essential term of the agreement. As noted by Appellants, "where an arbitration agreement governed by the FAA covers claims that have been asserted in a lawsuit, the court having jurisdiction *must* compel arbitration." This argument simply ignores the applicable law and improperly seeks to elevate the presumption of

arbitrability over the careful analysis the law requires of courts in determining the validity of arbitration agreements. The relevant portion of Section 4 of the FAA provides:

> [t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Appellant then invokes the language of Section 5 of the FAA to argue that the unavailability of the AAA forum and rules is immaterial and that the court is required to appoint a substitute arbitrator. This argument is based upon the "lapse in the naming of an arbitrator" language of § 5. Section 5 provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

The plain language of §5 prevents its application in this instance. Here, there has not been a "lapse in naming an arbitrator." The parties specifically named an arbitral forum and set of rules, the AAA, that no longer accepts these disputes. Based upon the analysis under *Grant,* the provision did not merely "name" an arbitrator, but chose specific substantive, procedural, and administrative choices that formed an

essential element of the agreement to arbitrate. Therefore, this contract is unenforceable because a material part of the arbitration clause no longer exists.

While Appellant HHE cites several cases in which courts applied §5 to appoint a substitute arbitrator, these cases are countered by numerous decisions favorable to the Respondent's position.[2] These same cases were considered by the Supreme Court in *Grant,* and that decision requires a finding by this Court that the selection of the AAA rules was the exclusive selection of a forum in the arbitration agreement. Because that forum fails, the arbitration agreement, as drafted, is unenforceable. Even if this Court were to reach the issue of whether Section 5 of the Agreement requires arbitration, which the *Grant* Court did not reach, those cases relied upon by Respondent are more persuasive and should be followed.

In *Smith Barney v. Critical Health Systems of North Carolina,* 212 F.3d 858, 860 (4th Cir. 2000), the arbitration agreement provided that arbitration would proceed in accordance with the rules of three self-regulatory organizations, the NASD, the NYSE and the AMEX. "Where the parties have agreed explicitly to settle their disputes before particular arbitration fora, that agreement must control. To hold otherwise would require us to impose a strained construction on a straightforward

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[2] See, *In Re: Solomon,* 68 F.3d 554 (2d Cir. 1995) (Where the Court concluded, in essence, that the language stating that the rules of the NYSE were to apply was the same as providing that the matter could only be arbitrated before the NYSE.); *Smith Barney, Inc. vs. Critical Health Systems in North Carolina, Inc.,* 212 F. 3d 858, CA4 (N.C. 2000) (Where the Fourth Circuit, after conducting an exhaustive review of other decisions, concluded that there was no difference between an agreement that provided for arbitration "only before" specified entities and an agreement that provided for arbitration "in accordance with the rules" of several entities and holding that where parties agreed explicitly to settle their disputes before a particular arbitration forum, that agreement must hold); and, *Buice vs. WMA Securities, Inc.,* WL 6063508 (Ct. App. 10/14/08) (Upholding order denying arbitration where failure of forum occurred.)

agreement." *Id.* at 862 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis,* 903 F. 2d 109, 113 (2d Cir. 1990)).

Likewise, in *In re Salomon Inc. Shareholders' Derivative Litigation,* 68 F.3d 554 (2nd Cir. 1995) the arbitration clause provided that the parties arbitrate disputes before the NYSE. Defendants sought appointment of a substitute arbitrator under § 5 of the FAA when the NYSE declined to arbitrate the dispute. The Court stated that "although federal policy favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agree to arbitrate disputes only before the NYSE." *Id.* at 559. The Court in *Salomon* states that §5 of the FAA applies when there is a "lapse in the naming of an arbitrator... or in filling a vacancy." 9 U.S.C §5. Because the parties had contractually agreed that only the NYSE would arbitrate any disputes between them, and there was no lapse in naming or filing a vacancy, the Court declined to appoint substitute arbitrators and compel arbitration in another forum. *Id* at 559.

