STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT CASE NO. 2019-CP-42-03236
RITA ST. AUBIN, as personal representative of the Estate of Irene Ramsey, Plaintiff, vs. THI OF SOUTH CAROLINA AT CAMP CARE, LLC d/b/a Lake Emory Post Acute Care; THI OF SOUTH CAROLINA, LLC; HUNT VALLEY HOLDINGS, LLC; THI OF BALTIMORE, INC.; and CASEY CADDELL, as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, Defendants.	)	**ORDER REGARDING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY ACTION**

Hearing Date:	December 18th, 2019, at 2:30 p.m.
Hearing Judge:	Grace Gilchrist Knie
Counsel for Plaintiff:	Stefan Bjorn Feidler
Counsel for Defendants:	Russell G. Hines
Court Reporter:	Michael R. Watts

This matter was before the Court on Wednesday, December 18th, 2019, at 2:30 p.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Defendants' Motion to Compel Arbitration. Attorney Stefan Bjorn Feidler of the Anastopoulo Law Firm, LLC, was present representing the interests of the Plaintiff. Attorney Russell G. Hines of Young Clement Rivers was present representing the interests of the Defendants. Michael R. Watts was the Court Reporter.

PROCEDURAL BACKGROUND:

This matter began with the filing of a Summons and Complaint on September 10th, 2019, asserting the causes of action of negligence/gross negligence, negligence per se, breach of

contract, fraud/misrepresentation/spoliation, violation of the South Carolina Unfair Trade Practices Act, elder abuse, corporate negligence, breach of fiduciary duty, unjust enrichment, alter ego/piercing the corporate veil, amalgamation of interests, conversion, a survival action under S.C. Code Ann. § 15-5-90, and a wrongful death action under S.C. Code Ann. § 15-51-10. An Affidavit of Service was filed September 18th, 2019, certifying that the Summons and Complaint were served on Lynanne Gares, Litigation Management Services Leader, for Defendant Hunt Valley Holdings, LLC on September 12th, 2019. An Affidavit of Service was filed September 18th, 2019 certifying that the Summons and Complaint were served on Lynanne Gares, Litigation Management Services Leader, for Defendant THI of Baltimore, Inc. on September 12th, 2019. An Affidavit of Service was filed September 18th, 2019, certifying that the Summons and Complaint were served on Trey Williams, Billing Administrator, for Defendant THI of South Carolina, LLC on September 12th, 2019. An Affidavit of Service was filed September 18th, 2019 certifying that the Summons and Complaint were served on Trey Williams, Billing Administrator for Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care on September 12th, 2019.

Defendant THI of South Carolina, LLC filed an Answer to the Complaint on October 14th, 2019. Defendant Hunt Valley Holdings, LLC filed an Answer to the Complaint on October 14th, 2019. Defendant THI of Baltimore, Inc. filed an Answer to the Complaint on October 14th, 2019. Defendant Casey Caddell filed an Answer to the Complaint on October 14th, 2019. Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care filed an Answer to the Complaint on October 14th, 2019.

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care filed a Motion to Stay the Action and Compel Arbitration on October 28th, 2019. Defendant Hunt

Valley Holdings, LLC filed a Motion to Stay on October 28th 2019. Defendant THI of Baltimore, Inc. filed a Motion to Stay on October 28th, 2019. Defendant THI of South Carolina, LLC filed a Motion to Stay on October 28th, 2019. Defendant Casey Caddell filed a Motion to Stay the Action and Compel Arbitration on December 9th, 2019.

FACTUAL BACKGROUND:

This is a professional negligence case involving Irene Ramsey (hereinafter "Ms. Ramsey"), who was admitted to Defendant's facility for rehabilitative purposes after suffering a fall at home resulting in a fractured femur. After admission, Ms. Ramsey suffered an additional fall at Defendant's facility. Plaintiff alleges that this fall was caused by Defendant's negligence and proximately caused Ms. Ramsey's death. Plaintiff filed this action shortly thereafter. Defendant subsequently filed the present Motion to Dismiss and Compel arbitration.

