

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2018-CP-26-06576

Cleo Bertiaux as Guardian for Kathryn G.
Parrish,

Appellant,

v.

NHC Healthcare/Garden City, LLC,

Respondent.

RECEIVED
MAR 10 2020
SC Court of Appeals

RECORD ON APPEAL

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2606576

Cleo Bertiaux et al
PLAINTIFF(S)

NHC Healthcare Garden City LLC
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's motion to dismiss is granted

Defense to prepare order.

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 03/06/2019 .

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), SCRCF.



Horry Common Pleas

Case Caption: Cleo Bertiaux , plaintiff, et al VS NHC Healthcare Garden City LLC
Case Number: 2018CP2606576
Type: Order/Electronic Form 4

So Ordered

s/ Larry B. Hyman 2152

Electronically signed on 2019-03-06 09:34:24 page 3 of 3

ELECTRONICALLY FILED - 2019 Mar 06 10:00 AM - HORRY - COMMON PLEAS - CASE#2018CP2606576

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A NO.: 2018-CP-26-06576
	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	
	)	
Plaintiff,	)	ORDER GRANTING DEFENDANT'S
	)	MOTION TO DISMISS AND COMPEL
-vs-	)	ARBITRATION
	)	
NHC Healthcare/Garden City, LLC,	)	
	)	
Defendant.	)	
	)	

This matter came before this Court on March 5, 2018, upon a motion by the Defendant NHC Healthcare/Garden City, LLC for an order dismissing this case and compelling binding arbitration pursuant to the Agreement to Arbitrate (the "Agreement") signed by Cleo Bertiaux (the "Plaintiff"), on June 21, 2017. This is an alleged medical malpractice action. Present at the hearing were attorneys Lydia Magee, Esquire, on behalf of Defendant NHC Healthcare/Garden City, LLC (the "Defendant"), and Robert Dodson, Esquire, on behalf of the Plaintiff Cleo Bertiaux as Guardian for Kathryn G. Parrish. After reviewing the pleadings, motions, memorandums of law submitted by both parties, hearing oral arguments, and considering the law, the Court grants the Defendant's Motion to Dismiss and Compel Arbitration of the claims asserted by Plaintiff for the reasons set forth below.

I. FACTUAL FINDINGS AND PROCEDURAL HISTORY

On or about August 3, 2015, the Horry County Probate Court issued an Order appointing Plaintiff Cleo Bertiaux as the Guardian of her mother, Kathryn Parrish, due to Ms. Parrish's dementia. Approximately two years later, on or about June 22, 2017, Ms. Parrish was admitted to NHC Healthcare/Garden City, LLC. Prior to Ms. Parrish's admission, on June 21, 2017, NHC

Healthcare/Garden City, LLC and Plaintiff entered into an Admission and Financial Agreement for the provision of health care services to Patient. Plaintiff also signed a Preadmission Agreement and Agreement to Arbitrate and Waive Jury Trial with NHC Healthcare/Garden City, LLC (the “Agreement”).

The Arbitration Agreement provides that the parties—including “their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated” —agree to follow the dispute resolution procedure set forth in the Arbitration Agreement executed concurrently with the other admissions documents. The scope of the arbitration provision can be generally summarized as follows:

1. The parties agree to follow the “Grievance Procedure” described in the Patient Rights Booklet for any claims or disputes arising out of or in connection with the care rendered to the Patient;
2. Where the amount in controversy does not exceed the statutory limits for submission to the South Carolina Small Claims Court, then the controversy shall be submitted to that court; and
3. Any disputes with an amount in controversy exceeding the statutory limits for submission to the South Carolina Small Claims Court shall be resolved by binding arbitration. There are no set limits on the award of actual or punitive damages in either of the Agreements.

Ms. Parrish, an 87-year-old widowed female, was admitted to NHC Healthcare/Garden City, LLC on June 22, 2017 with admitting diagnoses of displaced oblique fracture of the right femur, repeated falls, osteoarthritis, morbid obesity, dementia, atherosclerotic heart disease, chronic atrial fibrillation, diastolic congestive heart failure, and chronic obstructive pulmonary disease. The allegations underlying Plaintiff’s Complaint stem from an alleged fall that Ms.

Parrish suffered while a patient at Defendant's facility.

On April 4, 2018, Plaintiff, in her capacity as Guardian for Kathryn Parrish, filed with the Horry County Clerk of Court a Notice of Intent to File Suit in a Medical Malpractice Case, with an attached expert affidavit, pursuant to S.C. CODE ANN. § 15-79-125. These pleadings were assigned C/A No. 2018-NI-26-00013. Thereafter, on November 14, 2018, the parties participated in mediation required under S.C. CODE ANN. § 15-79-125(C); however, this pre-suit mediation ended in an impasse.

On or about November 21, 2018, Plaintiff filed a Summons and Complaint in this Court alleging, among other things, that Defendant negligently provided care to Ms. Parrish resulting in her fall. The Complaint was served on Defendant's registered agent on November 28, 2018.

On December 27, 2018, Defendant filed a Motion to Dismiss and Compel Arbitration of all claims related to the care provided to Ms. Parrish by Defendant and its employees. The Defendant argued that by filing the Summons and Complaint with this Court, Plaintiff failed to comply with the terms set forth in the Arbitration Agreement. Specifically, Defendant alleges that the Plaintiff has failed to follow the Grievance Procedure described in the Patient Rights Booklet for claims or disputes arising out of or in connection with the Patient's care. Defendant further argued that despite the fact that the amount in controversy exceeds the limits for submission to small claims court, Plaintiff has also failed to make an attempt to arbitrate this matter as required under the Arbitration Agreement.

ARGUMENT

Both state and federal policy favor arbitration of disputes. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 553, 606 S.E.2d 752, 757 (2004) (observing "the

strong presumption favoring arbitration of disputes”) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)). Once it is clear that the parties have a contract that provides for arbitration between them, any doubts concerning the scope of the arbitration shall be resolved in favor of arbitration. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993); Towles v. United Healthcare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. Zabinski, 346 S.C. at 597, 553 S.E.2d at 118-19; see also Towles, 338 S.C. at 41, 524 S.E.2d at 846 (“Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.”). “[A]rbitration agreements enjoy a strong presumption of validity in federal and state courts.” Dean v. Heritage Healthcare of Ridgeway, LLC, 408, S.C. 371, 380, 759 S.E.2d 727, 731-32 (2014)

The Arbitration Agreement in the instant case provides that the parties agree to submit to binding arbitration:

all disputes against each other and their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient’s stay and the care provided at the Center [NHC Healthcare/Garden City, LLC], including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center’s charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state’s small claims court statutory limits as later defined. (emphasis added).

The Complaint alleges that Ms. Parrish suffered personal injury due to alleged improper or inadequate care by Defendant and its employees. Thus, the Arbitration Agreement clearly

reflects the intent of the parties to arbitrate the claims alleged in Plaintiff's Complaint.¹

However, Plaintiff argues a principle of contract law, namely that the language of the contract alone determines the contract's force and effect, to support her position that there was no legally binding Arbitration Agreement because the legal name of Defendant was incorrectly handwritten into the Agreement. Although the correct legal name of Defendant is "NHC Healthcare/Garden City, LLC," during the preparation of the admission documents for signature, the words "National Healthcare Garden City, LLC" were inadvertently handwritten for the name of the Defendant. There is no dispute that National Healthcare Garden City, LLC is a nullity and does not legally exist.

Plaintiff asserts that the Defendant's Motion to Dismiss and Compel Arbitration should be denied because the Agreement is "between two different parties which are not the named parties to this litigation." Plaintiff suggests that if this Court were to grant the Defendant's Motion to Dismiss and Compel Arbitration that the Court would, in essence, be re-writing the Agreement between the parties. This Court disagrees. The South Carolina Supreme Court has held that a contract is "good between the parties, no matter how incorrect the name used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or receive its benefits." Cobb & Seal Shoe Store v. Aetna Ins. Co., 78 S.C. 388, 58 S.E. 1099 (1907) (emphasis added).

¹The Arbitration Agreement also provides that "[t]he Federal Arbitration Act shall apply to determine the arbitrability of any dispute and the scope of the arbitration agreement." As such, the Arbitration Agreement expressly invoked the FAA. See Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363-64 (holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms. The Defendant also noted that there was involvement of interstate commerce also which also makes the FAA applicable. See 9 U.S.C. § 2. "Generally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA.") Landers v. Federal Deposit Ins. Co., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, (2001). Plaintiff did not dispute that this Agreement was subject to the Federal Arbitration Act.

Plaintiff relies upon an unpublished Fourth Circuit case, Weckesser v. Knight Enterprises S.E., 735 Fed. Appx. 816 (2018), as the basis for his argument. However, this Court finds that Plaintiff's reliance upon Weckesser is misplaced as the present case is factually and legally distinct from Weckesser.

The Weckesser case involved an arbitration agreement between a cable service technician and his putative employer for various employment-related claims. In Weckesser, the Plaintiff signed a Service Agreement with the Defendant, wherein the name of the putative employer/Defendant written into the Service Agreement was correctly listed as Knight Enterprises, LLC. The Service Agreement did not contain any reference to arbitration. Plaintiff signed a separate Arbitration Rider; however, in the Arbitration Rider the name of the company identified as contracting with Plaintiff was listed as Jeffry Knight, Inc. d/b/a Knight Enterprises². Other language within the Arbitration Rider also noted that the agreement was with "Jeffry Knight, Inc. d/b/a Knight Enterprises and the undersigned." Significantly, both Jeffry Knight, Inc. d/b/a Knight Enterprises, and Knight Enterprises, LLC were separate legal entities in South Carolina duly registered with the Secretary of State. Accordingly, the Fourth Circuit recognized that each entity was separate and legally distinct from the other. Moreover, the Fourth Circuit noted: "Jeffry Knight is an actual legal entity. And that entity is no stranger to Patrick Weckesser—it's the parent company of Knight Enterprises, for whom he worked." Weckesser, 735 Fed. App. at 820. The Court found that it was reasonable "to believe that Jeffry Knight might (for example) require employees of its subsidiaries to sign an arbitration waiver to cabin its own liability. For this reason alone, it's much more plausible than in Cobb & Seal that the parties intended what the writing stated: that the Arbitration Rider applied to disputes between

²Apparently, in Weckesser, the individual who signed the Arbitration Rider for Defendant also signed it Jeffry Knight, Inc. d/b/a Knight Enterprises as the parent company of Knight Enterprises.

Weckesser and Jeffrey Knight, and not to disputes with its subsidiary.” Id.

This case is plainly factually distinct from Weckesser, as there is no legal entity in South Carolina known as “National Healthcare Garden City, LLC,” the name which was incorrectly written into the Arbitration Agreement. As such, unlike in Weckesser, Plaintiff cannot say that there was any confusion about with whom she thought she was contracting at the time. This Court is compelled to look at what the parties’ intentions were when signing this Agreement, and clearly the intention was that the Defendant would provide nursing care services to Ms. Parrish, and in exchange, the Defendant would receive remuneration and the benefit of the Arbitration Agreement should any disputes arise regarding Ms. Parrish’s care.

This Court finds that the reasoning of the Weckesser case actually supports the Defendant’s argument in this case that the Arbitration Agreement in question is enforceable. As noted by the Fourth Circuit, the primary issue is whether the two “companies” at issue actually legally exist to form a real and substantive question as to who the proper contracting parties may be. In this case, the scrivener’s error in the handwritten portion of the Agreement is not a legal entity, which Plaintiff readily conceded at oral argument and in his memorandum. Thus, the Court finds that in this case, there can be no potential for confusion as to with whom the Plaintiff was agreeing to contract in signing the Arbitration Agreement as there was in Weckesser. The Court believes that this ruling is consistent with Cobb & Seal Shoe Store v. Aetna Ins. Co., which held that a contract is good between two parties no matter how incorrect the names used in the agreement as long as the intent was to be bound by the contract or to receive the benefit of the contract. See Cobb, 78 S.C. 388, 58 S.E. 1099. Accordingly, this Court finds that the Arbitration Agreement is binding and enforceable between the parties, as the only legal conclusion which can be drawn is that it appears that the parties intended to be bound by the

contract and receive the benefits of that contract.

III. CONCLUSION

This Court concludes that the terms and conditions of the Arbitration Agreement must be enforced against Plaintiff, and that Plaintiff must submit the claims raised in his Complaint against Defendant to arbitration in accordance with the provisions of the Arbitration Agreement.

THEREFORE IT IS ORDERED that the Motion to Dismiss and Compel Arbitration filed by Defendant be GRANTED for the reasons set forth herein.

SIGNATURE PAGE TO FOLLOW



Horry Common Pleas

Case Caption: Cleo Bertiaux , plaintiff, et al VS NHC Healthcare Garden City LLC

Case Number: 2018CP2606576

Type: Order/Compel

So Ordered

s/ Larry B. Hyman 2152

Electronically signed on 2019-06-18 12:05:48 page 9 of 9

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	Docket No.:
	)	
Plaintiffs,	)	<u>NOTICE OF INTENT TO FILE SUIT</u>
	)	
versus	)	
	)	
NHC Healthcare/Garden City, LLC,	)	
	)	
Defendant.	)	
_____	)	

Come now the Plaintiffs and in accordance with S.C. Code § 15-79-125, gives the above named Defendant their Notice of Intent to File Suit:

INTRODUCTION

1. This is a medical/nursing home malpractice action that arises out of poor nursing home care that led to fall and hospitalization of the Plaintiff, Kathryn G. Parrish. As outlined and pleaded more fully below, Defendant's medical records specifically directed that Ms. Parrish was not to be left unattended in the bathroom or shower. However, Defendant, through its employees and/or agents left Ms. Parrish unattended in the shower. As a result, she fell, fractured her arm and shoulder and had to be hospitalized.

PARTIES JURISDICTION AND VENUE

2. Plaintiffs are citizens and residents of South Carolina.
3. Cleo Bertiaux is the daughter of Ms. Parrish.
4. On or about August 3, 2015, the Horry County Probate Court issued an Order appointing Mrs. Bertiaux as the Guardian of her mother, Ms. Parrish.

5. On information and belief, Defendant is a for-profit limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business located in Horry County.

6. On information and belief, Defendant operates a nursing home and senior care facility in Garden City, Horry County.

7. Venue is properly asserted in Horry County because the negligent errors and omissions giving rise to this case all occurred in Richland County.

8. This Court has jurisdiction over the subject matter and parties to this action.

FACTUAL ALLEGATIONS

9. Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

10. During the Summer of 2017, Ms. Parrish was admitted to Defendant's facility to recover and rehab for a hip injury she suffered.

11. At the time her admission, Ms. Parrish's medical condition made her a fall risk.

12. For this reason, the standard of care required Defendant not to leave Ms. Parrish unattended in the shower or bathroom.

13. Defendant's medical records on the Plaintiff state specifically: "Don't leave resident unattended in shower/bathroom."

14. At another place on medical records on the Plaintiff it states specifically: "Don't leave in Shower unattended."

15. Despite these orders and directives in the medical records, Defendant, through its agents, employees and/or servants left Ms. Parrish unattended in the shower.

16. As a direct and proximate result, Ms. Parrish fell and seriously injured her arm and shoulder.

17. Immediately thereafter she was transported by ambulance to a local hospital where she was admitted for care and treatment for the injuries she sustained because of the breaches in the standard of care by Defendants, as outlined and pleaded more fully above.

COMPLIANCE WITH S.C. CODE SECTION 15-79-125 and 15-36-100

18. In accordance with S.C. Code Annotated §§ 15-79-125 and 15-36-100, Plaintiffs have attached to this Notice of Intent to File Suit the Affidavit of Jane Cox.

19. As attested to in Ms. Cox's Affidavit, she is a registered nurse who maintained an active career that specifically includes geriatric care for elderly patients.

20. As attested to in Ms. Cox's Affidavit, she has reviewed the medical records of Ms. Parrish and has identified at least one act and/or omission of medical negligence by the nursing staff of Defendant named above.

FOR A FIRST CAUSE OF ACTION

MEDICAL NEGLIGENCE

21. Plaintiffs re-allege the above paragraphs by reference as if recounted at length herein.

22. Defendant owed Ms. Parrish a duty of reasonable and due care and specifically had a duty to use the degree of skill and care as a reasonably prudent long term care facility would use under like or similar circumstances to those outlined above.

23. Defendants, by and through their agents, employees, servants and/or representatives, breached this duty in one or more of the following particulars:

- a. In failing to adequately monitor Ms. Parrish;

- b. In failing to provide proper medical and nursing care to Ms. Parrish;
- c. In leaving Ms. Parrish unattended in the shower;
- d. In such additional particulars as may be learned through discovery and/or proven at trial.

24. As a direct and proximate result of Defendant's negligent, grossly negligent, wanton, and/or reckless conduct as described more fully above, Ms. Pollock fell and was seriously injured; required hospitalization and incurred medical bills and expenses.

25. As the duly appointed Guardian for Ms. Parrish, Ms. Bertiaux hereby makes demand against Defendant (jointly and severally) for all damages allowed by law.

WHEEFORE, Plaintiffs pray that the Court find for the Plaintiffs and against Defendant and that Plaintiffs be awarded all damages allowed by law, that Defendants be taxed with the cost of this action and that the Court award such additional and further relief, in law or equity, that the Court deems just and proper.

In accordance with the United States Constitution and South Carolina Constitution, Plaintiff demands a trial by jury.

s/Robert D. Dodson/
Robert D. Dodson
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Attorney for Plaintiff

Columbia, South Carolina
April 4, 2018

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

) IN THE COURT OF COMMON PLEAS

Cleo Bertiaux as Guardian for Kathryn G.)
Parrish,)

Docket No.:

Plaintiffs,)

AFFIDAVIT OF JANE COX

versus)

NHC Healthcare/Garden City, LLC,)

Defendant.)

PERSONALLY APPEARED BEFORE ME, Jane Cox, who after being duly sworn, deposed and says the following:

1. I am a citizen and resident of Florida.
2. I am a registered nurse and have maintained an active career that specifically includes geriatric care for elderly patients.
3. Attached to this Affidavit as Exhibit A and expressly made a part of this Affidavit as Exhibit A is a copy of my CV which further details my qualifications and professional experience. The information contained in my CV (Exhibit A) is true, correct and accurate.
4. I have been asked to review the medical care and treatment rendered Kathryn G. Parrish during 2017 at NHC Healthcare/Garden City, LLC. Toward that end, I reviewed the following documents and things: medical records from NHC Healthcare/Garden City, LLC bates labeled 1 through 417.
5. Based on my education, knowledge, training and experience, and based on my review of the documents listed in paragraph 4 above, there was a clear breach in the standard of care rendered to Kathryn G. Parrish by nurses, nurse techs and other healthcare providers at NHC Healthcare/Garden City, LLC on July 20, 2017 and this breach in the standard of care led to significant injuries to Ms. Parrish that required her hospitalization that same day.
6. More specifically, based on her pre-existing conditions for which she was admitted to NHC Healthcare/Garden City, LLC, Ms. Parrish was a fall risk. This fact was recognized by staff at NHC Healthcare/Garden City, LLC and there are specific notations and directives in the records to minimize the risk of falls. For example, Bates label 233 notes: "Falls, at risk for as evidenced by history." Another directive in the records states: "Do not leave in shower unattended." (Bates label 417). A care plan dated July 12, 2017 states: "Don't leave resident unattended in shower/bathroom."