In the case before this Court, the "lapse" argument is not compelling as there was no lapse in naming an arbitrator or lapse in filling a vacancy. Furthermore, Appellant was aware before the presentation of this agreement to the decedent's family upon the admission Ms. Roberts that the AAA would no longer arbitrate such disputes. If Appellant intended any other entity to arbitrate in place of the AAA or under its rules with a different arbitral forum, then they could have chosen to include appropriate language in their Agreement. As the superior, drafting party, this failure should be held against the Appellant HHE, rather than the Estate of Ms. Roberts.

Similarly, any argument by HHE that the FAA would somehow force the Personal Representative of Ms. Roberts' Estate to now execute a "post-injury" arbitration agreement is untenable. There is absolutely no authority for this. This cannot be the purpose of the Federal Arbitration Association, and to require such would allow parties who have failed in the construction of contracts, specifically arbitration agreements, to force the same result by after the fact, imposed modification. At its core, arbitration agreements are based upon the meeting of the minds and intentions of the parties. To argue that the Personal Representative is now compelled to enter into an agreement flies in the face of logic and the will and intent of parties to contract and make agreements.

II. APPELLANT HHE HAS WAIVED THE RIGHTS TO ENFORCE THE ARBITRATION AGREEMENT EVEN IF IT WERE VALID.

HHE has waived any right to seek arbitration. In South Carolina, parties can waive their right to enforce an arbitration agreement. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). Three factors generally are considered to determine if a party has waived its right to enforce an arbitration clause: 1) the time between commencement of the action and moving for arbitration, 2) whether the party seeking to compel arbitration engaged in discovery before moving for arbitration, and 3) prejudice to the non-moving party which must be more than mere inconvenience. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

The trial court correctly found that that Appellant HHE waived their rights to mediation. Appellant HHE's resort to the protections, benefits, rules, and procedures of the Courts of this state began when it defendant the initial Ex Parte TRO seeking the nursing home chart which was filed by the Plaintiff all the way back in September of

2008. Make no mistake – at the point in time that the dispute concerning daughter and power of attorney Linda Johnson's ability to collect her mother's medical records arose – Appellant HHE could have moved to have even that matter referred to arbitration. The breadth of the "any dispute' language of the Arbitration Agreement, presumably, could have covered disagreement. Not only did Appellant HHE file a motion with the court to dissolve the TRO, but HHE appeared before the Court, argued motions concerning the issues, and ultimately appealed the circuit court's decision to this court. The dispute concerning the release of the chart involved months of the Appellant HHE availing itself of the court system.

Then, almost two years after the initial suit for records, the instant proceedings were commenced by filing two Notices of Intent that were served on the Defendants on or about April 13, 2010. (Certificates of Service). A nursing home negligence action cannot be commenced until the Plaintiff has filed and served a Notice of Intent. *See* S.C. Code Ann. § 15-79-125. Again, Appellant HHE had an opportunity to move to compel arbitration. In fact, S.C. Code § 15-79-120 specifically addresses this issue and states that parties can agree to arbitrate prior to filing a medical malpractice action. Instead, the Appellant chose to participate in the Notice of Intent proceedings, attended a failed mediation, and the summonses and complaints were filed on October 13, 2010. HHE's motion was not filed until August 2, 2011. During that long delay, HHE engaged in discovery. Appellant has served and answered discovery, though they have attempted to limit that discovery only to "arbitration" issues. HHE has taken and defended depositions. Not only did HHE participate in the pre-suit mediation on September 9, 2010, but also a second mediation on August 11, 2011. Throughout this time frame HHE

has also participated in procedural and discovery hearings before the trial court, rather than moving to compel arbitration. In this matter, Appellant HHE has repeatedly availed itself of the court system since at least September of 2009.

Clearly, in South Carolina, the "right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (2011). Our Courts have held that less time constitutes waiver. *Rhodes*, 374 S.C. at 125, 128 647 S.E.2d at 250, 252 (Ct. App. 2007). This Court recently addressed the waiver of arbitration in *Carlson v. S.C. State Plastering, LLC*, (Ct. App. Opinion No. 5143, June 12, 2013). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). The question of whether waiver exists is a fact based analysis based on the facts of each particular case. *Carlson*, p. 5. *Carlson* reinforces the three factors to consider when determining whether a party has waived its right to compel arbitration: (1) whether a substantial length of time transpired; (2) whether the party seeking to compel arbitration engaged in extensive discovery; and, (3) whether the non-moving party was prejudiced by delay in seeking arbitration. *Id.*, citing *Davis v. KB Home of S.C., Inc.*, 394 S.C. at 131, 713 S.E.2d at 807.