On February 6, 2017, Rita St. Aubin executed the Admission Agreement and Arbitration Agreement on behalf of Irene Ramsey. The Admission Agreement and Arbitration Agreement were two separate agreements. This separation is evidenced by several factors. For instance, the Agreements are separately numbered and separately titled; and the Admission Agreement provided an opt-out option where either party could terminate the Admission Agreement, while the Arbitration Agreement did not provide such a provision. Further, the Arbitration Agreement itself does not contain language stating that it is voluntary and not a precondition to admission. As discussed below, material terms in the Arbitration Agreement are vague or missing. Specifically, the Arbitration Agreement fails to state where or how the parties shall choose the arbitration from a "panel" or who is responsible for the arbitration fees. At the hearing, the parties agreed the Federal Arbitration Act ("FAA") governs the Arbitration Agreement.

LEGAL ANALYSIS AND FINDINGS:

The Arbitration Agreement that is the subject of this Motion is governed by the FAA. There is a presumption in favor of the enforcement of arbitration agreements. However, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, Inc., 534 U.S. 279, 293-294, 122 S. Ct. 754, 764, 151 L.Ed.2d 755 (2002); Toler's Cove Homeowners Ass'n, Inc., v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003). Where the FAA does apply, the Arbitration Agreement is subject to the same defenses applicable to all other contracts as discussed below. Rent-A-Center, West , Inc. v. Jackson, 561 U.S. 63, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010).

This Court also interprets jury trial waivers narrowly and construes contract ambiguities against the Defendant as the drafter of the Arbitration Agreement. See WDI Meredith & Co. v. American Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. The South Carolina Supreme Court has stated "[a]lthough we 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, 644 S.E.2d 718, 720-21 (2007). Where the FAA looks to state law to decide the threshold questions of contract formation, the Arbitration Agreement is subject to the same defenses applicable to other contracts. Consequently, this Court's inquiry included an examination of contractual defects such as lack of mutual assent, consideration, ambiguity, vagueness, and unconscionability to determine the enforceability of the Arbitration Agreement.

As a threshold matter, this Court notes that Plaintiff first argued the Arbitration Agreement was an involuntary precondition to admission in violation of federal law, because of language in

the Admission Agreement coupled with the failure to state in the Arbitration Agreement that the agreement was voluntary and not a pre-condition to admission. Berkebile v. Outen, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993); See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15; 42 U.S.C. § 1396r(c)(5)(A)(iii). The Court finds this argument unpersuasive.

I. Material Terms of the Arbitration Agreement are Vague, Indefinite, and Omitted

The Court finds the Arbitration Agreement at issue is, at best, ambiguous. Moreover, material terms of the Arbitration Agreement are vague and indefinite, and in some respects completely omitted, requiring this Court to find the Arbitration Agreement unenforceable. Indeed, an agreement that omits material terms may be determined to be unenforceable for indefiniteness. In Grant v. Magnolia Manor-Greenwood, Inc., our South Carolina Supreme Court spoke to the proof required to establish an enforceable agreement to arbitrate:

> Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). 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). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. Player vs. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). An agreement that omits material terms may be determined to be unenforceable for indefiniteness. Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997); Ellis v. Taylor, 449 S.E.2d (S.C. App. 1994).

383 S.C. 125, 678 S.E.2d 435 (2009).

"Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced." Id. In the case at hand, even if the contract was validly executed, this Court finds there was not a "meeting of the minds" as to the essential terms of arbitration.

Specifically, the arbitration agreement is silent as to what "panel" the arbitrator is to be chosen from or who pays for arbitration. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Without a designated process to select an arbitrator from a "panel" to choose from, or any indication of what that "panel" would be or who it includes, the Court would be forced to fill in the parties' alleged contract with an arbitrator selection clause. Again, the Arbitration Agreement that is the subject of this motion simply states that the "parties shall select an arbitration from a panel having experience and knowledge of the health care industry" and, 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 process for doing so is vague and indefinite.