7. In my professional opinion the directives noted in paragraph 6 were necessary, appropriate and were the standard of care for nurses, nurse techs and other healthcare providers in their care and treatment of Ms. Parrish. Unfortunately for Ms. Parrish, the nurses, nurse techs and other care providers failed to care for Ms. Parrish in accordance with these directives and within the standard of care.
8. Specifically, a note dated July 20, 2017 at 5:40 PM states: "RESIDENT WAS SITTING IN SHOWER CHAIR IN HER BATHROOM. CNA WENT FOR ASSISTANCE TO GET ANOTHER CNA FOR TRANSFERRING RESIDENT OUT OF SHOWER CHAIR. RESIDENT STATED SHE REACHED DOWN TO TOUCH HER RIGHT KNEE WHILE IN SHOWER CHAIR, SHE WAS FOUND LYING ON THE BATHROOM FLOOR UPON CNA RETURN. WITH C/O LEFT SHOULDER AND ARM PAIN AND ALSO RIGHT HIP PAIN. RESIDENT WITH PAIN TO THE LEFT ARM AND COULD NOT RAISE HER ARM. SENT OUT VIA 911 FOR EVAL AND TX OF C/O PAIN..." (See Bates label 110).
9. It was a breach of the standard of care to leave Ms. Parrish in a shower chair unattended. This breach of the standard of care led to her fall and injuries that resulted in transfer to a local hospital where she was admitted. Had the standard of care been met, it is unlikely Ms. Parrish would have fallen or been injured.
10. I specifically reserve the right to alter or amend my opinions if additional information is presented to me but at this time there were clear and obvious breaches in the standard of care by the care providers at NHC Healthcare/Garden City, LLC. These breaches in the standard of care resulted in injuries to Kathryn Parrish that required hospitalization.

FURTHER AFFIANT SAYETH NOT.

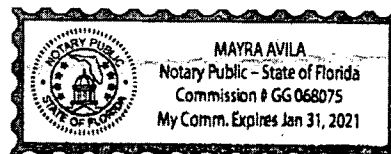
Jane Cox PhD, ARNP
Jane Cox PhD, ARNP

Sworn before me this 30th day

of March, 2018

Mayra Avila
Notary Public for Florida

My Commission Expires: January 31, 2021



JANE COX jane.cox@NCHmd.org 8813 Tamiami Trail E, Naples, FL 34113 Phone 239-649-7999

CAREER EXPERIENCE

10/2012-present **ARNP**: Private practice, Blane Crandall, MD Naples, FL

11/2004-present **NCH COMMUNITY HOME CARE**: Executive Director Naples, FL

11/2001-12/2008, 5/2015-present **FLORIDA GULF COAST UNIVERSITY**: Instructor Obstetrics, Pediatrics, Community Health, Ethics, Assessment, Caring Scholar Clinician, Entrepreneurship Fort Myers, FL

9/1994-present **NURSING NETWORK**: Director of Nursing Naples, FL

1/2014-present **NOVA SOUTHEASTERN UNIVERSITY**: Instructor Graduate ARNP: Family, Theory & Research, Health Policy, Advanced Roles, Evidence & Practice Davie, FL

8/2012-5/2013, 3/2016-5/2016, 3/2018 **BETHEL COLLEGE**: Instructor Obstetrics, Graduate: Ethical & Legal Issues in Healthcare Organizations, Advanced Theory Mishawaka, IN

9/2013-2/2014 **MED-LIFE INSTITUTE**: Director of Nursing Naples, FL

8/2011-5/2012 **SAINT MARY'S COLLEGE**: Instructor OB, Peds Notre Dame, IN

9/2007-10/2010 **ARNP**: Private practice Debra Shepard, MD Naples, FL

1/1994-9/1994 **THE CHILDREN'S HOSPITAL** Staff nurse NICU Fort Myers, FL

6/1993-1/1994 **NCH**: Manager Nursery & Postpartum Naples, FL

4/1992-1/1993 **KAPIOLANI MEDICAL CENTER**: Manager Adult Intensive Care Honolulu, HI

1/1992-5/1993 **KOKUA NURSING**: Agency nurse Intensive Care & Obstetrics Honolulu, HI

11/1987-9/1991 **GENENTECH**: Clinical Hospital Representative: Activase So. San Francisco, CA

1/1985-11/1987 **PFIZER LABS**: Professional Sales Representative: Feldene, Procardia NY, NY

1/1984-1/1985 **SOUTHWESTERN MICHIGAN COLLEGE**: Instructor: Roles in Nursing, Legal Aspects Dowagiac, MI

5/1978-1/1984 **SAINT JOSEPH MEDICAL CENTER**: LPN, RN Constant Care South Bend, IN

EDUCATION

2011 The Catholic University of America: PhD Washington, DC

"The Lived Experience of Childbirth among 21st Century Cuban Women in a Florida Hospital"

Clinical Preceptorships: Washington Free Clinic, Dr. Elizabeth Hawkins-Walsh	Washington, D.C.
Private practice, Dr. Debra Shepard	Naples, FL
Pediatric Hematology-Oncology, Dr. Eman Salman	Ft. Myers, FL
School-based health, Jean Fletcher, CPNP	Oxon Hill, MD

2007	The Catholic University of America: ARNP Pediatric	Washington, DC
1988	Andrews University: MSN magna cum laude	Berrien Springs, MI
1982	Saint Mary's College: BSN cum laude	Notre Dame, IN
1978	Ivy-Tech Northcentral: LPN	South Bend, IN

ACTIVITIES and HONORS

2018-2021	The Catholic University of America Board of Visitors	Washington, DC
2016-2017	American Nurses Association	
2015-2017	Chair: Department of Nursing Science Advisory Council	
	Saint Mary's College	Notre Dame, IN
2011-2017	American Academy of Nurse Practitioners	
2010-2017	Florida Nurse Practitioner Network	
2006-present	Certification National Association of Pediatric Nurse Practitioners	
2002-present	Nurse Practitioner Council of Collier County: Legislative Affairs (2011-2016), Treasurer (2007-2011)	
1998-2017	Notre Dame Club of Naples, Summer Service Learning Coordinator (2013-2017)	
1988-1991, 2013-2017	Lion's Club International, Speaker's Chairman (90-91)	Mishawaka, IN
1978-1984, 1995-present	American Red Cross CPR instructor	
2003-2011	Association of Women's Health, Obstetric & Neonatal Nurses	
2001-2005	Sigma Theta Tau International: Kappa Chapter (2005-present) Tau Zeta: Vice President (2001-2003) Treasurer (2003-2005), Virginia Henderson Fellow	
2001-2010, 2016-2017	Florida Nurses Association	
1998-2001	Florida Gulf Coast University Nursing Honor Society; Treasurer (1998-2001)	
1998-2011	American Board of Forensic Examiners	

1997-2001	City of Naples Staff Action Committee: Business representative	
1996-1999	5th Avenue South Association, Board of Directors Treasurer (1997-1999)	Naples, FL
1982-2006	American Association of Critical Care Nurse	
1983-1984	St. Joseph's Medical Center, Ethics Committee	South Bend, IN

PUBLICATIONS

(2018) The Future of Professional Nursing in Naples. *Life in Naples*, 47.

(2018) Coffee with a Cop. *Life in Naples* 9(4), 47.

(2017) Blue Zones Comes to Saint Ann School. *Life in Naples* 8(8), 26.

(2017) Into my Arms: Adoption Reflections. *Life in Naples* 8(7), 22.

(2017) Change Your Way of Thinking about Nursing. *Life in Naples* 8(6), 26.

(2017) A Pregnant Adolescent Living in an Area With Active Zika Virus Transmission. *Journal of Pediatric Health Care* 31(2). Doi:10.1016/j.pedhc.2016.10.009

(2016) Lending a Hand During an Emergency. *Life in Naples* Oct 2016.

(2013) *Listening to Cuban Mothers: Childbirth in a Southwest Florida Hospital*. Saarbrücken, Germany: LAP.

(2010) Accidental Femur Fracture in an Active Toddler. *Pediatric Oncall*, 7(5), 57-58.

(2008) A Toddler with Hypertonia. *Journal of Pediatric Health Care*, 22(2), 131-133. Doi: 10.1016/j.pedhc.2007.12.005

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	Docket No.:
	)	
Plaintiffs,	)	
	)	<u>COMPLAINT</u>
	)	(Jury Trial Requested)
versus	)	
	)	
NHC Healthcare/Garden City, LLC,	)	
	)	
Defendant.	)	
_____	)	

Come now the Plaintiffs, by and through undersigned counsel, who would show unto the Court as follows:

INTRODUCTION

1. This is a medical/nursing home malpractice action that arises out of poor nursing home care that led to the fall and hospitalization of the Plaintiff, Kathryn G. Parrish. As outlined and pleaded more fully below, Defendant's medical records specifically directed that Ms. Parrish was not to be left unattended in the bathroom or shower. However, Defendant, through its employees and/or agents left Ms. Parrish unattended in the shower. As a result, she fell, fractured her arm and shoulder and had to be hospitalized.

PARTIES JURISDICTION AND VENUE

2. Plaintiffs are citizens and residents of South Carolina.
3. Cleo Bertiaux is the daughter of Ms. Parrish.
4. On or about August 3, 2015, the Horry County Probate Court issued an Order appointing Mrs. Bertiaux as the Guardian of her mother, Ms. Parrish.

5. On information and belief, Defendant is a for-profit limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business located in Horry County.

6. On information and belief, Defendant operates a nursing home and senior care facility in Garden City, Horry County.

7. Venue is properly asserted in Horry County because the negligent errors and omissions giving rise to this case all occurred in Richland County.

8. This Court has jurisdiction over the subject matter and parties to this action.

FACTUAL ALLEGATIONS

9. Plaintiff re-alleges the above paragraphs by reference as if recounted at length herein.

10. During the Summer of 2017, Ms. Parrish was admitted to Defendant's facility to recover and rehab for a hip injury she suffered.

11. At the time her admission, Ms. Parrish's medical condition made her a fall risk.

12. For this reason, the standard of care required Defendant not to leave Ms. Parrish unattended in the shower or bathroom.

13. Defendant's medical records on the Plaintiff state specifically: "Don't leave resident unattended in shower/bathroom."

14. At another place on medical records on the Plaintiff it states specifically: "Don't leave in Shower unattended."

15. Despite these orders and directives in the medical records, Defendant, through its agents, employees and/or servants left Ms. Parrish unattended in the shower.

16. As a direct and proximate result, Ms. Parrish fell and seriously injured her arm and shoulder.

17. Immediately thereafter she was transported by ambulance to a local hospital where she was admitted for care and treatment for the injuries she sustained because of the breaches in the standard of care by Defendants, as outlined and pleaded more fully above.

COMPLIANCE WITH S.C. CODE SECTION 15-79-125 and 15-36-100

18. In accordance with S.C. Code Annotated §§ 15-79-125 and 15-36-100, Plaintiffs previously filed a Notice of Intent to File Suit with an attached expert the affidavit.

19. Thereafter, the parties conducted a pre-filing mediation on November 14, 2018 but were unable to resolve this matter at mediation.

20. Plaintiffs have fully complied with all South Carolina statutory requirements before commencing this action.

FOR A FIRST CAUSE OF ACTION

MEDICAL NEGLIGENCE

21. Plaintiffs re-allege the above paragraphs by reference as if recounted at length herein.

22. Defendant owed Ms. Parrish a duty of reasonable and due care and specifically had a duty to use the degree of skill and care as a reasonably prudent long-term care facility would use under like or similar circumstances to those outlined above.

23. Defendants, by and through their agents, employees, servants and/or representatives, breached this duty in one or more of the following particulars:

- a. In failing to adequately monitor Ms. Parrish;
- b. In failing to provide proper medical and nursing care to Ms. Parrish;

- c. In leaving Ms. Parrish unattended in the shower;
- d. In such additional particulars as may be learned through discovery and/or proven at trial.

24. As a direct and proximate result of Defendant's negligent, grossly negligent, wanton, and/or reckless conduct as described more fully above, Ms. Pollock fell and was seriously injured; required hospitalization and incurred medical bills and expenses.

25. As the duly appointed Guardian for Ms. Parrish, Ms. Bertiaux hereby makes demand against Defendant (jointly and severally) for all damages allowed by law.

WHEEFORE, Plaintiffs pray that the Court find for the Plaintiffs and against Defendant and that Plaintiffs be awarded all damages allowed by law, that Defendants be taxed with the cost of this action and that the Court award such additional and further relief, in law or equity, that the Court deems just and proper.

In accordance with the United States Constitution and South Carolina Constitution, Plaintiff demands a trial by jury.

s/Robert D. Dodson/
Robert D. Dodson
Law Offices of Robert Dodson, P.A.
1722 Main Street, Suite 200
Columbia, S.C. 29201
Telephone: (803) 252-2600
Fax: (803) 771-2259
Email: rdodson@rdodsonlaw.com
Attorney for Plaintiff

Columbia, South Carolina
November 14, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A NO.: 2018-CP-26-06576
	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	ANSWER ON BEHALF OF NHC
	)	HEALTHCARE/GARDEN CITY, LLC
	)	TO COMPLAINT
NHC Healthcare/Garden City, LLC,	)	(Jury Trial Requested)
	)	
Defendant.	)	
	)	

The Defendant NHC Healthcare/Garden City, LLC, answering the Complaint of the Plaintiff, will respectfully show unto the Court as follows:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of Plaintiff's Complaint not hereinafter specifically admitted, modified, or explained. Strict proof is demanded.
2. The Defendant denies the allegations of paragraph one (1) of the Complaint and demands strict proof thereof.
3. The Defendant admits upon information and belief the allegations of paragraphs two (2), three (3), and four (4) of the Complaint.
4. The Defendant denies the allegations of paragraphs five (5), six (6), and seven (7) of the Complaint and demands strict proof thereof.
5. The Defendant admits the allegations of paragraph eight (8) of the Complaint.
6. In responding to the allegations of paragraph nine (9) of the Complaint, the Defendant incorporates by reference its responses to the allegations of paragraphs one (1) through eight (8) of the Complaint as if repeated verbatim.

7. Answering the allegations of paragraphs ten (10) and eleven (11) of the Complaint, the Defendant refers to the medical records and the testimony of the healthcare providers involved for a complete and accurate recitation of the care and treatment provided. All allegations of these paragraphs inconsistent with the medical records and the testimony of the healthcare providers involved are denied, and strict proof is demanded.

8. The Defendant denies the allegations of paragraph twelve (12) of the Complaint and demands strict proof thereof.

9. Answering the allegations of paragraphs thirteen (13) and fourteen (14) of the Complaint, Defendant would assert that Ms. Parrish had finished her bath and was in a wheelchair partially dressed in the bathroom when she fell forward out of the wheelchair and hurt her upper extremity. Prior to the fall, Ms. Parrish had no history of wandering, dizziness, or trunk restraint, and she did not exhibit unsafe behavior like trying to stand, transfer, or walk alone unsafely; climb over bed rails or try to get out of bed unsafely; walk when too tired to be safe; or propel her wheelchair in unsafe areas. Prior to the fall, Ms. Parrish was known to Defendant's staff as someone who followed directions. As such, Defendant and its staff were unaware that Ms. Parrish would try to reach forward and fall out of her wheelchair. After the fall, one of Defendant's staff wrote in the medical records not to leave the resident in the shower/bathroom unattended. Defendant refers to the medical records and the testimony of the healthcare providers involved for a complete and accurate recitation of the care and treatment provided. All allegations of these paragraphs inconsistent with the medical records and the testimony of the healthcare providers involved are denied, and strict proof is demanded.

10. The Defendant denies the allegations of paragraph fifteen (15) of the Complaint and demands strict proof thereof.

11. The Defendant denies the allegations as stated of paragraphs sixteen (16) and seventeen (17) of the Complaint and demands strict proof thereof. Defendant denies that either it or its employees breached any standard of care in their care and treatment of Ms. Parrish. Strict proof is demanded.

12. Answering the allegations of paragraph eighteen (18) of the Complaint, Defendant admits that Plaintiff filed a Notice of Intent to File Suit and attached an affidavit, but Defendant denies all allegations raised in the Notice of Intent to File Suit as well as the Affidavit and demands strict proof thereof.

13. The Defendant admits the allegations of paragraph nineteen (19) of the Complaint.

14. With regard to the allegations of paragraph twenty (20) of the Complaint, the Defendant states that these allegations call for a legal conclusion to which no admission or denial is required. However, if a response is required, the Defendant denies same and demands strict proof thereof.

15. In responding to the allegations of paragraph twenty-one (21) of the Complaint, the Defendant incorporates by reference its responses to the allegations of paragraphs one (1) through twenty (20) of the Complaint as if repeated verbatim.

16. With regard to the allegations of paragraph twenty-two (22) of the Complaint, the Defendant states that these allegations call for a legal conclusion to which no admission or denial is required. However, if a response is required, the Defendant denies same and demands strict proof thereof.

17. The Defendant denies the allegations of paragraphs twenty-three (23) including all subparagraphs, twenty-four (24), twenty-five (25), and the "wherefore" clause of the

Complaint and demands strict proof thereof.

18. The Defendant joins in the demand for a jury trial.

FOR A SECOND DEFENSE

19. The Defendant alleges that its employees and personnel properly followed proper standards recognized and practiced by nurses, therapists, directors, patient care techs/nursing aides, and other similar type employees. The Defendant further alleges that its employees and personnel practiced that degree of knowledge, care, and skill equal to that of similarly-qualified employees and personnel and that they acted in accordance with standards recognized and practiced by each of those specialties. Defendant denies that its agents, servants, and/or employees breached any standard of care or violated any statutes or regulations in their care and treatment of Ms. Parrish.

FOR A THIRD DEFENSE

20. That any alleged negligence on the part of the Defendant, which negligence is denied, was not the proximate cause of any injury or damage to Plaintiff.

FOR A FOURTH DEFENSE

21. That any injury or damage as alleged in the Complaint was due to and caused by the sole negligence, recklessness, willfulness and wantonness of the Plaintiff Kathryn G. Parrish in failing to exercise reasonable care, due care, or any care for the protection of her own person.

FOR A FIFTH DEFENSE

22. Defendant alleges, as an affirmative defense, that even if Defendant was negligent, careless, grossly negligent, reckless, willful or wanton, which it specifically denies, Kathryn G. Parrish's negligent, careless, grossly negligent, reckless, willful and wanton conduct was greater than Defendant's alleged negligence, so this cause of action is barred.

Alternatively, if Plaintiff's negligence was less than Defendant's alleged negligence, the Plaintiff's amount of recovery, if any, should be reduced in proportion to the amount of Kathryn G. Parrish's negligence based on the doctrine of comparative negligence.

FOR A SIXTH DEFENSE

23. The Plaintiff failed to mitigate her damages and is thus responsible for any and all of her alleged injuries and damages.

FOR A SEVENTH DEFENSE

24. The alleged injuries of Kathryn G. Parrish were, upon information and belief, the result of her underlying medical condition and disease processes which constitute an unavoidable accident by virtue of which the Defendant is not responsible to the Plaintiff in any sum whatsoever.

FOR AN EIGHTH DEFENSE

25. Because the alleged acts of negligence occurred after July 1, 2005, this case is subject to the limitations of liability and provisions outlined in the S.C. Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-200, et seq.