Unlike the factual situation in *Carlson*, in this case – without question – HHE participated in extensive discovery. The parties have conducted extensive written and deposition discovery, participated in two mediations, and attended multiple Court hearings. The costs associated with discovery that may not have been expended in arbitration is an example of prejudice that is beyond mere inconvenience. *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). The

Estate has borne the costs of two failed mediations. Most prejudicially, now the respondent faces years of appellate wrangling and delay before she can finalize discovery and prepare for trial. At least if HHE had moved in a timely manner, these issues might have been resolved by this point. Appellant HHE has availed itself of the courts and delayed pursuing purported rights to arbitration. The trial court properly denied HHE's request on this ground alone.

III. AS A MATTER OF CONTRACT, THE ARBITRATION AGREEMENT FAILS AND IS INVALID BECAUSE THERE IS NO MEETING OF THE MINDS BETWEEN THE PARTIES.

In order to have a contract, there must be a meeting of the minds as to essential parts of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Here, there is no meeting of the minds as to what the parties were entering into.

The admission director for HHE, Appellant's agent in the admissions process and who is charged with securing signatures including the Arbitration Agreement at issue, was Ms. Sally Dobson. Ms. Dobson described her role and responsibilities in the admissions process as follows:

> A: I am the admissions director. I take referrals from the hospital or from home. We go over them, we check the pay sources, and then if we can help these people or can admit them for care then we do the process of admitting.
>
> Q: Okay. What is your involvement in the actual admission process itself?
>
> A: I sign – I have the paperwork singed by either the patient or a family member.

(R. p. 632).

Ms. Dobson further testified that she and the administrator explain to residents and family members that arbitration means that if "they have any complaints or any

concerns that are not being taken care of in a timely manner then we can go into arbitration." (R. p. 632). When asked if she was aware that the arbitration agreement required adherence to the AAA rules, she testified as follows:

> Q Did you know, Ms. Dobson, that the Arbitration Agreement that we're here about today contains a provision that the American Arbitration Association rules have to be followed? Were you aware of that?
>
> A If it's on that sheet of paper, Well, I don't know what the Arbitration Agreements are.
>
> Q Well, how is it if you don't know, how would a resident know or their family member?
>
> A I don't know.
>
> Q Well, don't you think that's an important part of it?
>
> A It is.
>
> Q It's a material part of the contract?
>
> A It is.
>
> Q And but you don't know what it is?
>
> A But I don't know what it is.
>
> Q And so you can't expect a resident to know?
>
> A That's --
>
> MR. RISSLER: Object to the form.
>
> A -- correct.
>
> Q or their personal representative?
>
> A Uh-huh (affirmative).
>
> Q Right?
>
> A Right.

Q Or power of attorney, right?

A Right.

Q Or their family member?

A Right.

(R. p. 633).

Astoundingly, the person HHE selected as the person to instruct residents and family members on the documents that they must sign in order to be admitted to the facility does not know what those very documents mean. Quite candidly, she further admitted that there could be no meeting of the minds as to an integral part of the contract. (R. p. 633). Accordingly, there is no meeting of the minds and the arbitration agreement must fail.

IV. EVEN IF THE ISSUE OF INTERSTATE COMMERCE UNDER THE FAA IS REACHED, UNDER *TIMMS V. GREENE*, APPELLANT'S ARGUMENTS FAIL, AS INTERSTATE COMMERCE IS NOT EVIDENCED IN THE AGREEMENT.

The Arbitration Agreement of the parties is not a transaction involving interstate commerce. This issue was addressed long ago by the South Carolina Supreme Court in the case of *Timms vs. Greene*, 310 S.C. 469, 427, S.E.2d 642 (1993).