Even if the court assumes that the Arbitration Agreement did clearly provide direction to the parties as to where or what the "panel" is to choose the arbitrator from, the Arbitration Agreement remains vague to other material terms as well. Specifically, the Arbitration Agreement does not indicate who is to pay for the arbitrator's fees. There can be no doubt that this is a material and essential term of the Arbitration Agreement. This is important for two (2) reasons. First, even if the Court assumes the Arbitration Agreement is enforceable, the parties would have to, once again, ask the Court to add terms outside of the Arbitration Agreement as to who pays for the arbitration itself. This Court declines to do so. Second, had language regarding payment of arbitration fees been included in the Arbitration Agreement it could have potentially been considered additional consideration.

Simply put, the parties cannot be bound to act on a promise that does not exist. If the Court found the Arbitration Agreement enforceable, the parties would then have to make arrangements and additional agreements outside of the Arbitration Agreement to begin the arbitration process or

ask the Court to create those terms. Due to the vagueness and indefiniteness of the Arbitration Agreement's provisions and the lack of a "meeting of the minds" as to these essential terms, there is no enforceable contract.

Consequently, the Court finds that, because the Arbitration Agreement is vague, contains indefinite terms, omits essential and material terms, and lacks valid consideration, the Arbitration Agreement is unenforceable.

II. The Arbitration Agreement Lacks Valuable Consideration Necessary to Form an Enforceable Contract

Plaintiff argued the Admission Agreement is unenforceable due to lack of valid consideration. The Court agrees it is axiomatic that every contract in South Carolina be supported by mutual consideration in order to be valid and enforceable. Defendant argued the Arbitration Agreement was not involuntary and instead made in consideration of admission. However, as discussed below, this does not constitute effective consideration to make the Arbitration Agreement enforceable.

While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc., 561 U.S. at 63, 130 S.Ct. at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."). The necessary elements of a contract are an offer,

acceptance, and valuable consideration. Sauner v. Public Service Authority of S.C., 354 S.C. 397, 581 S.E.2d 161, 166 (2003). "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Reidman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument. State Accident Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (internal citations omitted). Ms. St. Aubin was asked to sign the Admission paperwork upon Ms. Ramsey's presentation to the facility. Ms. St. Aubin was also asked to sign the separate Arbitration Agreement. Having already signed the admission paperwork, there was no additional consideration in agreeing to the Arbitration Agreement itself. Therefore, neither party gained a right, interest, profit, or benefit by agreeing to the Arbitration Agreement. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other party when agreeing to the Arbitration Agreement. Finally, viewing the Arbitration Agreement itself within its four corners, there is no mention of consideration. Therefore, after analyzing the four corners of the Arbitration Agreement itself, this Court finds no valuable consideration exists. As such, the Arbitration Agreement is unenforceable.

CONCLUSION:

The Court acknowledges and appreciates the amount of research and preparation for the hearing by all counsel, as well as, the professionalism of all counsel in their presentations to the Court. After consideration of the record, arguments of counsel, memorandum of counsel, and the applicable law, and for the reasons set forth above, it is Ordered that Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care's Motion to Compel Arbitration is denied; and

It is further ordered that Defendants THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care's Motions to Stay Action are denied, as those Motions are now moot.

IT IS SO ORDERED.

/s/Grace Gilchrist Knie
Honorable Grace Gilchrist Knie
Resident Judge, Seventh Judicial Circuit

January 8th, 2020
Spartanburg, South Carolina

Spartanburg Common Pleas

Case Caption: Irene Ramsey VS Thi Of South Carolina At Camp Care, Llc , defendant, et al

Case Number: 2019CP4203236

Type: Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760