FOR A NINETH DEFENSE

26. This Defendant asserts that this action is governed by the S.C. Noneconomic Damage Awards Act of 2005, S.C. Code Ann. §15-32-200, et seq. Therefore, if Plaintiff is entitled to any recovery, which this Defendant specifically denies, recovery for any alleged noneconomic damages is capped pursuant to S.C. Code Ann. § 15-32-220.

FOR A TENTH DEFENSE

27. This Defendant would affirmatively assert that 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 Economic Development, Citizen and Small Business Protection Act and the South Carolina Medical Malpractice Reform Statutes including, but not limited to §15-38-15; §15-32-200; §15-32-210; §15-32-220; §15-32-230; §15-32-240; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

FOR AN ELEVENTH DEFENSE

28. Plaintiff's claims for punitive damages should be dismissed pursuant to S.C. Code Ann. § 15-32-520 and S.C. Code Ann. § 15-32-530 in that there is no evidence which would support an award of punitive damages, and this Defendant asserts all defenses and limitations of liability provided by statute and case law.

FOR A TWELFTH DEFENSE

29. That any claim for punitive or exemplary damages as set forth in the Plaintiff's Complaint against this Defendant would violate the Defendant's constitutional rights under the due process clause in the Fifth and Fourteenth Amendments to the Constitution of the United States of America, Excessive Fines Clause in the Eighth Amendment to the Constitution of the United States of America, the Double Jeopardy Clause in the Fifth Amendment to the Constitution of the United States of America, and similar provisions in the Constitution of the State of South Carolina and/or the common law and public policies of the State of South Carolina, and/or applicable statutes and court rules, and this Defendant raises these defenses as a complete bar to the imposition of punitive or exemplary damage against it.

FOR A THIRTEENTH DEFENSE

30. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, as is consistent with

the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully responded to the Complaint of the Plaintiff, this Defendant requests that the same be dismissed with prejudice together with the costs and disbursements in the defense of this matter and from such other and further relief as this Court deems just and proper.

Respectfully submitted,

s/Marian Williams Scalise

Marian Williams Scalise, Esquire (SC Bar No. 6744)

Lydia L. Magee, Esquire (SC Bar No. 16584)

Richardson, Plowden & Robinson, P.A.

2103 Farlow Street, P. O. Box 3646

Myrtle Beach, SC 29578

(843) 443-3581

mscalise@richardsonplowden.com

lmagee@richardsonplowden.com

Attorneys for Defendant NHC Healthcare/Garden City,
LLC

December 27, 2018.

Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A NO.: 2018-CP-26-06576
	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	
NHC Healthcare/Garden City, LLC,	)	
	)	
Defendant.	)	
	)	

**AMENDED
ANSWER ON BEHALF OF NHC
HEALTHCARE/GARDEN CITY, LLC
TO COMPLAINT
(Jury Trial Requested)**

Subject to the Motion to Dismiss and Compel Arbitration filed herewith, now comes the Defendant NHC Healthcare/Garden City, LLC, answering the Complaint of the Plaintiff, who will respectfully show unto the Court as follows:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of Plaintiff's Complaint not hereinafter specifically admitted, modified, or explained. Strict proof is demanded.
2. The Defendant denies the allegations of paragraph one (1) of the Complaint and demands strict proof thereof.
3. The Defendant admits upon information and belief the allegations of paragraphs two (2), three (3), four (4), five (5), and six (6) of the Complaint.
4. The Defendant denies the allegations of paragraph seven (7) of the Complaint and demands strict proof thereof.
5. The Defendant admits the allegations of paragraph eight (8) of the Complaint.
6. In responding to the allegations of paragraph nine (9) of the Complaint, the Defendant incorporates by reference its responses to the allegations of paragraphs one (1)

through eight (8) of the Complaint as if repeated verbatim.

7. Answering the allegations of paragraphs ten (10) and eleven (11) of the Complaint, the Defendant refers to the medical records and the testimony of the healthcare providers involved for a complete and accurate recitation of the care and treatment provided. All allegations of these paragraphs inconsistent with the medical records and the testimony of the healthcare providers involved are denied, and strict proof is demanded.

8. The Defendant denies the allegations of paragraph twelve (12) of the Complaint and demands strict proof thereof.

9. Answering the allegations of paragraphs thirteen (13) and fourteen (14) of the Complaint, Defendant would assert that Ms. Parrish had finished her bath and was in a wheelchair partially dressed in the bathroom when she fell forward out of the wheelchair and hurt her upper extremity. Prior to the fall, Ms. Parrish had no history of wandering, dizziness, or trunk restraint, and she did not exhibit unsafe behavior like trying to stand, transfer, or walk alone unsafely; climbing over bed rails or trying to get out of bed unsafely; walking when too tired to be safe; or propeling her wheelchair in unsafe areas. Prior to the fall, Ms. Parrish was known to Defendant's staff as someone who followed directions. As such, Defendant and its staff were unaware that Ms. Parrish would try to reach forward and fall out of her wheelchair. After the fall, one of Defendant's staff wrote in the medical records not to leave the resident in the shower/bathroom unattended. Defendant refers to the medical records and the testimony of the healthcare providers involved for a complete and accurate recitation of the care and treatment provided. All allegations of these paragraphs inconsistent with the medical records and the testimony of the healthcare providers involved are denied, and strict proof is demanded.

10. The Defendant denies the allegations of paragraph fifteen (15) of the Complaint

and demands strict proof thereof.

11. The Defendant denies the allegations as stated in paragraphs sixteen (16) and seventeen (17) of the Complaint and demands strict proof thereof. Defendant denies that either it or its employees breached any standard of care in their care and treatment of Ms. Parrish. Strict proof is demanded.

12. Answering the allegations of paragraph eighteen (18) of the Complaint, Defendant admits that Plaintiff filed a Notice of Intent to File Suit and attached an affidavit, but Defendant denies all allegations raised in the Notice of Intent to File Suit as well as the Affidavit and demands strict proof thereof.

13. The Defendant admits the allegations of paragraph nineteen (19) of the Complaint.

14. With regard to the allegations of paragraph twenty (20) of the Complaint, the Defendant states that these allegations call for a legal conclusion to which no admission or denial is required. However, if a response is required, the Defendant denies same and demands strict proof thereof.

15. In responding to the allegations of paragraph twenty-one (21) of the Complaint, the Defendant incorporates by reference its responses to the allegations of paragraphs one (1) through twenty (20) of the Complaint as if repeated verbatim.

16. With regard to the allegations of paragraph twenty-two (22) of the Complaint, the Defendant states that these allegations call for a legal conclusion to which no admission or denial is required. However, if a response is required, the Defendant denies same and demands strict proof thereof.

17. The Defendant denies the allegations of paragraphs twenty-three (23) including

all subparagraphs, twenty-four (24), twenty-five (25), and the “wherefore” clause of the Complaint and demands strict proof thereof.

18. The Defendant joins in the demand for a jury trial.

FOR A SECOND DEFENSE

19. The Defendant alleges that its employees and personnel properly followed proper standards recognized and practiced by nurses, therapists, directors, patient care techs/nursing aides, and other similar type employees. The Defendant further alleges that its employees and personnel practiced that degree of knowledge, care, and skill equal to that of similarly-qualified employees and personnel and that they acted in accordance with standards recognized and practiced by each of those specialties. Defendant denies that its agents, servants, and/or employees breached any standard of care or violated any statutes or regulations in their care and treatment of Ms. Parrish.

FOR A THIRD DEFENSE

20. That any alleged negligence on the part of the Defendant, which negligence is denied, was not the proximate cause of any injury or damage to Plaintiff.

FOR A FOURTH DEFENSE

21. That any injury or damage as alleged in the Complaint was due to and caused by the sole negligence, recklessness, willfulness and wantonness of the Plaintiff Kathryn G. Parrish in failing to exercise reasonable care, due care, or any care for the protection of her own person.

FOR A FIFTH DEFENSE

22. Defendant alleges, as an affirmative defense, that even if Defendant was negligent, careless, grossly negligent, reckless, willful or wanton, which it specifically denies, Kathryn G. Parrish's negligent, careless, grossly negligent, reckless, willful and wanton conduct

was greater than Defendant's alleged negligence, so this cause of action is barred.

Alternatively, if Plaintiff's negligence was less than Defendant's alleged negligence, the Plaintiff's amount of recovery, if any, should be reduced in proportion to the amount of Kathryn G. Parrish's negligence based on the doctrine of comparative negligence.

FOR A SIXTH DEFENSE

23. The Plaintiff failed to mitigate her damages and is thus responsible for any and all of her alleged injuries and damages.

FOR A SEVENTH DEFENSE

24. The alleged injuries of Kathryn G. Parrish were, upon information and belief, the result of her underlying medical condition and disease processes which constitute an unavoidable accident by virtue of which the Defendant is not responsible to the Plaintiff in any sum whatsoever.

FOR AN EIGHTH DEFENSE

25. Because the alleged acts of negligence occurred after July 1, 2005, this case is subject to the limitations of liability and provisions outlined in the S.C. Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-200, et seq.

FOR A NINETH DEFENSE

26. This Defendant asserts that this action is governed by the S.C. Noneconomic Damage Awards Act of 2005, S.C. Code Ann. §15-32-200, et seq. Therefore, if Plaintiff is entitled to any recovery, which this Defendant specifically denies, recovery for any alleged noneconomic damages is capped pursuant to S.C. Code Ann. § 15-32-220.

FOR A TENTH DEFENSE

27. This Defendant would affirmatively assert that 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 Economic Development, Citizen and Small Business Protection Act and the South Carolina Medical Malpractice Reform Statutes including, but not limited to §15-38-15; §15-32-200; §15-32-210; §15-32-220; §15-32-230; §15-32-240; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

FOR AN ELEVENTH DEFENSE

28. Plaintiff's claims for punitive damages should be dismissed pursuant to S.C. Code Ann. § 15-32-520 and S.C. Code Ann. § 15-32-530 in that there is no evidence which would support an award of punitive damages, and this Defendant asserts all defenses and limitations of liability provided by statute and case law.

FOR A TWELFTH DEFENSE

29. That any claim for punitive or exemplary damages as set forth in the Plaintiff's Complaint against this Defendant would violate the Defendant's constitutional rights under the due process clause in the Fifth and Fourteenth Amendments to the Constitution of the United States of America, Excessive Fines Clause in the Eighth Amendment to the Constitution of the United States of America, the Double Jeopardy Clause in the Fifth Amendment to the Constitution of the United States of America, and similar provisions in the Constitution of the State of South Carolina and/or the common law and public policies of the State of South Carolina, and/or applicable statutes and court rules, and this Defendant raises these defenses as a complete bar to the imposition of punitive or exemplary damage against it.

FOR A THIRTEENTH DEFENSE

30. The Defendant pleads the Admission and Financial Contract and Arbitration

Agreement as a complete bar to this claim and further alleges that this claim and dispute are subject to the terms and conditions of the Admission and Financial Contract and Arbitration Agreement.

31. That the Plaintiff has failed to follow the terms and conditions of the Admission and Financial Contract and Arbitration Agreement.

32. That the Plaintiff's failure to follow the terms and conditions of the Admission and Financial Contract and Arbitration Agreement is a bar to this action.

FOR A FOURTEENTH DEFENSE

33. This Defendant reserves any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, as is consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully responded to the Complaint of the Plaintiff, this Defendant requests that the same be dismissed with prejudice together with the costs and disbursements in the defense of this matter and from such other and further relief as this Court deems just and proper.

Respectfully submitted,

s/Marian Williams Scalise
 Marian Williams Scalise, Esquire (SC Bar No. 6744)
 Lydia L. Magee, Esquire (SC Bar No. 16584)
 Richardson, Plowden & Robinson, P.A.
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Attorneys for Defendant NHC Healthcare/Garden City,
 LLC

December 27, 2018.
 Myrtle Beach, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) 2018-CP-26-06576

Cleo Bertiaux, as Guardian for)
Kathryn G. Parrish,)

Plaintiff,)

Versus)

March 5, 2019

NHC Healthcare/Garden City,)
LLC,)

Defendant.)

B E F O R E:

Honorable Larry B. Hyman, Jr.
Horry County Courthouse
Conway, South Carolina

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

Robert Daniel Dodson, Esquire
Attorney for Plaintiff

Lydia Lewis Magee, Esquire
Attorney for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 (There were no exhibits marked during the hearing.)

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1 (On the record, March 5, 2019.)

2 THE COURT: Is this your motion, Ms. Magee?

3 MS. MAGEE: It is, Your Honor.

4 THE COURT: Is it a 12(b)(6)?

5 MS. MAGEE: No, sir. It's actually -- well, it's a
6 motion to dismiss and enforce arbitration.

7 THE COURT: Okay. All right.

8 MS. MAGEE: And --

9 THE COURT: Tell me then, it looks like it's a medical
10 mal; right?

11 MS. MAGEE: That's correct, Your Honor.

12 THE COURT: And you want to tell me a little bit about it
13 and why you moved to enforce arbitration?

14 MS. MAGEE: Sure, and Your Honor, and just for the record
15 it's Lydia Magee, M-A-G-E-E, for the Defendant NHC Healthcare/
16 Garden City. This is our motion to dismiss and compel
17 arbitration on behalf of the Defendant. We did file a
18 memorandum, Your Honor, previously, and if I may approach I
19 have another copy of that.

20 THE COURT: Thank you.

21 MS. MAGEE: There are some exhibits attached to that as
22 well.

23 THE COURT: Mr. Dodson --

24 MR. DODSON: Yes, Your Honor.

25 THE COURT: -- your client's name it's --

1 MR. DODSON: I believe it's pronounced Bertiaux.

2 THE COURT: Bertiaux.

3 MR. DODSON: Yes, Your Honor.

4 THE COURT: If you're not sure I feel much better. Okay.

5 MR. DODSON: I am quite bad at pronunciations, so.

6 THE COURT: Okay. All right, sir. All right, Ms. Magee.

7 MS. MAGEE: Okay. Yes, Your Honor. This is a medical
8 malpractice case. We represent NHC Healthcare/Garden City.
9 They're actually the NHC facility out there by the Garden City
10 Connector, Bypass 17, Garden City. Ms. Parrish is the
11 daughter of the Plaintiff, Ms. Bertiaux, I'm sorry, the mother
12 of the Plaintiff, Ms. Bertiaux. She was admitted to our
13 facility with some dementia issues.

14 Just some background as far as the allegations of the
15 medical malpractice action, it's alleged that she suffered
16 some injuries. We believe she fell out of a wheelchair and
17 sustained some injuries. I think the, the Plaintiff will say
18 she was using a shower chair when that fall occurred, but
19 regardless, that's kind of the basis of why they're bringing
20 the medical malpractice action.

21 THE COURT: Well, let me ask you this, is it admitted or
22 is it clear as to whether or not this is a medical malpractice
23 action requiring the filing of an affidavit by an expert or is
24 this more along the lines of a negligence action not
25 associated with medical malpractice?

1 MS. MAGEE: It's been filed as a medical malpractice
2 action, Your Honor. We've gone through the notice of intent.
3 I don't think there's an issue about that in particular.

4 THE COURT: Okay. All right. Go ahead.

5 MS. MAGEE: Really the question before the Court, Your
6 Honor, is this arbitration agreement.

7 THE COURT: Okay.

8 MS. MAGEE: So when the patient is admitted to the
9 facility they sign certain admission paperwork and, and part
10 of that paperwork is an agreement to arbitrate and attached to
11 the memorandum that I've handed up to you is actually those,
12 those preadmission forms and arbitration forms, and if you'll
13 look at -- there should be exhibit numbers, exhibit two(a) it
14 is the arbitration agreement, and it is signed by Ms.
15 Bertiaux, and it is the agreement to arbitrate, and it
16 specifically states -- let me find it -- that all -- the, the
17 parties agree to submit to binding arbitration all disputes
18 against each other, their employees, agents, representatives
19 arising out of or in any way related or connected to the
20 patient's stay and care provided at the center, NHC/Garden
21 City including, but not limited to, any disputes concerning
22 alleged personal injury to the patient caused by improper or
23 inadequate care including allegations of medical malpractice
24 and any other dispute under state or federal law based on
25 contract, tort or statute which exceeds the state's small

1 claims court statutory limits shall be submitted to
2 arbitration.

3 THE COURT: Okay. And do you believe that the agreement
4 to arbitrate does, in fact, require the statutory language
5 required on an arbitration agreement?

6 MS. MAGEE: We do, and we do believe we have that. We
7 also believe that it complies with the state, state
8 arbitration act and the federal act for arbitration which
9 involves interstate commerce. We believe the federal act is
10 controlling over state in any regard and that it's clear that
11 the FAA, the Federal Arbitration Act, applies in federal or
12 state courts to any arbitration agreement regarding a
13 transaction that involves interstate commerce regardless of
14 whether the parties intended this to be an interstate
15 transaction. We've attached the affidavit of Alex Sellars or
16 Alex Sellars who is the administrator of the facility at that
17 time who kind of goes through and outlines, "These are the
18 interstate commerce activities that we participate in."

19 THE COURT: Doesn't, doesn't the statute require that the
20 -- that there be notification in bold print on the face of the
21 agreement? I mean, and, and I, I may be wrong there. I'm
22 just going from memory.

23 MS. MAGEE: And, Your Honor, it is in bold on the page
24 that has been signed.

25 THE COURT: And I understand that, but, but is there also

1 a requirement that -- it'd be on the face of the document, and
2 I may be wrong. I, I don't know, Ms. Magee. I'm just asking
3 you if that's --

4 MS. MAGEE: Your Honor, I am --

5 THE COURT: I, I see that it's just above the -- or it's
6 in the document on bold -- in bold type, and it is just above
7 the -- I saw it a moment ago, just above the --

8 MS. MAGEE: There's another signature page, page eight.

9 THE COURT: -- the signature page.

10 MS. MAGEE: Right.

11 THE COURT: Okay.

12 MS. MAGEE: Your Honor, and even if the state does
13 require that, I'm not sure that the federal provision requires
14 it. I think --

15 THE COURT: And I'm not either.

16 MS. MAGEE: I think the federal provision --

17 THE COURT: I, I can't recall.

18 MS. MAGEE: -- would be -- would override the state, the
19 State Arbitration Act in any event, so.

20 THE COURT: Okay. All right.

21 MS. MAGEE: And but kind -- and then kind of this is
22 somewhat, you know, I'm not trying to belabor this point
23 because I do think and, and Mr. Dodson can correct me if it's
24 wrong, I don't think the Plaintiff would dispute that the FAA
25 applies to this agreement or that that would be the law that's

1 controlling. I think what I would want to really argue before
2 you now, Your Honor, is that Plaintiff is now contending that
3 this contract should be deemed unenforceable really due to a
4 scrivener's error in the, the handwritten name of Defendant's
5 corporate entity. So the, the name, the party that's been
6 sued is NHC Healthcare/Garden City, LLC, and if you look at
7 the, the paperwork that was signed on page five --

8 THE COURT: Well, on page one it says it's National
9 Healthcare.

10 MS. MAGEE: On page one, page one of -- yeah, there's --
11 there's an admission and financial agreement and then there's
12 the agreement to arbitrate. So there's really two different
13 documents in here. In both of those, those places, both those
14 documents, it is handwritten in there National
15 Healthcare/Garden City, LLC, which is slightly different than
16 NHC Healthcare/Garden City, LLC. Your Honor, it's our
17 contention this is a scrivener's error. You know, Plaintiff
18 is arguing that this should render the contract unenforceable.
19 However, I would point out the Plaintiff did receive the full
20 benefit and bargain under the contract, accepted our full
21 performance thereunder. The, the patient is still at our
22 facility.