Timms stemmed from a nursing home resident's lawsuit seeking damages for injuries sustained while she was left unattended under a hair dryer at defendant's facility. The arbitration agreement in *Timms* required submission of any dispute to binding arbitration. The *Timms* defendant argued that interstate commerce was involved in the contract because the defendant was a division of a national corporation; the defendant hired employees from out of state; the defendant marketed its services out of state; the

defendant purchased majority of its goods and equipment from out of state; and, the defendant contemplated payments from Medicare and Medicaid. The lower court found the contract did not involve interstate commerce, rendering the FAA moot. The Supreme Court affirmed. The Court in *Timms* stated "although these factors could evidence the center's involvement in interstate commerce we find that their relationship to the agreement between the center and the respondent is insufficient to form the basis of a contract between the parties." *Id.*

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between *Timms* and the defendant, the Supreme Court refused to require arbitration because the Plaintiff's cause of action was not subject to the Arbitration Act of South Carolina and the Federal Arbitration Act was inapplicable.

In this case, there is no evidence of interstate commerce in the actual Arbitration Agreement between the parties.[3] The contract was entered into between Ms. Johnson, a South Carolina resident, and Heritage Healthcare of Estill, LLC, a South Carolina LLC. Furthermore, there has been no showing by HHE of any interstate commerce between the parties to the arbitration agreement. Furthermore, HHE's reference to involvement of Georgia corporations as parties to this lawsuit does not support a finding that the arbitration agreement itself involves interstate commerce. Clearly, the agreement *itself* is

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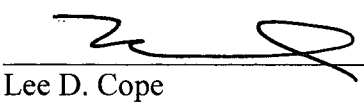
[3] The trial court found correctly that parties cannot simply stipulate to the involvement of interstate commerce. It is well-established that parties cannot stipulate to subject matter jurisdiction before Courts. Similarly, parties cannot "stipulate" to interstate commerce that would invoke the FAA and deprive the Courts of jurisdiction over disputes. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham,* 262 S.E.2d 921 (1980). It is not enough to say interstate commerce is involved; it must be evidenced in the contract itself. *Timms, supra.* The trial court properly concluded that it should not relinquish its jurisdiction and authority to hear the dispute merely because of a contract term.

the focus of the inquiry under *Timms*. Within its four corners, the Arbitration Agreement at issue does not mention any of the out of state entities. Rather, the agreement specifically limits arbitration to disputes involving the resident and the "facility." (R. pp. 645-646). The "facility" is HHE, d/b/a Heritage of the Low Country. There is no evidence that Ms. Johnson knew or should have known of the existence of the out-of-state corporations at the time she entered into this admission agreement. Additionally, the responsive pleadings of the out of state corporations deny that they are responsible for the care provided at the HHE facility. (R. pp. 91; 97; 103; 109; 115; 121; 127; and, 133). There is no signed arbitration agreement or any other contract signed by the decedent and UHS Pruitt, United Rehab and/or United Clinical Services. Accordingly, the FAA does not apply.

CONCLUSION

The trial court properly concluded that *Grant v. Magnolia Manor-Greenwood* is dispositive of the issues of arbitrability in this case and refused to compel arbitration. Furthermore, even if Grant does not end the analysis, Appellant HHE waived any rights to claim arbitration by participating in this litigation for the length of time and to the extent which is availed itself of the court system. Finally, the Arbitration Agreement fails as a matter of contract and the FAA is not triggered by the involvement of interstate commerce within the Arbitration Agreement itself. For these reasons, the trial court's Order Denying Appellant HHE's Motion to Compel Arbitration should be affirmed.

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

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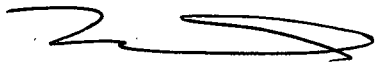
Lind Johnson, as Personal Representative of the Estate of
Inez Roberts.....Respondent,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation .....Appellants.

RESPONDENT'S CERTIFICATION OF COMPLIANCE WITH RULE 211(B), SCACR

I, the undersigned, as counsel for the Respondents, hereby certify that the within Final Brief of the Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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CERTIFICATE OF SERVICE

I, the undersigned, of the law offices of Peters, Murdaugh, Parker, Eltzroth & Detrick, attorneys for the Respondents, do hereby certify that I have served all counsel in this action with a copy of Respondent's Final Brief and Rule 211 (b) Certification to be included in the Record on Appeal by mailing a copy of the same to counsel via Untied States Mail, postage prepaid, at the following address(es):

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