23 THE COURT: Well, don't the parties base their claim and,
24 and their -- the care that they received and the standard of
25 care that would be commensurate with that upon the agreement?

1 MS. MAGEE: Yes, Your Honor, and I would point out that
2 there is in South Carolina --

3 THE COURT: How about that, Mr. Dodson, don't you rely on
4 the agreement?

5 MR. DODSON: Yes, sir. You do.

6 THE COURT: Okay. And -- okay.

7 MR. DODSON: And, and that -- and I don't mean to
8 interrupt her argument, but, but that's really one of my, my
9 arguments here today is that there is no arbitration between
10 the Plaintiff to this lawsuit and the Defendant to this
11 lawsuit. It is not a scrivener's error. There is an --

12 THE COURT: Is it a different company?

13 MR. DODSON: It, it, it is a non-existent -- the
14 Defendant to this lawsuit is an LLC that is organized and is
15 -- and existing under South Carolina law.

16 THE COURT: Well, let me ask you this, who did your
17 client intend to contract with?

18 MR. DODSON: What is written --

19 THE COURT: When, when she signed these agreements what
20 was her intent?

21 MR. DODSON: What is written in the agreement is not the
22 Defendant to this lawsuit. The Defendant --

23 THE COURT: I mean, that's not what I asked you. What I
24 asked you --

25 MR. DODSON: Okay.

1 THE COURT: -- was what was her intent? Who, who did she
2 intend to contract with?

3 MR. DODSON: Her intent, as evidenced in the four corners
4 of the document, was with National Healthcare/Garden City,
5 LLC.

6 THE COURT: But, but you told me that's, that's not even
7 a -- an, an entity; is it?

8 MR. DODSON: That entity does not exist.

9 THE COURT: Okay.

10 MR. DODSON: And is not the Defendant to this action,
11 Your Honor.

12 THE COURT: Okay. All right.

13 MR. DODSON: And that's exactly why this arbitration
14 agreement fails.

15 THE COURT: Okay.

16 MS. MAGEE: I think I can shed a little bit of light on
17 that, Your Honor. He is absolutely correct. National
18 Healthcare/Garden City, LLC, is not a legal entity. If you go
19 to the Secretary of State website, there's no entity that has
20 that name. I have a case I'd like to hand up. It is --

21 THE COURT: Well, well, who is the -- he has sued the
22 proper entity, though; right?

23 MS. MAGEE: He has sued the proper entity, but that was
24 the intention.

25 THE COURT: I mean, NHC Healthcare/Garden City, LLC, is

1 --

2 MS. MAGEE: The proper entity, yes, sir.

3 THE COURT: Okay. All right.

4 MS. MAGEE: The case of Cobb & Seal Shoe Store v. Aetna,
5 it's 78 S.C. 388, I will hand that up to you now, Your Honor.
6 This case clearly states that a contract is good between the
7 parties, no matter how incorrect the names used in the paper
8 may be, if it appears they were intended as the names of the
9 party to be bound by the contract or to receive its benefits.
10 So I think that goes to what Your Honor was just asking
11 Plaintiff's counsel.

12 THE COURT: And, and that's precisely what I was asking
13 Mr. Dodson. You say she intended to contract with a non-
14 person, which is impossible.

15 MS. MAGEE: Correct, and Your Honor, Mr. Dodson relies
16 upon the case of Weckesser versus Knight Enterprises for the
17 proposition that this contract is deemed invalid. In, in that
18 particular case, there was an agreement to arbitrate that was
19 signed by two parties. The party that was misnamed, so to
20 speak, in their agreed -- agreement to arbitrate was a valid
21 corporate entity that was the parent corporation of the, the
22 party that should have been listed. So in that case,
23 Weckesser, they found that there could be some ambiguity.

24 THE COURT: Dispute as to who --

25 MS. MAGEE: Correct. Exactly, because in this particular

1 case and this case even, Weckesser, I believe even supports
2 our position because National Healthcare/Garden City, LLC, is
3 not a legal entity, there can be no ambiguity about what the
4 intention of the parties were, who they were contracting with.

5 THE COURT: Okay. Mr. Dodson, let me hear from you.

6 I've been touching with you, but --

7 MR. DODSON: Yes, Your Honor.

8 THE COURT: -- let me hear from you fully.

9 MR. DODSON: Thank you, Your Honor. If I may approach, I
10 did print out copies of my memorandum.

11 THE COURT: Okay. Thank you very much for that.

12 MR. DODSON: And the case I'm going to rely on as well.
13 I brought an extra copy of each for your law clerk as well.

14 THE COURT: All right. Well, thank you.

15 MR. DODSON: And so, Your Honor, you know, the beauty of
16 arbitration agreements is that you go to the four corners of
17 the document itself because the arbitration agreement is a, is
18 a contract or purported contract that stands on its own. It's
19 not an arbitration agreement in another contract. It, it is
20 even as they have noted here and attached, it is, it is itself
21 a separate agreement, and their brief, the Defendant to this
22 action is NHC Healthcare/Garden City, LLC. That's an LLC
23 that's organized and existing under the laws of the State of
24 South Carolina. The arbitration agreement is very clear. It
25 says that the arbitration agreement applies to -- this is an

1 agreement to arbitrate any dispute that might arise between
2 Kathryn Parrish, patient, and National Healthcare/Garden City,
3 LLC. That, that entity, National Healthcare/Garden City, LLC,
4 is not a legal entity. I attached from the Secretary of
5 State's website --

6 THE COURT: Okay.

7 MR. DODSON: -- showing that is not a legal entity. So
8 there is no contract here. There is no arbitration agreement
9 between these parties.

10 I didn't point this out in my memorandum, but I will
11 point this out to Your Honor now, which is additionally that
12 the Defendant to this lawsuit is not and never has been a
13 party to this arbitration agreement, that the Plaintiff that's
14 named in the arbitration agreement is different than the
15 Plaintiff here because the Plaintiff to this lawsuit is
16 Kathryn -- or, or Cleo Bertiaux as Guardian for Kathryn G.
17 Parrish, and all that's listed on the arbitration agreement is
18 Kathryn Parrish, not Cleo Bertiaux.

19 THE COURT: Are you, are you saying that it would not be
20 binding as to someone appearing on behalf of the patient?

21 MR. DODSON: That's, that's not how the contract is
22 worded.

23 THE COURT: Okay.

24 MR. DODSON: But I think the more salient point and, and,
25 and the one that, that I just mentioned is the Defendant to

1 this lawsuit is not a party to the arbitration agreement, and
2 the language that's in the arbitration agreement about it
3 applying broadly to affiliates and parent companies and
4 whatnot can't be an affiliate or a parent company or a
5 management company for an entity that doesn't even exist. So
6 the only way --

7 THE COURT: Well, let me ask you this. What is the basis
8 for your claim that there is a relationship, a duty then to --
9 owed to your client by the Defendant?

10 MR. DODSON: Because as, as she acknowledged it, it is
11 the Defendant that I named that is the proper Defendant here,
12 not the entity to the arbitration agreement.

13 THE COURT: Why? Why? I mean, if, if there was no
14 agreement, no contract to provide services, no duty to provide
15 services on behalf of her client, why'd you sue them?

16 MR. DODSON: Services were provided by the named
17 Defendant, who is NHC --

18 THE COURT: How do you know that?

19 MR. DODSON: -- Healthcare -- because they've admitted it
20 in their answer.

21 THE COURT: All right.

22 MR. DODSON: They've admitted it in their answer.

23 THE COURT: All right.

24 MR. DODSON: Everything that they have submitted to Your
25 Honor, the affidavits, the pleadings refer to NHC

1 Healthcare/Garden City, LLC. That is not the legal --

2 THE COURT: That, that is who your client accepted
3 services from.

4 MR. DODSON: That is correct, but she --

5 THE COURT: All right. And the contract was for services
6 that she expected.

7 MR. DODSON: That's not the contract that we're talking
8 about. We're talking about simply the arbitration agreement,
9 only the arbitration agreement.

10 THE COURT: Are, are you saying then there was another
11 contract to provide services that named the same parties that
12 you do want to rely on?

13 MR. DODSON: We look for arbitration agreements. Our
14 courts have made very clear. We look to the four corners of
15 the document. So the only contract that we're talking about
16 here this morning is the arbitration agreement. The, the, the
17 fact that she received services at this nursing home, that's
18 not the issue. The issue is, is what is in the four corners
19 of the document, and the case that I handed up to Your Honor
20 --

21 THE COURT: The Knight case; right?

22 MR. DODSON: Yeah. The -- it's --

23 THE COURT: Weckesser versus Knight?

24 MR. DODSON: Yeah. Weckesser, I think, versus Knight.

25 This same issue was raised before Judge Gergel here in South

1 Carolina in the, in the, in the United States District Court
2 where there was a clear -- there were -- there was clear work
3 between the parties to a lawsuit, but an improper -- but the
4 name of the Defendant on the arbitration agreement was
5 different than the name on the -- in the pleadings.

6 THE COURT: But that was clearly a person; was it not?

7 MR. DODSON: It -- no. It was a legal entity, Your
8 Honor.

9 THE COURT: It was a legal entity.

10 MR. DODSON: It was a legal --

11 THE COURT: That's a person under the law.

12 MR. DODSON: It was a, it was a legal entity.

13 THE COURT: Yeah.

14 MR. DODSON: Okay, and there the Fourth Circuit affirmed
15 Judge Gergel when he said you cannot compel arbitration when
16 the arbitration agreement is between different parties. So
17 you -- you've had four, and I recognize that, you know, the
18 Fourth Circuit is not necessarily binding precedent on Your
19 Honor, but what I would point out is I do think it's
20 persuasive authority --

21 THE COURT: Okay.

22 MR. DODSON: -- because you've had four federal judges,
23 three Fourth Circuit and Judge Gergel here in South Carolina
24 that have looked at this very issue, and they've said for an
25 arbitration agreement to be enforceable, the party, the

1 Defendant to the lawsuit has to be named in the four corners
2 of that document. That's the essential holding in the case
3 that I've handed up, the Knight Enterprises case. That's not
4 what we have here today. The only way you can get where she
5 wants to go to arbitration --

6 THE COURT: Is look at the intent of the parties in
7 executing the contract.

8 MR. DODSON: Is -- well, the only way that you can get to
9 where they want to go is for Your Honor to pull out a blue pen
10 or a blue pencil and rewrite the contract for them and put in
11 the name of the Defendant to this lawsuit and mark out
12 National Healthcare/Garden City or essentially write an
13 addendum then because the, the arbitration agreement is
14 between, as it states, Kathryn Parrish and National
15 Healthcare/Garden City, LLC. Not one time in that arbitration
16 agreement is NHC Healthcare/Garden City mentioned as a party.
17 So the only way you can grant this motion is to rewrite the
18 contract for them, and I have cited to Your Honor in my
19 memorandum a whole host of cases, including the one I handed
20 up, where the courts say that's not proper.

21 THE COURT: Okay. All right. I find that the parties
22 intended to enter into a -- an arbitration contract. That's
23 clear by the fact that she received services, was admitted to
24 the Defendant, has sued the Defendant hospital for those
25 failures in those services or Defendant nursing home. I'm

1 going to enforce the contract or the arbitration clause.

2 Prepare me an order, Ms. Magee. I'm sure this is going to go
3 up either way, but I believe that that's the proper way.

4 MS. MAGEE: Thank you, Your Honor.

5 THE COURT: Thank you.

6 MR. DODSON: Thank you, Your Honor.

7 THE COURT: All right.

8 (Adjourned.)

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1 C E R T I F I C A T E

2

3 I, the undersigned, Grace L. Hurley, Official Court
4 Reporter for the State of South Carolina, do hereby certify
5 that the foregoing is a true, accurate and complete transcript
6 of the hearing held in the case of Cleo Bertiaux as Guardian
7 for Kathryn G. Parrish versus NHC Healthcare/Garden City, LLC,
8 held in the Court of Common Pleas for Horry County, Horry
9 County Courthouse, Conway, South Carolina, on March 5, 2019.

10 I do hereby certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12

13

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15

16

Grace L. Hurley, CVR-CM-M

17

Official Reporter

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23

24 August 9, 2019.

25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A NO.: 2018-CP-26-06576

Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)
	)
	)
Plaintiff,	)

-vs-

NHC Healthcare/Garden City, LLC,	)
	)
Defendant.	)
	)

**MOTION TO DISMISS AND COMPEL
ARBITRATION ON BEHALF OF
DEFENDANT**

TO: ROBERT D. DODSON, ESQUIRE, AS ATTORNEY FOR PLAINTIFF

YOU WILL PLEASE TAKE NOTICE that the Defendant will move before the presiding judge of the Fifteenth Judicial Circuit, ten days hence or as soon thereafter as counsel may be heard, for an Order dismissing/staying this action and compelling binding arbitration pursuant to the Agreement to Arbitrate (the "Agreement") signed by Cleo Bertiaux, on June 21, 2017. A copy of the signed Agreement is attached as Exhibit #1.

The Motion shall be based upon the pleadings, upon the case and statutory laws of South Carolina, and upon such other and further information, Memorandums, or argument as may be received by the Court at the time the Motion is called for hearing.

[signature on following page]

Respectfully submitted,

s/Marian Williams Scalise

Marian Williams Scalise, Esquire (SC Bar No. 6744)

Lydia L. Magee, Esquire (SC Bar No. 16584)

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Attorneys for Defendant NHC Healthcare/Garden City,
LLC

December 27, 2018.

Myrtle Beach, South Carolina

EXHIBIT 1

NATRYN (ARRIST)

Admission Documents

1. Preadmission Agreement
2. Agreement to Arbitrate
and Waive Jury Trial

Name of Center National Healthcare Care Center, LLC
 Name of Patient Kathryn Parrish
 Social Security Number [REDACTED]
 Name of Legal Representative (if applicable) Cleo M. Bertaux "Tez"
 Additional Signature (if applicable) [Signature]

PRELIMINARY STATEMENTS:

Patient individually or by and through Patient's Legal Representative (hereafter collectively referred to as Patient) has considered appropriate care settings and is desirous of receiving care at this Center; and

Center is a licensed nursing facility and will provide the services set forth below in accordance with the standards of the industry, none of which cause the Center to become an insurer nor guarantor of the health and safety of the Patient, or for that matter, the insurer or guarantor of the Patient's personal property.

Identification of Legal Representative [if applicable]:

The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

TYPE (check one)

- ☒ Guardianship
☐ Limited, Durable POA
☐ Unlimited/Durable POA
☐ Power of Attorney
☐ Health Care Agent/Proxy
☐ Surrogate

SCOPE (check all that apply)

- ☐ Routine health care
☐ Unlimited health care
☐ Limited access to income/finance
☐ Authorized to accept income and control financial resources of patient

The Legal Representative, by signing this contract, acknowledges acceptance of the duties and responsibilities of this role. The Legal Representative who is authorized to accept the Patient's finances will not incur personal financial liability except for breach of duty or contract in properly directing the Patient's resources to pay for the Patient's care.

Attach a copy of all written authorizations to this agreement.

PATIENT CONSENTS AND ACKNOWLEDGEMENTS:

1. The Patient hereby consents to all routine nursing home care rendered in accordance with physician's orders.
2. The Patient consents to pictures taken for identification purposes only.
3. The Patient declares that he or she retains capacity and is competent, has never been adjudged or determined to lack capacity or competence, and knows of no petition pending to adjudicate his or her lack of capacity or competence. Alternatively, if the Patient has been or should be deemed to lack capacity or competence, then Patient's Legal Representative declares that he or she has been given authority by the Patient when competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care and concern for the Patient, familiarity with the Patient's personal values, reasonable availability, and willingness to serve.

4. Patient acknowledges that nursing services do not include continuous one-on-one care and that the caregivers in the Center are responsible for multiple patients. The Patient and/or Legal Representative acknowledges that the Patient Rights Booklet contains a Grievance Procedure that provides certain steps that may be taken if the patient is not receiving the degree of care which meets the Patient's and/or Legal Representative's expectations. The Patient and/or Legal Representative further acknowledges they have the right to either pay for additional care through the use of private-duty personnel or to remove the Patient from the center as provided in Transfer and Discharge section of the Patient's Rights booklet.
5. Patient certification and authorization to release information and payment request:
 - a. I certify that the information given by me in applying for payment under Title XVIII of the Social Security Act or my private insurance is correct. I request that payment of authorized benefits be made on my behalf.
 - b. I hereby authorize the Center, its officers and partners, to release to any third party payor (such as an insurance company or governmental agency, i.e., Blue Cross/Blue Shield or Medicare/Medicaid) any medical, mental health/psychiatric, alcohol, drug abuse, and/or HIV (AIDS) treatment information, records, diagnoses, in accordance with the policy of the Center and any applicable State or Federal Statutes, concerning diagnosis and treatment for this admission when requested by such third party payor for its use in connection with determining a claim for payment for treatment and/or diagnosis. I do hereby release the Center from all liability that may arise from the release of the information requested.
 - c. I hereby consent to having the agency processing any eligibility application I have made to release information regarding the status of my application whether pending, denied or approved to the bookkeeper or social services department of this Center.
 - d. I hereby consent to the release by other healthcare providers of all my medical records and medical information to the Center and its representatives, and I further consent to such healthcare providers speaking to the Center and its representatives regarding my medical conditions and treatment.

RE-ADMISSION ACKNOWLEDGEMENT:

Patient and Legal Representative agree that all terms, conditions and consents in this agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the readmission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

AGREEMENT TERMINATION:

This agreement can be terminated by Patient upon the giving of notice to the Center and this agreement can be terminated by Center upon the giving of 30 days written notice to Patient, in accordance with the licensure laws of this state and applicable Medicare/Medicaid regulations.

LEGAL COMPLIANCE:

Center complies with all Federal and State civil rights and non-discrimination laws, rules and regulations. Patients are admitted without regard to sex, age, race, religion, or physical handicap, if any.

Patient and other parties signing this agreement have reviewed this PREADMISSION AGREEMENT, have had the opportunity to ask questions of Center personnel about the agreement, understand that admission to this Center constitutes agreement to be bound by said PREADMISSION AGREEMENT, and acknowledge they will be asked to review and sign the Admission and Financial Agreement within 72 hours of admission to Center.

THE CENTER:

[Signature]
By Administrator/Social Worker

Date

6/21/17

gk 7/11/17

Administrator Review
(Initial and date)

THE PATIENT:

DX Dementia
By Patient

Date

6/21/17

Other Persons Signing on Behalf of Patient
(Please specify authority to sign):

[Signature]
Guardian / Daughter

EXPLANATION

In order to minimize the time and costs of resolving all disputes, both parties agree, depending on the amount in the dispute, to either:

- a. submit the dispute to this state's small claims court, or
- b. if the amount exceeds the small claims court statutory limits as later defined, then submit to binding arbitration.
- c. if it is determined by a court of law that the arbitration agreement is invalid, then waive their right to a jury trial and consent to a trial by the court.

Arbitration is a method of resolving disputes without the substantial time and expense of using the judicial system. Since the arbitration procedure is private rather than public, it can help protect privacy and dignity concerning the sensitive issues that sometimes arise. An arbitration hearing takes only months to schedule, while civil litigation may take years to complete. By avoiding the judicial system, many costs are eliminated. There are charges and fees involved in arbitration, but an arbitration hearing will almost always resolve a dispute sooner and at less cost than a trial when the dispute exceeds the jurisdiction of this state's small claims court.

It is important to understand, however, that there is only a limited right to appeal an arbitration award. Unless there is evidence of fraud on the part of the arbitrator or a serious procedural defect, an arbitration award will be final. Of course, the Center also agrees to be bound by the arbitrator's decision.

BY SIGNING THIS AGREEMENT, BOTH PARTIES ARE WAIVING THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL AND CONSENTING TO BINDING ARBITRATION, OR IF THE AGREEMENT TO ARBITRATE IS INVALID, TO TRIAL BY THE COURT WITHOUT A JURY.

This is an Agreement to arbitrate any dispute that might arise between

Kathryn Parrish ("Patient") National Healthcare Garden City, LLC and ("Center").

The Patient/Legal Representative acknowledges that the Patient Rights Booklet contains a Grievance Procedure that provides certain steps that may be taken if the Patient is not receiving the degree of care which meets the Patient's/Legal Representative's expectations.

The parties shall submit to binding arbitration all disputes against each other and their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient's stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined. The parties agree that each may bring claims against the other only in an individual capacity and not as a plaintiff or class member in any purported class or representative proceeding.

Revised 10/14

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K. Parrish
Initials

Initials

arbitration agreement. In rendering a decision on the merits of the dispute, the arbitrator shall apply the substantive law of the state in which the center is located. The arbitrator's fees and expenses will be paid by the center, but the arbitrator shall have the discretion to tax any unreasonable costs attributable to the Patient/Legal Representative to that party.

The party initiating arbitration shall serve upon the other party via certified mail a demand for arbitration, which should include a brief description of the claim, the relief sought, and a proposed arbitrator who must be neutral, experienced, and disinterested. This arbitrator shall serve unless the non-initiating party provides written objection via certified mail to the other party within ten (10) business days of the notice or demand of intent to arbitrate and suggests an alternate, neutral, experienced, and disinterested arbitrator. The arbitrator proposed by the non initiating party shall serve as the arbitrator, unless the initiating party provides written objection via certified mail to the non-initiating party's suggestion. If both parties object as provided above, then a neutral, experienced, and disinterested arbitrator will be selected by a judge of the court which serves the county in which the center is located and which would have subject matter jurisdiction of the dispute. Each party may be represented by counsel in connection with all arbitration proceedings. Any arbitration hearing arising under this Agreement shall be held in the county in which the Center is located. In conducting the hearing and all other proceedings relative to the arbitration of the dispute, the arbitrator shall apply the rules of civil procedure and the rules of evidence of the state where the Center is located, unless otherwise agreed by the parties. The arbitrator shall, however, have the discretion and authority to reasonably limit discovery upon the request of any party.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Center to the Patient, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Center or received by the Patient, and is not presented in the arbitration proceeding. The Agreement to Arbitrate shall survive and not otherwise be revoked by the death or incompetency of Patient. The judgment rendered by the arbitrator may be entered in any court having jurisdiction thereof.

ACKNOWLEDGEMENTS

The Patient declares that he or she retains capacity and is competent, has never been adjudged or determined to lack capacity or competence, and knows of no petition pending to adjudicate his or her lack of capacity or competence. Alternatively, if the Patient has been or should be deemed to lack capacity or competence, then Patient's Legal Representative declares that he or she has been given authority by the Patient when competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care and concern for the Patient, familiarity with the Patient's personal values, reasonable availability, and willingness to serve.

X CMB
Initials

Initials

opportunity to ask questions of Center personnel about the Agreement

The Patient and/or Legal Representative understands that this Agreement may be revoked by signing the revocation provision set forth below during normal business hours within ten (10) business days of the admission. If not revoked, this Agreement shall remain in effect for all claims arising out of the Patient's stay at the Center. If the acts or events underlying the dispute are committed prior to any such revocation, then this Agreement shall be binding with respect to such acts or events.

The parties agree that any claim, controversy, dispute or disagreement within the following statutory limits, and as subsequently modified by the appropriate legislative body, shall be resolved through the state's lower court system, without a jury:

AL (District)	\$3,000	SC (Magistrate)	\$7,500
GA (Magistrate)	\$15,000	KY (Small Claims)	\$1,500
MO (Associate Circuit)	\$25,000	NH (District)	\$5,000
TN (General Sessions)	\$25,000	VA (Small Claims)	\$5,000

If a party overlooks the obligation to arbitrate any dispute and participates in litigating the matter in the court system, such party will not be deemed to have waived the right to compel arbitration assuming the motion to compel arbitration is served before the first day of trial.

The parties agree that the arbitration process and the arbitration award may remain confidential. In the event that any portion of the Agreement is determined to be invalid or unenforceable, the remainder of this Agreement will continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.

Patient and Legal Representative agree that all terms, conditions and consents in this Agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the readmission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

K. C. [Signature]
Initials

Initials

ARBITRATE AND WAIVE JURY TRIAL AND UNDERSTAND THAT BY SIGNING THIS AGREEMENT, THEY HAVE WAIVED THE RIGHT TO A TRIAL BEFORE A JURY, AND THAT THEY VOLUNTARILY CONSENT TO ALL OF THE TERMS OF THIS AGREEMENT.

THE PATIENT:

DX Dementia
By Patient

Date: _____
Other Persons Signing on Behalf of Patient
(please specify authority to sign)

X Cliff Bates
Guardian / Daughter
Date: 6/21/17

THE CENTER:

[Signature]
By Administrator/Social Worker

Date: 6/21/17

REVOCATION OF ARBITRATION PROVISION

By signing the original Agreement on file at the Center, I/we (all who signed above must sign below within ten (10) business days of the admission to effectuate the revocation) hereby revoke the agreement to arbitrate set forth above.

Patient's Signature

Date _____

Legal Representative's Signature

Date _____

Additional Signature (If Applicable)

Date _____

Administrator's Signature

Date _____

ES 7/11/17
Administrator Review
(initial and date)

Admission and Financial Agreement

AFA-200
Revised 07/15

Name of Patient Kathryn Parrish
 Social Security Number [REDACTED]
 Name of Legal Representative (if applicable) _____
 Additional Signature (if applicable) _____

PRELIMINARY STATEMENTS:

Patient acknowledges that this Center participates in the Medicare and Medicaid Program as a service to Patients on a voluntary and limited basis, and that the Center may limit or terminate its participation in this program at its discretion upon appropriate notice to all affected parties.

Patient acknowledges that all references to "Center" in this agreement are references not only to Center's trade name, but to its legal entity, which is

National Healthcare Garden City, LLC
 Identification of Legal Representative [if applicable]:

The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

☒ Confirm Legal Representative information from Preadmission Agreement.

TYPE (check one)

- ☒ Guardianship
☐ Limited, Durable POA
☐ Unlimited/Durable POA
☐ Power of Attorney
☐ Health Care Agent/Proxy
☐ Surrogate

SCOPE (check all that apply)

- ☒ Routine healthcare
☒ Unlimited healthcare
☐ Limited access to income/finance
☒ Authorized to accept income and control financial resources of patient

Attach a copy of all written authorizations to this agreement.

NOW, THEREFORE, in consideration of the prompt payment by the Patient (and the applicable state, federal, or private insurance program) of the charges made to the Patient's account in accordance with the charge structure of the Center, and in further consideration of the mutual covenants and promises herein, the parties agree as follows:

CENTER CHARGE STRUCTURE:

1. The charges made to you by this Center are:

a. Daily Rate for Room and Board:

Semi-private accommodations from 234.00 to _____

Private accommodations from 264.00 to _____

Your room and board rate for accommodations selected: \$ 234.00 per day.

b. Personal Laundry Services: 1.10 per day

Requested: ☒ Yes ☐ No

c. Specialized Therapy, Central Supply and Pharmacy charges are available.

In the event it becomes necessary to change this charge structure the Center agrees to give thirty (30) days notice. Advance notice of other changes will be made whenever possible as required by state law.

2. Daily Rate Includes:

The routine daily rate includes room and board, routine nursing services, routine social services, activities, routine restoration services, housekeeping and maintenance.

3. Subject to Additional Charge:

Treatments by licensed therapists, such as physical therapy, speech therapy, occupational therapy; personal laundry service; beauty and barber services; medications ordered by physician; over the counter medications; central supply items ordered and/or used by particular Patient; special equipment; oxygen, IV fluids, braces, splints and laboratory work ordered by the physician, are subject to additional charge by the Center.

4. Services Billed Separate and Apart From Center Charges:

Physician charges and any services furnished to the Patient as physician requested consultation, including but not limited to dental services, podiatry, optometry, audiology or mental health services are billed directly to Patient by provider of service.

Sitters and private duty nurses are allowed at the Center only if said sitter or private duty nurse complies with all applicable Rules and Regulations of the Center. Any sitter or private duty nurse must be approved by the Center and can be removed from the premises by Center without reason at any time. The financial arrangement with such persons is private.

It may be necessary for the Patient to arrange bedside telephone, in room television, and/or in room cable television. The Center maintenance department will provide the specifications of the Center for installation.

Dry cleaning, personal shopping, clothing with proper identification and clothing repair are the responsibility of the Patient.

5. Bed Reservations:

Rooms may be reserved for Patients absent from the Center at the request of the Patient and/or family provided the usual room and board rate is paid to hold the room.

In the event the Patient/family chooses not to reserve a bed by paying the usual rate, there is no assurance an appropriate bed will be available if the Patient wishes to return.

6. Failure to pay:

Failure to pay an account at the Center when due is a breach of this agreement and will allow Center to discharge Patient upon giving a 30 day written notice, during which 30 day period the breach may be cured by payment of the account in full.

7. Payment in Advance:

It is the policy of this Center to collect payment for room and board 30 days in advance.

Patient hereby makes payment in advance of \$ 0.00

If Medicare or Medicaid coverage as determined by Center's professional staff is expected or other private insurance benefits are assigned to the Center, Patient must pay in advance only that portion of expected charges specifically not covered by plan(s).

Patient expecting Medicare coverage specifically understands that Medicare coinsurance is the responsibility of the Patient. Payment of coinsurance is required. Payment is not expected until services are rendered.

and not needed to cover charges. The return will be made as soon as practicable, not to exceed number of days required by state and never more than 60 days following month of discharge and/or settling of account.

Note: Medicare, Medicaid and Private Insurance accounts sometimes take several months to resolve. Refunds contingent upon insurance payments will be made within 30 days of resolution of claim. Monies held for a Patient in trust will be paid to Patient's estate within 30 days of death.

9. Insurance Coverage:

When the Center has determined that the Patient is eligible for insurance benefits, including but not limited to Medicare it will submit a claim for payment. Pre-certification of insurance, if required, is the responsibility of the Patient.

The fact that the Center submits a claim for payment does not relieve the Patient from liability for the cost of care for any days determined by the Program Administrators as non covered, or for the Patient's portion of the liability as determined by the appropriate program administrators.

a. Medicare Coverage

Medicare Part A pays for the following services when medically necessary except when another payment source is primary:

- Room and Board
- Specialized rehabilitation services: Physical, Speech, Occupational and Respiratory Therapies
- Medications ordered by physician
- Ancillary Central Supply items including certain special equipment such as air fluidized beds
- Oxygen, IV Fluids, Braces
- Basic Personal Laundry
- Certain Personal Hygiene Items
- Over the counter drugs

Medicare Part B pays 80% of the cost of certain services within program limitations as provided with consent of the Patient:

- Specialized Rehabilitation Services when Part A unavailable up to limits defined by Medicare.
- Physician services and certain physician ordered consultations.
- Prosthetic items when Part A unavailable

Medicare Part A does not pay for the following services which are subject to charge if requested by Patient:

- Private Room differential (if not medically necessary)
- Beauty and Barber services
- Telephone or Television
- Private duty nurses and sitters
- Payment to hold bed when Patient hospitalized
- Services determined not to meet Medicare coverage criteria, and the
- Patient has been so notified in writing by the Center

mark (a) for Patient placed in Medicare certified bed,
 mark (a) & (b) for Patient placed in a bed certified for Medicare and Medicaid
 mark (c) for Patient placed in non-Medicare certified bed.

a. ☒ If the Patient has a Medicare card or number, then the Patient acknowledges that an explanation as to the Patient's eligibility for Medicare benefits on this admission has been fully made and understood by Patient. It is the professional judgment of this Center that Patient's care will ☐ will not ☐ be covered by Medicare.

☐ Not technically qualified for Medicare because

☐ Medically not qualified. Letter with non-coverage explanation attached.

b. ☐ Patient placed in bed certified for both Medicare and Medicaid acknowledges that a change to a lower level of care renders patient subject to assignment to any nursing center certified bed in the center.

c. ☐ In the event you are placed in a bed not certified for Medicare, Patient acknowledges that Center has explained that services furnished in a non-certified bed are not payable by Medicare.

Placement in non-certified bed is the result of

- ☐ free choice of Patient/family waiving any right to Medicare payment
☐ medically and technically qualified for Medicare, awaiting availability of first open Medicare certified bed
☐ not technically qualified for Medicare payment because

☐ medically not qualified. Letter with non-coverage explanation attached

I ☐ do ☐ do not request that a "Medicare demand bill" be submitted to the Medicare Intermediary.
☐ N/A (if Medicare is primary).

Patient understands that Patient or someone acting on Patient's behalf may request that the Center file a claim for Medicare benefits. Based upon this claim, Medicare will make a formal determination and advise whether any benefits are payable.

Patient Signature _____

Legal Representative Signature X. C. M. B. A.

Additional Signature (if applicable) Guardian / Daigute

Date 6/25/17

Medicare Utilization Review: The Center continues to monitor the Patient's progress, reporting to the Patient's physician and to the physicians belonging to the Center's Utilization Review Committee. This committee will determine the medical necessity for and the effectiveness of the treatment the Patient receives, determining ongoing Medicare coverage.

This is your notification of the dates these reviews are scheduled and to assure you that there will be an opportunity for your attending physician to participate in the decision. The Utilization Review Committee meets every Tues and also every

2nd Tues monthly

agreed to accept assignment of the following policy: BUS

Benefit explanation _____

Patient hereby assigns the private health insurance benefits here listed and available to Patient to Center.

Signature: _____ (Insured)

Legal Representative: X Chen

Additional Signature (if applicable): Guardian/Daugherty

Patient specifically acknowledges that Center agreement to accept assignment of private health insurance does not relieve the Patient of the responsibility for payment for services rendered. Furthermore, should private insurance claim not be paid within 60 days of submission, the Patient specifically agrees to pay account in full upon request by Center.

c. Medicaid Coverage

Patient ☐ has ☒ has not applied for Medicaid eligibility.
If patient has applied they will receive a Medicaid guidebook.

d. Veterans Administration Coverage

Where contradictions exist between this Admission Agreement and the VA Contract, a Patient's VA Contract takes precedence until its expiration at which time all terms of this Admission Agreement apply.

PATIENT RESPONSIBILITIES:

1. Promptly pay all charges in accordance with this agreement.
2. Providing such personal clothing and effects as needed or desired by Patient.
3. Providing all "non-medically" necessary transportation, including transport to appointments in physician office.
4. Paying all costs, expenses and a reasonable attorney's fee incurred by Center in the collection of any and all sums due and owing by the Patient (including judicial and arbitrator awards), plus a service charge equal to the highest rate permitted by law, not to exceed 1% per month for all accounts over 30 days.
5. It is the responsibility of Patient to give advance notice when Patient is terminating this agreement, except when prevented by Patient's medical condition.
6. Abiding by the Rules and Regulations established from time to time in connection with the operation and maintenance of the Center.

agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the re-admission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

AGREEMENT TERMINATION:

This agreement can be terminated by Patient upon the giving of notice to the Center and this agreement can be terminated by Center upon the giving of 30 days written notice to Patient, in accordance with the licensure laws of this state and applicable Medicare/Medicaid regulations.

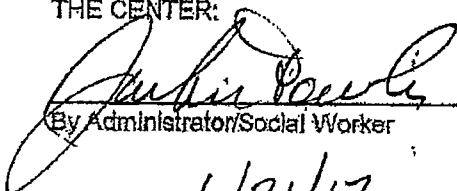
LEGAL COMPLIANCE:

Center complies with all Federal and State civil rights and non-discrimination laws, rules and regulations. Patients are admitted without regard to sex, age, race, religion, or physical handicap, if any.

ACKNOWLEDGEMENT:

Patient and other parties signing this agreement have reviewed this ADMISSION AND FINANCIAL AGREEMENT, have had opportunity to ask questions of Center personnel about the agreement and understand that admission to this Center constitutes agreement to be bound by said ADMISSION AND FINANCIAL AGREEMENT.

THE CENTER:


By Administrator/Social Worker

Date

6/21/17

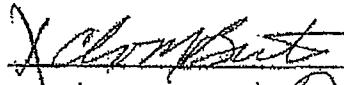
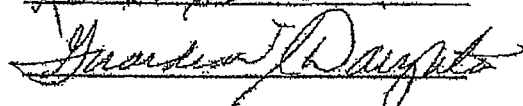
THE PATIENT:

DX Dementia
By Patient

Date

6/21/17

Other Persons Signing on Behalf of Patient
(please specify authority to sign):

X 


JS 7/17/17
Administrator Review
(initial and date)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A NO.: 2018-CP-26-06576
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	
	)	
Plaintiff,	)	MEMORANDUM OF LAW IN SUPPORT
	)	OF THE MOTION TO DISMISS AND
v.	)	COMPEL ARBITRATION ON BEHALF OF
	)	DEFENDANT
NHC Healthcare/Garden City, LLC,	)	
	)	
Defendant.	)	
	)	

TO: ROBERT D. DODSON, ESQUIRE, AS ATTORNEY FOR PLAINTIFF

Defendant NHC Healthcare/Garden City, LLC, by and through its undersigned counsel, hereby respectfully submits this Memorandum of Law in Support of its Motion to Dismiss and Compel Arbitration.

BACKGROUND

On or about August 3, 2015, the Horry County Probate Court issued an Order appointing Cleo Bertiaux as the Guardian of her mother, Kathryn Parrish, due to Ms. Parrish's dementia.¹ Approximately two years later, on or about June 22, 2017, Kathryn Parrish ("Patient" or "Parrish") was admitted to NHC-Garden City. On June 21, 2017, NHC-Garden City and Ms. Parrish's guardian Cleo Bertiaux entered into an Admission and Financial Agreement (the "Admissions Agreement") for the provision of health care services to Patient, a copy of which is

¹ Cleo Bertiaux brought the present lawsuit as legal Guardian of her mother, and she signed all of Defendant's documents as legal Guardian of her mother. The Probate Court Order gave Ms. Bertiaux actual as well as apparent authority to bring lawsuits as well as waive the right to a jury trial. "The guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship." See S.C. Code Ann Section 62-5-312.

attached as Exhibit 1.² Bertiaux also signed a Preadmission Agreement and Agreement to Arbitrate and Waive Jury Trial with NHC-Garden City (the “Arbitration Agreement”), a copy of which is attached as Exhibit 2³ and incorporated herein by reference.

The Arbitration Agreement provides that the parties—including “their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated” —agree to follow the dispute resolution procedure set forth in the Arbitration Agreement executed concurrently with the other admissions documents. This arbitration procedure can be generally summarized as follows:

1. The parties agree to follow the “Grievance Procedure” described in the Patient Rights Booklet for any claims or disputes arising out of or in connection with the care rendered to the Patient;
2. Where the amount in controversy does not exceed the statutory limits for submission to the South Carolina Small Claims Court, then the controversy shall be submitted to that court; and
3. Any disputes with an amount in controversy exceeding the statutory limits for submission to the South Carolina Small Claims Court shall be resolved by binding arbitration. There are no set limits on the award of actual or punitive damages in either of the Agreements.

² The signed document was faxed, so some of the wording is cut off on Exhibit 1A. A sample original showing all of the wording is attached as Exhibit 1B.

³ The signed document was faxed, so some of the wording is cut off on Exhibit 2A. A sample original showing all of the wording is attached as Exhibit 2B.

Ms. Parrish, an 87-year-old widowed female was admitted to NHC-Garden City on June 22, 2017 with admitting diagnoses of displaced oblique fracture of the right femur, repeated falls, osteoarthritis, morbid obesity, dementia, atherosclerotic heart disease, chronic atrial fibrillation, diastolic congestive heart failure, and chronic obstructive pulmonary disease. About a month later, on July 20, 2017, after Ms. Parrish had finished her bath and was in a wheelchair partially dressed in the bathroom, she fell forward out of the wheelchair and hurt her upper extremity. Prior to the fall, Ms. Parrish had no history of wandering, dizziness, or trunk restraint, and she did not exhibit unsafe behavior like trying to stand, transfer, or walk alone unsafely; climbing over bed rails or trying to get out of bed unsafely; walking when too tired to be safe; or propelling her wheelchair in unsafe areas. Prior to the fall, Ms. Parrish was known to Defendant's staff as someone who followed directions. As such, Defendant and its staff were unaware that Ms. Parrish would try to reach forward and fall out of her wheelchair. After the fall, one of Defendant's staff wrote in the medical records not to leave the resident in the shower/bathroom unattended. Ms. Parrish was evaluated by an orthopedic surgeon and made non-weight bearing. It was estimated she would need an additional two months of long-term care as a result of the fall.

On April 4, 2018, Cleo Bertiaux ("Plaintiff"), as Guardian for Kathryn Parrish, filed with the Horry County Clerk of Court a Notice of Intent to File Suit in a Medical Malpractice Case, with an attached expert affidavit, pursuant to S.C. CODE ANN. § 15-79-125. These pleadings were assigned C/A No. 2018-NI-26-00013. Thereafter, on November 14, 2018, the parties

participated in mediation required under S.C. CODE ANN. § 15-79-125(C); however, this pre-suit mediation ended in an impasse.⁴

On or about November 21, 2018, Plaintiff filed a Summons and Complaint in this Court alleging, among other things, that Defendant negligently provided care to Patient resulting in her fall. The Complaint was served on Defendant's registered agent on November 28, 2018.

By filing the Summons and Complaint with this Court, Plaintiff has failed to comply with the terms set forth in the Arbitration Agreement. Specifically, Plaintiff has failed to follow the Grievance Procedure described in the Patient Rights Booklet for claims or disputes arising out of or in connection with the Patient's care. Moreover, despite the fact that the amount in controversy exceeds the limits for submission to small claims court, Plaintiff has also failed to make an attempt to arbitrate this matter as required under the Arbitration Agreement.

On December 27, 2018, Defendant filed a Motion to Dismiss and Compel Arbitration of all claims related to the care provided to Patient by Defendant and its employees. Defendant hereby submits this Memorandum of Law in Support of its Motion to Compel Arbitration.

ARGUMENT

Both state and federal policy favor arbitration of disputes. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001); see also Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 553, 606 S.E.2d 752, 757 (2004) (observing "the strong presumption favoring arbitration of disputes") (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967)). Once it is clear that the parties have a contract that

⁴ Defendant did not waive its right to enforce the Arbitration Agreement by participating in the mediation required by statute where Defendant filed its motion to compel arbitration after Plaintiff filed the formal complaint. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 387-88, 759 S.E.2d 727, 736 (2014) (holding nursing home did not waive its right to enforce arbitration agreement because nursing home filed its motion to compel following the plaintiff's filing of the formal complaint after the statutorily mandated mediation failed).

provides for arbitration between them, any doubts concerning the scope of the arbitration shall be resolved in favor of arbitration. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983); S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993); Towles v. United Healthcare Corp., 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999). Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. Zabinski, 346 S.C. at 597, 553 S.E.2d at 118-19; see also Towles, 338 S.C. at 41, 524 S.E.2d at 846 (“Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.”). “[A]rbitration agreements enjoy a strong presumption of validity in federal and state courts.” Dean v. Heritage Healthcare of Ridgeway, LLC, 408, S.C. 371, 380, 759 S.E.2d 727, 731-32 (2014)

The Arbitration Agreement in the instant case provides that the parties agree to submit to binding arbitration:

all disputes against each other and their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, ***arising out of or in any way related or connected to the Patient's stay and the care provided at the Center [NHC-Garden City], including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice;*** any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined.

Arbitration Agreement, p. 5 (emphasis added).

The Complaint alleges that Parrish suffered personal injury due to alleged improper or inadequate care by Defendant and its employees. See Paragraph 23 of the Complaint. The

Arbitration Agreement clearly reflects the intent to arbitrate these issues raised in Plaintiff's Complaint, and this Court should effectuate that intent and compel arbitration.

The Arbitration Agreement also provides that "[t]he Federal Arbitration Act shall apply to determine the arbitrability of any dispute and the scope of the arbitration agreement." *Id.* at p. 6. As such, the Arbitration Agreement expressly invokes the FAA. See *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 363-64 (holding an agreement that provides it shall be governed by the FAA is enforceable in accordance with its terms); see also *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 126, 747 S.E.2d 461, 466 (2013) (observing that an arbitration agreement which expressly invokes the FAA should be enforced in accordance with such unambiguous contractual terms) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (noting that the "preeminent concern" in construing arbitration agreements is to protect the contractual rights of the parties, which requires courts to enforce "rigorously" those terms upon which private parties have agreed"))).

Even if the FAA was not referenced in the Arbitration Agreement, the involvement of interstate commerce also makes the FAA applicable. The FAA provides:

A written provision in . . . a contract **evidencing a transaction involving commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added).

"Generally, any arbitration agreement affecting interstate commerce . . . is subject to the FAA." *Landers v. Federal Deposit Ins. Co.*, 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, (2001)). The United States Supreme Court "has previously described the [FAA]'s reach expansively as coinciding with that of the

Commerce Clause." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 274 (1995) (citing Perry v. Thomas, 482 U.S. 483, 490, (1987)). Thus, in determining whether the FAA applies to a particular arbitration agreement, a court considers whether the contract concerns a transaction involving interstate commerce. Episcopal Housing Corp. v. Fed. Ins. Co., 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977).

To ascertain whether a transaction “involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.” Zabinski, 346 S.C. at 594, 553 S.E.2d 110 at 117. Under the Arbitration Agreement, the parties agreed to submit to binding arbitration “any dispute arising out of or in any way related or connected to the Patient’s stay and the care provided at the Center” including any disputes concerning (1) alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; (2) whether any statutory or regulatory provisions relating to the Patient were violated; (3) the Center’s charges to the Patient; and (4) any other dispute under state or federal law based on contract, tort, or statute that exceeds the state’s small claims court statutory limits. Arbitration Agreement, p. 5.

The services and care provided to Patient Parrish involved interstate commerce. Alex Sellars, the Administrator at NHC- Garden City, submitted an affidavit evidencing the presence of interstate commerce in the Defendant’s provision of services to patients. Defendant’s employees routinely attend out-of-state conferences. Defendant’s staff routinely communicates with prospective patients and/or their families who are living outside of South Carolina. Residents of other states frequently become patients of Defendant. Finally, employees of Defendant routinely solicit and review proposals for services from out-of-state medical and ancillary service providers. See Affidavit of Alex Sellars, Exhibit 3 ¶¶ 3-6; see also Towles v.

United HealthCare Corp., 338 S.C. 29, 36, 524 S.E.2d 839, 843 (Ct. App. 1999) (holding that attendance at out-of-state conferences and reviewing proposals from out-of-state medical and ancillary service providers constitutes sufficient evidence of interstate commerce).

Secondly, the Affidavit of Alex Sellars evidences the fact that a wide variety of supplies used in the provision of services to Patient Parrish were purchased and shipped to Defendant from out-of-state. For example, Defendant purchased medical supplies, maintenance equipment, bedding supplies, dietary supplies, linen, food, and office supplies, among other items, from out-of-state sources. These purchases of goods and services, acquired through interstate commerce for use in the care of Patient Parrish, satisfy the requirements for application of the FAA. Sellars Aff., Ex. 3 ¶ 7; see also Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (finding nursing home services did, in fact, involve interstate commerce and stating that “nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors”); Soil Remediation Co. v. Nu-Way Environ., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (holding that the interstate commerce requirement was met where the nature of the transaction involved interstate commerce and numerous items specified were, in fact, purchased and shipped from outside of South Carolina).

Third, as an elder care service provider, Defendant NHC is directly regulated by federal law, and Defendant NHC receives federal funds. Specifically, Defendant NHC received federal funds for the care of Patient Parrish.⁵ Sellars Aff., Ex. 3 ¶ 8. As a result, during Patient Parrish’s

⁵See, e.g., In re Nexion Health at Humble, Inc., 173 S.W.3d 67, 69 (Tex. 2005) (holding that Medicare payments made to the healthcare center on patient’s behalf were “interstate commerce,” thereby bringing the contract between the patient and the healthcare center within the scope of the FAA); Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 987–88 (Ala. 2004) (finding that the receipt of Medicare or Medicaid payments evidenced a transaction involving interstate commerce).

residency at NHC-Garden City, monies from the federal government were used to pay all or some of the Patient's expenses. See, e.g., Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E.2d 360 (2001) (relying on disbursement of loan proceeds from out-of-state bank as evidence of interstate commerce).

CONCLUSION

For the reasons set forth herein, this Court should enforce the terms and conditions of the Arbitration Agreement against Plaintiff and grant Defendant's Motion to Dismiss and Compel Arbitration.

Respectfully submitted,

s/Marian Williams Scalise

Marian Williams Scalise, Esquire (SC Bar No. 6744)

Lydia L. Magee, Esquire (SC Bar No. 16584)

Richardson, Plowden & Robinson, P.A.

2103 Farlow Street, P. O. Box 3646

Myrtle Beach, SC 29578

(843) 443-3581

mscalise@richardsonplowden.com

lmagee@richardsonplowden.com

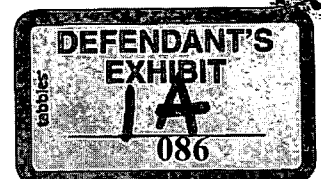
Attorneys for Defendant NHC Healthcare/Garden City,
LLC

January 25, 2019.

Myrtle Beach, South Carolina

Admission and Financial Agreement

AFA-200
Revised 07/15



Name of Patient Kathryn Tarrish
 Social Security Number [REDACTED]
 Name of Legal Representative (if applicable) _____
 Additional Signature (if applicable) _____

PRELIMINARY STATEMENTS:

Patient acknowledges that this Center participates in the Medicare and Medicaid Program as a service to Patients on a voluntary and limited basis, and that the Center may limit or terminate its participation in this program at its discretion upon appropriate notice to all affected parties.

Patient acknowledges that all references to "Center" in this agreement are references not only to Center's trade name, but to its legal entity, which is

National Healthcare Garden City, LLC
 Identification of Legal Representative [if applicable]:

The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

☒ Confirm Legal Representative information from Preadmission Agreement.

TYPE (check one)

- ☒ Guardianship
☐ Limited, Durable POA
☐ Unlimited/Durable POA
☐ Power of Attorney
☐ Health Care Agent/Proxy
☐ Surrogate

SCOPE (check all that apply)

- ☒ Routine healthcare
☒ Unlimited healthcare
☐ Limited access to income/finance
☐ Authorized to accept income and control financial resources of patient

Attach a copy of all written authorizations to this agreement.

NOW, THEREFORE, in consideration of the prompt payment by the Patient (and the applicable state, federal, or private insurance program) of the charges made to the Patient's account in accordance with the charge structure of the Center, and in further consideration of the mutual covenants and promises herein, the parties agree as follows:

CENTER CHARGE STRUCTURE:

1. The charges made to you by this Center are:

a. Daily Rate for Room and Board:

Semi-private accommodations from 234.00 to _____

Private accommodations from 264.00 to _____

Your room and board rate for accommodations selected: \$ 234.00 per day.

b. Personal Laundry Services: 1.10 per day

Requested: ☒ Yes ☐ No

c. Specialized Therapy, Central Supply and Pharmacy charges are available.

In the event it becomes necessary to change this charge structure the Center agrees to give thirty (30) days notice. Advance notice of other changes will be made whenever possible as required by state law.

2. Daily Rate Includes:

The routine daily rate includes room and board, routine nursing services, routine social services, activities, routine restoration services, housekeeping and maintenance.

3. Subject to Additional Charge:

Treatments by licensed therapists, such as physical therapy, speech therapy, occupational therapy; personal laundry service; beauty and barber services; medications ordered by physician; over the counter medications; central supply items ordered and/or used by particular Patient; special equipment; oxygen, IV fluids, braces, splints and laboratory work ordered by the physician, are subject to additional charge by the Center.

4. Services Billed Separate and Apart From Center Charges:

Physician charges and any services furnished to the Patient as physician requested consultation, including but not limited to dental services, podiatry, optometry, audiology or mental health services are billed directly to Patient by provider of service.

Sitters and private duty nurses are allowed at the Center only if said sitter or private duty nurse complies with all applicable Rules and Regulations of the Center. Any sitter or private duty nurse must be approved by the Center and can be removed from the premises by Center without reason at any time. The financial arrangement with such persons is private.

It may be necessary for the Patient to arrange bedside telephone, in room television, and/or in room cable television. The Center maintenance department will provide the specifications of the Center for installation.

Dry cleaning, personal shopping, clothing with proper identification and clothing repair are the responsibility of the Patient.

5. Bed Reservations:

Rooms may be reserved for Patients absent from the Center at the request of the Patient and/or family provided the usual room and board rate is paid to hold the room.

In the event the Patient/family chooses not to reserve a bed by paying the usual rate, there is no assurance an appropriate bed will be available if the Patient wishes to return.

6. Failure to pay:

Failure to pay an account at the Center when due is a breach of this agreement and will allow Center to discharge Patient upon giving a 30 day written notice, during which 30 day period the breach may be cured by payment of the account in full.

7. Payment in Advance:

It is the policy of this Center to collect payment for room and board 30 days in advance.

Patient hereby makes payment in advance of \$ 0.

If Medicare or Medicaid coverage as determined by Center's professional staff is expected or other private insurance benefits are assigned to the Center, Patient must pay in advance only that portion of expected charges specifically not covered by plan(s).

Patient expecting Medicare coverage specifically understands that Medicare coinsurance is the responsibility of the Patient. Payment of coinsurance is required. Payment is not expected until services are rendered.

and not needed to cover charges. The refund will be made as soon as practicable, not to exceed number of days required by state and never more than 60 days following month of discharge and/or settling of account.

Note: Medicare, Medicaid and Private Insurance accounts sometimes take several months to resolve. Refunds contingent upon insurance payments will be made within 30 days of resolution of claim. Monies held for a Patient in trust will be paid to Patient's estate within 30 days of death.

9. Insurance Coverage:

When the Center has determined that the Patient is eligible for insurance benefits, including but not limited to Medicare it will submit a claim for payment. Pre-certification of Insurance, if required, is the responsibility of the Patient.

The fact that the Center submits a claim for payment does not relive the Patient from liability for the cost of care for any days determined by the Program Administrators as non covered, or for the Patient's portion of the liability as determined by the appropriate program administrators.

a. Medicare Coverage

Medicare Part A pays for the following services when medically necessary except when another payment source is primary:

- Room and Board
- Specialized rehabilitation services: Physical, Speech, Occupational and Respiratory Therapies
- Medications ordered by physician
- Ancillary Central Supply items including certain special equipment such as air fluidized beds
- Oxygen, IV Fluids, Braces
- Basic Personal Laundry
- Certain Personal Hygiene Items
- Over the counter drugs

Medicare Part B pays 80% of the cost of certain services within program limitations as provided with consent of the Patient:

- Specialized Rehabilitation Services when Part A unavailable up to limits defined by Medicare.
- Physician services and certain physician ordered consultations.
- Prosthetic items when Part A unavailable

Medicare Part A does not pay for the following services which are subject to charge if requested by Patient:

- Private Room differential (if not medically necessary)
- Beauty and Barber services
- Telephone or Television
- Private duty nurses and sitters
- Payment to hold bed when Patient hospitalized
- Services determined not to meet Medicare coverage criteria, and the
- Patient has been so notified in writing by the Center

Agree to accept assignment of the following policy: BUS

Benefit explanation _____

Patient hereby assigns the private health insurance benefits here listed and available to Patient to Center.

Signature: _____ (Insured)

Legal Representative: X Charmaine

Additional Signature (if applicable): Guardian/Daughter

Patient specifically acknowledges that Center agreement to accept assignment of private health insurance does not relieve the Patient of the responsibility for payment for services rendered. Furthermore, should private insurance claim not be paid within 60 days of submission, the Patient specifically agrees to pay account in full upon request by Center.

c. Medicaid Coverage

Patient ☐ has ☒ has not applied for Medicaid eligibility.

If patient has applied they will receive a Medicaid guidebook.

d. Veterans Administration Coverage

Where contradictions exist between this Admission Agreement and the VA Contract, a Patient's VA Contract takes precedence until its expiration at which time all terms of this Admission Agreement apply.

PATIENT RESPONSIBILITIES:

1. Promptly pay all charges in accordance with this agreement.
2. Providing such personal clothing and effects as needed or desired by Patient.
3. Providing all "non-medically" necessary transportation, including transport to appointments in physician office.
4. Paying all costs, expenses and a reasonable attorney's fee incurred by Center in the collection of any and all sums due and owing by the Patient (including judicial and arbitrator awards), plus a service charge equal to the highest rate permitted by law, not to exceed 1% per month for all accounts over 30 days.
5. It is the responsibility of Patient to give advance notice when Patient is terminating this agreement, except when prevented by Patient's medical condition.
6. Abiding by the Rules and Regulations established from time to time in connection with the operation and maintenance of the Center.

agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the re-admission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

AGREEMENT TERMINATION:

This agreement can be terminated by Patient upon the giving of notice to the Center and this agreement can be terminated by Center upon the giving of 30 days written notice to Patient, in accordance with the licensure laws of this state and applicable Medicare/Medicaid regulations.

LEGAL COMPLIANCE:

Center complies with all Federal and State civil rights and non-discrimination laws, rules and regulations. Patients are admitted without regard to sex, age, race, religion, or physical handicap, if any.

ACKNOWLEDGEMENT:

Patient and other parties signing this agreement have reviewed this ADMISSION AND FINANCIAL AGREEMENT, have had opportunity to ask questions of Center personnel about the agreement and understand that admission to this Center constitutes agreement to be bound by said ADMISSION AND FINANCIAL AGREEMENT.

THE CENTER:

Justin Powell
By Administrator/Social Worker

Date 6/21/17

THE PATIENT:

DX Dementia
By Patient

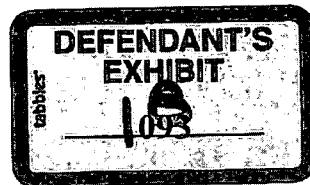
Date 6/21/17

Other Persons Signing on Behalf of Patient
(please specify authority to sign):

X Christopher
Guardian/Daughter

JS 7/11/17
Administrator Review
(initial and date)

Admission and Financial Agreement



ADMISSION AND FINANCIAL AGREEMENT

Name of Center _____
Name of Patient _____
Social Security Number _____
Name of Legal Representative (if applicable) _____
Additional Signature (if applicable) _____

PRELIMINARY STATEMENTS:

Patient acknowledges that this Center participates in the Medicare and Medicaid Program as a service to Patients on a voluntary and limited basis, and that the Center may limit or terminate its participation in this program at its discretion upon appropriate notice to all affected parties.

Patient acknowledges that all references to "Center" in this agreement are references not only to Center's trade name, but to its legal entity, which is

Identification of Legal Representative [if applicable]:

The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

☐ Confirm Legal Representative information from Preadmission Agreement.

TYPE (check one)

- ☐ Guardianship
- ☐ Limited, Durable POA
- ☐ Unlimited/Durable POA
- ☐ Power of Attorney
- ☐ Health Care Agent/Proxy
- ☐ Surrogate

SCOPE (check all that apply)

- ☐ Routine healthcare
- ☐ Unlimited healthcare
- ☐ Limited access to income/finance
- ☐ Authorized to accept income and control financial resources of patient

Attach a copy of all written authorizations to this agreement.

NOW, THEREFORE, in consideration of the prompt payment by the Patient (and the applicable state, federal, or private insurance program) of the charges made to the Patient's account in accordance with the charge structure of the Center, and in further consideration of the mutual covenants and promises herein, the parties agree as follows:

CENTER CHARGE STRUCTURE:

1. The charges made to you by this Center are:

a. Daily Rate for Room and Board:

Semi-private accommodations from _____ to _____.

Private accommodations from _____ to _____.

Your room and board rate for accommodations selected: \$ _____ per day.

b. Personal Laundry Services: _____ per day

Requested: ☐ Yes ☐ No

c. Specialized Therapy, Central Supply and Pharmacy charges are available.

FINANCIAL AGREEMENTS:**1. Notification of Changes in Rates:**

In the event it becomes necessary to change this charge structure the Center agrees to give thirty (30) days notice. Advance notice of other changes will be made whenever possible as required by state law.

2. Daily Rate Includes:

The routine daily rate includes room and board, routine nursing services, routine social services, activities, routine restoration services, housekeeping and maintenance.

3. Subject to Additional Charge:

Treatments by licensed therapists, such as physical therapy, speech therapy, occupational therapy; personal laundry service; beauty and barber services; medications ordered by physician; over the counter medications; central supply items ordered and/or used by particular Patient; special equipment; oxygen, IV fluids, braces, splints and laboratory work ordered by the physician, are subject to additional charge by the Center.

4. Services Billed Separate and Apart From Center Charges:

Physician charges and any services furnished to the Patient as physician requested consultation, including but not limited to dental services, podiatry, optometry, audiology or mental health services are billed directly to Patient by provider of service.

Sitters and private duty nurses are allowed at the Center only if said sitter or private duty nurse complies with all applicable Rules and Regulations of the Center. Any sitter or private duty nurse must be approved by the Center and can be removed from the premises by Center without reason at any time. The financial arrangement with such persons is private.

It may be necessary for the Patient to arrange bedside telephone, in room television, and/or in room cable television. The Center maintenance department will provide the specifications of the Center for installation.

Dry cleaning, personal shopping, clothing with proper identification and clothing repair are the responsibility of the Patient.

5. Bed Reservations:

Rooms may be reserved for Patients absent from the Center at the request of the Patient and/or family provided the usual room and board rate is paid to hold the room.

In the event the Patient/family chooses not to reserve a bed by paying the usual rate, there is no assurance an appropriate bed will be available if the Patient wishes to return.

6. Failure to pay:

Failure to pay an account at the Center when due is a breach of this agreement and will allow Center to discharge Patient upon giving a 30 day written notice, during which 30 day period the breach may be cured by payment of the account in full.

7. Payment in Advance:

It is the policy of this Center to collect payment for room and board 30 days in advance.

Patient hereby makes payment in advance of \$ _____.

If Medicare or Medicaid coverage as determined by Center's professional staff is expected or other private insurance benefits are assigned to the Center, Patient must pay in advance only that portion of expected charges specifically not covered by plan(s).

Patient expecting **Medicare** coverage specifically understands that Medicare coinsurance is the responsibility of the Patient. **Payment of coinsurance is required. Payment is not expected until services are rendered.**

8. Refunds:

This Center will refund to the Patient or legal representative any payment collected in advance and not needed to cover charges. The refund will be made as soon as practicable, not to exceed number of days required by state and never more than 60 days following month of discharge and/or settling of account.

Note: Medicare, Medicaid and Private Insurance accounts sometimes take several months to resolve. Refunds contingent upon insurance payments will be made within 30 days of resolution of claim. Monies held for a Patient in trust will be paid to Patient's estate within 30 days of death.

9. Insurance Coverage:

When the Center has determined that the Patient is eligible for insurance benefits, including but not limited to Medicare it will submit a claim for payment. Pre-certification of Insurance, if required, is the responsibility of the Patient.

The fact that the Center submits a claim for payment does not relieve the Patient from liability for the cost of care for any days determined by the Program Administrators as non covered, or for the Patient's portion of the liability as determined by the appropriate program administrators.

a. Medicare Coverage

Medicare Part A pays for the following services when medically necessary except when another payment source is primary:

- Room and Board
- Specialized rehabilitation services: Physical, Speech, Occupational and Respiratory Therapies
- Medications ordered by physician
- Ancillary Central Supply items including certain special equipment such as air fluidized beds
- Oxygen, IV Fluids, Braces
- Basic Personal Laundry
- Certain Personal Hygiene Items
- Over the counter drugs

Medicare Part B pays 80% of the cost of certain services within program limitations as provided with consent of the Patient:

- Specialized Rehabilitation Services when Part A unavailable up to limits defined by Medicare.
- Physician services and certain physician ordered consultations.
- Prosthetic items when Part A unavailable

Medicare Part A does not pay for the following services which are subject to charge if requested by Patient:

- Private Room differential (if not medically necessary)
- Beauty and Barber services
- Telephone or Television
- Private duty nurses and sitters
- Payment to hold bed when Patient hospitalized
- Services determined not to meet Medicare coverage criteria, and the
- Patient has been so notified in writing by the Center

THIS SECTION MUST BE COMPLETED IF PATIENT HAS A MEDICARE CARD OR NUMBER:

mark (a) for Patient placed in Medicare certified bed.

mark (a) & (b) for Patient placed in a bed certified for Medicare and Medicaid

mark (c) for Patient placed in non-Medicare certified bed.

a. ___ If the Patient has a Medicare card or number, then the Patient acknowledges that an explanation as to the Patient's eligibility for Medicare benefits on this admission has been fully made and understood by Patient. It is the professional judgment of this Center that Patient's care will ___ will not ___ be covered by Medicare.

___ Not technically qualified for Medicare because

___ Medically not qualified. Letter with non-coverage explanation attached.

b. ___ Patient placed in bed certified for both Medicare and Medicaid acknowledges that a change to a lower level of care renders patient subject to assignment to any nursing center certified bed in the center.

c. ___ In the event you are placed in a bed not certified for Medicare, Patient acknowledges that Center has explained that services furnished in a non-certified bed are not payable by Medicare.

Placement in non-certified bed is the result of

- ☐ free choice of Patient/family waiving any right to Medicare payment
- ☐ medically and technically qualified for Medicare, awaiting availability of first open Medicare certified bed
- ☐ not technically qualified for Medicare payment because
- ___
- ☐ medically not qualified. Letter with non-coverage explanation attached

I ☐ do ☐ do not request that a "Medicare demand bill" be submitted to the Medicare intermediary.
☐ N/A (if Medicare is primary).

Patient understands that Patient or someone acting on Patient's behalf may request that the Center file a claim for Medicare benefits. Based upon this claim, Medicare will make a formal determination and advise whether any benefits are payable.

Patient Signature _____

Legal Representative Signature _____

Additional Signature (if applicable) _____

Date _____

Medicare Utilization Review: The Center continues to monitor the Patient's progress, reporting to the Patient's physician and to the physicians belonging to the Center's Utilization Review Committee. This committee will determine the medical necessity for and the effectiveness of the treatment the Patient receives, determining ongoing Medicare coverage.

This is your notification of the dates these reviews are scheduled and to assure you that there will be an opportunity for your attending physician to participate in the decision. The Utilization Review Committee meets every _____ and also every _____.

b. Private Insurance

The Center accepts assignment of certain private health insurance benefits, and has agreed to accept assignment of the following policy: _____

Benefit explanation _____

Patient hereby assigns the private health insurance benefits here listed and available to Patient to Center.

Signature: _____ (Insured)

Legal Representative: _____

Additional Signature (if applicable): _____

Patient specifically acknowledges that Center agreement to accept assignment of private health insurance does not relieve the Patient of the responsibility for payment for services rendered. Furthermore, should private insurance claim not be paid within 60 days of submission, the Patient specifically agrees to pay account in full upon request by Center.

c. Medicaid Coverage

Patient ☐ has ☐ has not applied for Medicaid eligibility.

If patient has applied they will receive a Medicaid guidebook.

d. Veterans Administration Coverage

Where contradictions exist between this Admission Agreement and the VA Contract, a Patient's VA Contract takes precedence until its expiration at which time all terms of this Admission Agreement apply.

PATIENT RESPONSIBILITIES:

1. Promptly pay all charges in accordance with this agreement.
2. Providing such personal clothing and effects as needed or desired by Patient.
3. Providing all "non-medically" necessary transportation, including transport to appointments in physician office.
4. Paying all costs, expenses and a reasonable attorney's fee incurred by Center in the collection of any and all sums due and owing by the Patient (including judicial and arbitrator awards), plus a service charge equal to the highest rate permitted by law, not to exceed 1% per month for all accounts over 30 days.
5. It is the responsibility of Patient to give advance notice when Patient is terminating this agreement, except when prevented by Patient's medical condition.
6. Abiding by the Rules and Regulations established from time to time in connection with the operation and maintenance of the Center.

RE-ADMISSION ACKNOWLEDGEMENT:

Patient and Legal Representative agree that all terms, conditions and consents in this agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the re-admission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

AGREEMENT TERMINATION:

This agreement can be terminated by Patient upon the giving of notice to the Center and this agreement can be terminated by Center upon the giving of 30 days written notice to Patient, in accordance with the licensure laws of this state and applicable Medicare/Medicaid regulations.

LEGAL COMPLIANCE:

Center complies with all Federal and State civil rights and non-discrimination laws, rules and regulations. Patients are admitted without regard to sex, age, race, religion, or physical handicap, if any.

ACKNOWLEDGEMENT:

Patient and other parties signing this agreement have reviewed this **ADMISSION AND FINANCIAL AGREEMENT**, have had opportunity to ask questions of Center personnel about the agreement and understand that admission to this Center constitutes agreement to be bound by said **ADMISSION AND FINANCIAL AGREEMENT**.

THE CENTER:**THE PATIENT:**_____
By Administrator/Social Worker_____
By Patient

Date _____

Date _____

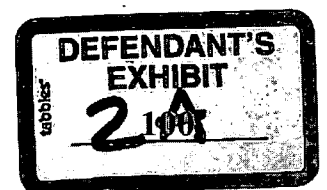
Other Persons Signing on Behalf of Patient
(please specify authority to sign):

Administrator Review
(initial and date)

Admission Documents

1. Preadmission Agreement
2. Agreement to Arbitrate
and Waive Jury Trial

AFA/Preadmission-200
Revised 10/14



Name of Center IVATIONAL HEALTHCARE Garden City, LLC
 Name of Patient Kathryn Parrish
 Social Security Number [REDACTED]
 Name of Legal Representative (if applicable) Cleo M Bertaux "Tez"
 Additional Signature (if applicable) [Signature]

PRELIMINARY STATEMENTS:

Patient individually or by and through Patient's Legal Representative (hereafter collectively referred to as Patient) has considered appropriate care settings and is desirous of receiving care at this Center; and

Center is a licensed nursing facility and will provide the services set forth below in accordance with the standards of the industry, none of which cause the Center to become an insurer nor guarantor of the health and safety of the Patient, or for that matter, the insurer or guarantor of the Patient's personal property.

Identification of Legal Representative [if applicable]:

The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

TYPE (check one)

- ☒ Guardianship
☐ Limited, Durable POA
☐ Unlimited/Durable POA
☐ Power of Attorney
☐ Health Care Agent/Proxy
☐ Surrogate

SCOPE (check all that apply)

- ☐ Routine health care
☐ Unlimited health care
☐ Limited access to income/finance
☒ Authorized to accept income and control financial resources of patient

The Legal Representative, by signing this contract, acknowledges acceptance of the duties and responsibilities of this role. The Legal Representative who is authorized to accept the Patient's finances will not incur personal financial liability except for breach of duty or contract in properly directing the Patient's resources to pay for the Patient's care.

Attach a copy of all written authorizations to this agreement.

PATIENT CONSENTS AND ACKNOWLEDGEMENTS:

1. The Patient hereby consents to all routine nursing home care rendered in accordance with physician's orders.
2. The Patient consents to pictures taken for identification purposes only.
3. The Patient declares that he or she retains capacity and is competent, has never been adjudged or determined to lack capacity or competence, and knows of no petition pending to adjudicate his or her lack of capacity or competence. Alternatively, if the Patient has been or should be deemed to lack capacity or competence, then Patient's Legal Representative declares that he or she has been given authority by the Patient when competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care and concern for the Patient, familiarity with the Patient's personal values, reasonable availability, and willingness to serve.

4. Patient acknowledges that nursing services do not include continuous one-on-one care and that the caregivers in the Center are responsible for multiple patients. The Patient and/or Legal Representative acknowledges that the Patient Rights Booklet contains a Grievance Procedure that provides certain steps that may be taken if the patient is not receiving the degree of care which meets the Patient's and/or Legal Representative's expectations. The Patient and/or Legal Representative further acknowledges they have the right to either pay for additional care through the use of private-duty personnel or to remove the Patient from the center as provided in Transfer and Discharge section of the Patient's Rights booklet.
5. Patient certification and authorization to release information and payment request:
- I certify that the information given by me in applying for payment under Title XVIII of the Social Security Act or my private insurance is correct. I request that payment of authorized benefits be made on my behalf.
 - I hereby authorize the Center, its officers and partners, to release to any third party payor (such as an insurance company or governmental agency, i.e., Blue Cross/Blue Shield or Medicare/Medicaid) any medical, mental health/psychiatric, alcohol, drug abuse, and/or HIV (AIDS) treatment information, records, diagnoses, in accordance with the policy of the Center and any applicable State or Federal Statutes, concerning diagnosis and treatment for this admission when requested by such third party payor for its use in connection with determining a claim for payment for treatment and/or diagnosis. I do hereby release the Center from all liability that may arise from the release of the information requested.
 - I hereby consent to having the agency processing any eligibility application I have made to release information regarding the status of my application whether pending, denied or approved to the bookkeeper or social services department of this Center.
 - I hereby consent to the release by other healthcare providers of all my medical records and medical information to the Center and its representatives, and I further consent to such healthcare providers speaking to the Center and its representatives regarding my medical conditions and treatment.

RE-ADMISSION ACKNOWLEDGEMENT:

Patient and Legal Representative agree that all terms, conditions and consents in this agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the readmission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

AGREEMENT TERMINATION:

This agreement can be terminated by Patient upon the giving of notice to the Center and this agreement can be terminated by Center upon the giving of 30 days written notice to Patient, in accordance with the licensure laws of this state and applicable Medicare/Medicaid regulations.

LEGAL COMPLIANCE:

Center complies with all Federal and State civil rights and non-discrimination laws, rules and regulations. Patients are admitted without regard to sex, age, race, religion, or physical handicap, if any.

... parties signing this agreement have reviewed this PREADMISSION AGREEMENT, have had the opportunity to ask questions of Center personnel about the agreement, understand that admission to this Center constitutes agreement to be bound by said PREADMISSION AGREEMENT, and acknowledge they will be asked to review and sign the Admission and Financial Agreement within 72 hours of admission to Center.

THE CENTER:

By Administrator/Social Worker

Date

6/21/17

Administrator Review
(initial and date)

JD 7/11/17

THE PATIENT:

By Patient

Date

6/21/17

Other Persons Signing on Behalf of Patient
(Please specify authority to sign):

X Chomp Buhang
Guardian / Daughter

In order to minimize the time and costs of resolving all disputes, both parties agree, depending on the amount in the dispute, to either:

- submit the dispute to this state's small claims court, or
- if the amount exceeds the small claims court statutory limits as later defined, then submit to binding arbitration.
- if it is determined by a court of law that the arbitration agreement is invalid, then waive their right to a jury trial and consent to a trial by the court.

Arbitration is a method of resolving disputes without the substantial time and expense of using the judicial system. Since the arbitration procedure is private rather than public, it can help protect privacy and dignity concerning the sensitive issues that sometimes arise. An arbitration hearing takes only months to schedule, while civil litigation may take years to complete. By avoiding the judicial system, many costs are eliminated. There are charges and fees involved in arbitration, but an arbitration hearing will almost always resolve a dispute sooner and at less cost than a trial when the dispute exceeds the jurisdiction of this state's small claims court.

It is important to understand, however, that there is only a limited right to appeal an arbitration award. Unless there is evidence of fraud on the part of the arbitrator or a serious procedural defect, an arbitration award will be final. Of course, the Center also agrees to be bound by the arbitrator's decision.

BY SIGNING THIS AGREEMENT, BOTH PARTIES ARE WAIVING THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL AND CONSENTING TO BINDING ARBITRATION, OR IF THE AGREEMENT TO ARBITRATE IS INVALID, TO TRIAL BY THE COURT WITHOUT A JURY.

This is an Agreement to arbitrate any dispute that might arise between

Kathryn Parrish ("Patient") National Healthcare Garden City, LLC and ("Center").
The Patient/Legal Representative acknowledges that the Patient Rights Booklet contains a Grievance Procedure that provides certain steps that may be taken if the Patient is not receiving the degree of care which meets the Patient's/Legal Representative's expectations.

The parties shall submit to binding arbitration all disputes against each other and their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient's stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined. The parties agree that each may bring claims against the other only in an individual capacity and not as a plaintiff or class member in any purported class or representative proceeding.

Revised 10/14

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arbitration agreement. In rendering a decision on the merits of the dispute, the arbitrator shall apply the substantive law of the state in which the center is located. The arbitrator's fees and expenses will be paid by the center, but the arbitrator shall have the discretion to tax any unreasonable costs attributable to the Patient/Legal Representative to that party.

The party initiating arbitration shall serve upon the other party via certified mail a demand for arbitration, which should include a brief description of the claim, the relief sought, and a proposed arbitrator who must be neutral, experienced, and disinterested. This arbitrator shall serve unless the non-initiating party provides written objection via certified mail to the other party within ten (10) business days of the notice or demand of intent to arbitrate and suggests an alternate, neutral, experienced, and disinterested arbitrator. The arbitrator proposed by the non initiating party shall serve as the arbitrator, unless the initiating party provides written objection via certified mail to the non-initiating party's suggestion. If both parties object as provided above, then a neutral, experienced, and disinterested arbitrator will be selected by a judge of the court which serves the county in which the center is located and which would have subject matter jurisdiction of the dispute. Each party may be represented by counsel in connection with all arbitration proceedings. Any arbitration hearing arising under this Agreement shall be held in the county in which the Center is located. In conducting the hearing and all other proceedings relative to the arbitration of the dispute, the arbitrator shall apply the rules of civil procedure and the rules of evidence of the state where the Center is located, unless otherwise agreed by the parties. The arbitrator shall, however, have the discretion and authority to reasonably limit discovery upon the request of any party.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Center to the Patient, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Center or received by the Patient, and is not presented in the arbitration proceeding. The Agreement to Arbitrate shall survive and not otherwise be revoked by the death or incompetency of Patient. The judgment rendered by the arbitrator may be entered in any court having jurisdiction thereof.

ACKNOWLEDGEMENTS

The Patient declares that he or she retains capacity and is competent, has never been adjudged or determined to lack capacity or competence, and knows of no petition pending to adjudicate his or her lack of capacity or competence. Alternatively, if the Patient has been or should be deemed to lack capacity or competence, then Patient's Legal Representative declares that he or she has been given authority by the Patient when competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care and concern for the Patient, familiarity with the Patient's personal values, reasonable availability, and willingness to serve.

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opportunity to ask questions of Center personnel about the Agreement

The Patient and/or Legal Representative understands that this Agreement may be revoked by signing the revocation provision set forth below during normal business hours within ten (10) business days of the admission. If not revoked, this Agreement shall remain in effect for all claims arising out of the Patient's stay at the Center. If the acts or events underlying the dispute are committed prior to any such revocation, then this Agreement shall be binding with respect to such acts or events.

The parties agree that any claim, controversy, dispute or disagreement within the following statutory limits, and as subsequently modified by the appropriate legislative body, shall be resolved through the state's lower court system, without a jury:

AL (District)	\$3,000	SC (Magistrate)	\$7,500
GA (Magistrate)	\$15,000	KY (Small Claims)	\$1,500
MO (Associates Circuit)	\$25,000	NH (District)	\$5,000
TN (General Sessions)	\$25,000	VA (Small Claims)	\$5,000

If a party overlooks the obligation to arbitrate any dispute and participates in litigating the matter in the court system, such party will not be deemed to have waived the right to compel arbitration assuming the motion to compel arbitration is served before the first day of trial.

The parties agree that the arbitration process and the arbitration reward may remain confidential. In the event that any portion of the Agreement is determined to be invalid or unenforceable, the remainder of this Agreement will continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement.

Patient and Legal Representative agree that all terms, conditions and consents in this Agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the readmission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

X CUB
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ARBITRATE AND WAIVE JURY TRIAL AND UNDERSTAND THAT BY SIGNING THIS AGREEMENT, THEY HAVE WAIVED THE RIGHT TO A TRIAL BEFORE A JURY, AND THAT THEY VOLUNTARILY CONSENT TO ALL OF THE TERMS OF THIS AGREEMENT.

THE PATIENT:

Dx Dementia
By Patient

Date: _____
Other Persons Signing on Behalf of Patient
(please specify authority to sign)

X Al M Bates
Guardian / Daughter
Date: 6/21/17

THE CENTER:

[Signature]
By Administrator/Social Worker

Date: 6/21/17

REVOCATION OF ARBITRATION PROVISION

By signing the original Agreement on file at the Center, I/we (all who signed above must sign below within ten (10) business days of the admission to effectuate the revocation) hereby revoke the agreement to arbitrate set forth above.

Patient's Signature

Date _____

Legal Representative's Signature

Date _____

Additional Signature (If Applicable)

Date _____

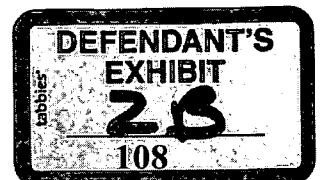
Administrator's Signature

Date _____

AS 7/11/17
Administrator Review
(initial and date)

Admission Documents

- 1. Preadmission Agreement**
- 2. Agreement to Arbitrate
and Waive Jury Trial**



PREADMISSION AGREEMENT

Name of Center _____

Name of Patient _____

Social Security Number _____

Name of Legal Representative (if applicable) _____

Additional Signature (if applicable) _____

PRELIMINARY STATEMENTS:

Patient individually or by and through Patient's Legal Representative (hereafter collectively referred to as Patient) has considered appropriate care settings and is desirous of receiving care at this Center; and

Center is a licensed nursing facility and will provide the services set forth below in accordance with the standards of the industry, none of which cause the Center to become an insurer nor guarantor of the health and safety of the Patient, or for that matter, the insurer or guarantor of the Patient's personal property.

Identification of Legal Representative [if applicable]:

The legal representative is anyone authorized by the Patient or by law to act on the Patient's behalf. Please check the type and scope of authority for anyone other than the Patient who signs this contract:

TYPE (check one)

- ☐ Guardianship
☐ Limited, Durable POA
☐ Unlimited/Durable POA
☐ Power of Attorney
☐ Health Care Agent/Proxy
☐ Surrogate

SCOPE (check all that apply)

- ☐ Routine health care
☐ Unlimited health care
☐ Limited access to income/finance
☐ Authorized to accept income and control financial resources of patient

The Legal Representative, by signing this contract, acknowledges acceptance of the duties and responsibilities of this role. The Legal Representative who is authorized to accept the Patient's finances will not incur personal financial liability except for breach of duty or contract in properly directing the Patient's resources to pay for the Patient's care.

Attach a copy of all written authorizations to this agreement.

PATIENT CONSENTS AND ACKNOWLEDGEMENTS:

1. The Patient hereby consents to all routine nursing home care rendered in accordance with physician's orders.
2. The Patient consents to pictures taken for identification purposes only.
3. The Patient declares that he or she retains capacity and is competent, has never been adjudged or determined to lack capacity or competence, and knows of no petition pending to adjudicate his or her lack of capacity of competence. Alternatively, if the Patient has been or should be deemed to lack capacity or competence, then Patient's Legal Representative declares that he or she has been given authority by the Patient when competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care and concern for the Patient, familiarity with the Patient's personal values, reasonable availability, and willingness to serve.

PATIENT CONSENTS AND ACKNOWLEDGEMENTS: (cont.)

4. Patient acknowledges that nursing services do not include continuous one-on-one care and that the caregivers in the Center are responsible for multiple patients. The Patient and/or Legal Representative acknowledges that the Patient Rights Booklet contains a Grievance Procedure that provides certain steps that may be taken if the patient is not receiving the degree of care which meets the Patient's and/or Legal Representative's expectations. The Patient and/or Legal Representative further acknowledges they have the right to either pay for additional care through the use of private-duty personnel or to remove the Patient from the center as provided in Transfer and Discharge section of the Patient's Rights booklet.
5. Patient certification and authorization to release information and payment request:
 - a. I certify that the information given by me in applying for payment under Title XVIII of the Social Security Act or my private insurance is correct. I request that payment of authorized benefits be made on my behalf.
 - b. I hereby authorize the Center, its officers and partners, to release to any third party payor (such as an insurance company or governmental agency, i.e., Blue Cross/Blue Shield or Medicare/Medicaid) any medical, mental health/psychiatric, alcohol, drug abuse, and/or HIV (AIDS) treatment information, records, diagnoses, in accordance with the policy of the Center and any applicable State or Federal Statutes, concerning diagnosis and treatment for this admission when requested by such third party payor for its use in connection with determining a claim for payment for treatment and/or diagnosis. I do hereby release the Center from all liability that may arise from the release of the information requested.
 - c. I hereby consent to having the agency processing any eligibility application I have made to release information regarding the status of my application whether pending, denied or approved to the bookkeeper or social services department of this Center.
 - d. I hereby consent to the release by other healthcare providers of all my medical records and medical information to the Center and its representatives, and I further consent to such healthcare providers speaking to the Center and its representatives regarding my medical conditions and treatment.

RE-ADMISSION ACKNOWLEDGEMENT:

Patient and Legal Representative agree that all terms, conditions and consents in this agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the readmission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

AGREEMENT TERMINATION:

This agreement can be terminated by Patient upon the giving of notice to the Center and this agreement can be terminated by Center upon the giving of 30 days written notice to Patient, in accordance with the licensure laws of this state and applicable Medicare/Medicaid regulations.

LEGAL COMPLIANCE:

Center complies with all Federal and State civil rights and non-discrimination laws, rules and regulations. Patients are admitted without regard to sex, age, race, religion, or physical handicap, if any.

ACKNOWLEDGEMENT:

Patient and other parties signing this agreement have reviewed this PREADMISSION AGREEMENT, have had the opportunity to ask questions of Center personnel about the agreement, understand that admission to this Center constitutes agreement to be bound by said PREADMISSION AGREEMENT, and acknowledge they will be asked to review and sign the Admission and Financial Agreement within 72 hours of admission to Center.

THE CENTER:

By Administrator/Social Worker

Date _____

Administrator Review
(initial and date)

THE PATIENT:

By Patient

Date _____

Other Persons Signing on Behalf of Patient
(Please specify authority to sign):

AGREEMENT TO ARBITRATE AND WAIVE JURY TRIAL

EXPLANATION

In order to minimize the time and costs of resolving all disputes, both parties agree, depending on the amount in the dispute, to either:

- a. submit the dispute to this state's small claims court, or
- b. if the amount exceeds the small claims court statutory limits as later defined, then submit to binding arbitration.
- c. if it is determined by a court of law that the arbitration agreement is invalid, then waive their right to a jury trial and consent to a trial by the court.

Arbitration is a method of resolving disputes without the substantial time and expense of using the judicial system. Since the arbitration procedure is private rather than public, it can help protect privacy and dignity concerning the sensitive issues that sometimes arise. An arbitration hearing takes only months to schedule, while civil litigation may take years to complete. By avoiding the judicial system, many costs are eliminated. There are charges and fees involved in arbitration, but an arbitration hearing will almost always resolve a dispute sooner and at less cost than a trial when the dispute exceeds the jurisdiction of this state's small claims court.

It is important to understand, however, that there is only a limited right to appeal an arbitration award. Unless there is evidence of fraud on the part of the arbitrator or a serious procedural defect, an arbitration award will be final. Of course, the Center also agrees to be bound by the arbitrator's decision.

BY SIGNING THIS AGREEMENT, BOTH PARTIES ARE WAIVING THEIR CONSTITUTIONAL RIGHT TO A JURY TRIAL AND CONSENTING TO BINDING ARBITRATION, OR IF THE AGREEMENT TO ARBITRATE IS INVALID, TO TRIAL BY THE COURT WITHOUT A JURY.

This is an Agreement to arbitrate any dispute that might arise between

_____ ("Patient") _____ and ("Center").

The Patient/Legal Representative acknowledges that the Patient Rights Booklet contains a Grievance Procedure that provides certain steps that may be taken if the Patient is not receiving the degree of care which meets the Patient's/Legal Representative's expectations.

The parties shall submit to binding arbitration all disputes against each other and their employees, agents, representatives, affiliates, fiduciaries, medical directors, officers, directors, governing bodies, management companies, insurers, attorneys, predecessors, successors, assigns, third party beneficiaries, heirs, executors, administrators, or any of them, and all persons, entities or corporations with whom any of the former have been, are now, or may be affiliated, arising out of or in any way related or connected to the Patient's stay and the care provided at the Center, including but not limited to any disputes concerning alleged personal injury to the Patient caused by improper or inadequate care, including allegations of medical malpractice; any disputes concerning whether any statutory or regulatory provisions relating to the Patient were violated; any dispute related to Center's charges to the Patient; and any other dispute under state or federal law based on contract, tort, or statute that exceeds the state's small claims court statutory limits as later defined. The parties agree that each may bring claims against the other only in an individual capacity and not as a plaintiff or class member in any purported class or representative proceeding.

The Federal Arbitration Act shall apply to determine the arbitrability of any dispute and the scope of the arbitration agreement. In rendering a decision on the merits of the dispute, the arbitrator shall apply the substantive law of the state in which the center is located. The arbitrator's fees and expenses will be paid by the center, but the arbitrator shall have the discretion to tax any unreasonable costs attributable to the Patient/Legal Representative to that party.

The party initiating arbitration shall serve upon the other party via certified mail a demand for arbitration, which should include a brief description of the claim, the relief sought, and a proposed arbitrator who must be neutral, experienced, and disinterested. This arbitrator shall serve unless the non-initiating party provides written objection via certified mail to the other party within ten (10) business days of the notice or demand of intent to arbitrate and suggests an alternate, neutral, experienced, and disinterested arbitrator. The arbitrator proposed by the non initiating party shall serve as the arbitrator, unless the initiating party provides written objection via certified mail to the non-initiating party's suggestion. If both parties object as provided above, then a neutral, experienced, and disinterested arbitrator will be selected by a judge of the court which serves the county in which the center is located and which would have subject matter jurisdiction of the dispute. Each party may be represented by counsel in connection with all arbitration proceedings. Any arbitration hearing arising under this Agreement shall be held in the county in which the Center is located. In conducting the hearing and all other proceedings relative to the arbitration of the dispute, the arbitrator shall apply the rules of civil procedure and the rules of evidence of the state where the Center is located, unless otherwise agreed by the parties. The arbitrator shall, however, have the discretion and authority to reasonably limit discovery upon the request of any party.

All claims based in whole or in part on the same incident, transaction, or related course of care or services provided by the Center to the Patient, shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Center or received by the Patient, and is not presented in the arbitration proceeding. The Agreement to Arbitrate shall survive and not otherwise be revoked by the death or incompetency of Patient. The judgment rendered by the arbitrator may be entered in any court having jurisdiction thereof.

ACKNOWLEDGEMENTS

The Patient declares that he or she retains capacity and is competent, has never been adjudged or determined to lack capacity or competence, and knows of no petition pending to adjudicate his or her lack of capacity or competence. Alternatively, if the Patient has been or should be deemed to lack capacity or competence, then Patient's Legal Representative declares that he or she has been given authority by the Patient when competent to act on behalf of the Patient, and/or is qualified to act as the Patient's surrogate by reason of special care and concern for the Patient, familiarity with the Patient's personal values, reasonable availability, and willingness to serve.

The Patient and/or Legal Representative understand that he/she has the right to consult with an attorney prior to signing this Agreement and that he/she has reviewed this Agreement and has had opportunity to ask questions of Center personnel about the Agreement

The Patient and/or Legal Representative understands that this Agreement may be revoked by signing the revocation provision set forth below during normal business hours within ten (10) business days of the admission. If not revoked, this Agreement shall remain in effect for all claims arising out of the Patient's stay at the Center. If the acts or events underlying the dispute are committed prior to any such revocation, then this Agreement shall be binding with respect to such acts or events.

The parties agree that any claim, controversy, dispute or disagreement within the following statutory limits, and as subsequently modified by the appropriate legislative body, shall be resolved through the state's lower court system, without a jury:

AL (District)	\$3,000	SC (Magistrate)	\$7,500
GA (Magistrate)	\$15,000	KY (Small Claims)	\$1,500
MO (Associates Circuit)	\$25,000	NH (District)	\$5,000
TN (General Sessions)	\$25,000	VA (Small Claims)	\$5,000

If a party overlooks the obligation to arbitrate any dispute and participates in litigating the matter in the court system, such party will not be deemed to have waived the right to compel arbitration assuming the motion to compel arbitration is served before the first day of trial.

The parties agree that the arbitration process and the arbitration reward may remain confidential. In the event that any portion of the Agreement is determined to be invalid or unenforceable, the remainder of this Agreement will continue to be binding upon the parties hereto in the same manner as if the invalid or unenforceable provision were not a part of the Agreement

Patient and Legal Representative agree that all terms, conditions and consents in this Agreement shall be valid and binding upon Patient's re-admission to this Center, provided either the readmission is within 30 days of the transfer or discharge OR as long as payment is made by or on behalf of Patient to hold the bed.

THE UNDERSIGNED ACKNOWLEDGE THAT THEY HAVE READ THIS AGREEMENT TO ARBITRATE AND WAIVE JURY TRIAL AND UNDERSTAND THAT BY SIGNING THIS AGREEMENT, THEY HAVE WAIVED THE RIGHT TO A TRIAL BEFORE A JURY, AND THAT THEY VOLUNTARILY CONSENT TO ALL OF THE TERMS OF THIS AGREEMENT.

THE PATIENT:

By Patient

Date: _____
Other Persons Signing on Behalf of Patient
(please specify authority to sign)

Date: _____

THE CENTER:

By Administrator/Social Worker

Date: _____

REVOCATION OF ARBITRATION PROVISION

By signing the original Agreement on file at the Center, I/we (all who signed above must sign below within ten (10) business days of the admission to effectuate the revocation) hereby revoke the agreement to arbitrate set forth above.

Patient's Signature

Date _____

Legal Representative's Signature

Date _____

Additional Signature (If Applicable)

Date _____

Administrator's Signature

Date _____

Administrator Review
(initial and date)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	C/A NO.: 2018-CP-26-06576
	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	
	)	
Plaintiff,	)	
	)	AFFIDAVIT OF ALEX SELLARS
-vs-	)	
	)	
NHC Healthcare/Garden City, LLC,	)	
	)	
Defendant.	)	
	)	

PERSONALLY APPEARED BEFORE ME, Alex Sellars, who being duly sworn, deposes, states, swears and affirms, under penalty of perjury, as follows:

1. That I am above the age of eighteen (18) years and am competent to declare the facts stated herein, which are made upon my personal knowledge and belief.
2. That I am currently employed by Defendant NHC Healthcare/Garden City, LLC, a skilled nursing center located in Garden City, South Carolina.
3. That employees of Defendant NHC routinely attend out-of-state conferences and receive out-of-state continuing education and updated learning opportunities in the field of nursing home health care.
4. That Defendant NHC's staff, as part of its business operations, routinely communicates with prospective patients and/or their families who are living outside of the State of South Carolina.
5. That residents of states other than South Carolina frequently become patients of Defendant NHC.



6. That employees of Defendant NHC routinely solicit and review proposals for services from out-of-state medical and ancillary health care or other service providers.

7. That supplies routinely used in the provision of services to Kathryn G. Parrish, were purchased and shipped from out-of-state. For example, medical supplies, maintenance equipment, bedding supplies, dietary supplies, linen, food and office supplies, among other items, were purchased from out-of-state sources.

8. That Defendant NHC received federal funds for the care of Kathryn G. Parrish from Medicaid.

9. That Defendant NHC presents to the potential patient and patient's family member or representative at the same initial meeting time the Pre-admission Agreement and Arbitration Agreement which are incorporated in one another as well as the Admission and Financial Agreement, explains these documents, and answers any questions about these documents before they are signed.

10. That for a potential patient of Defendant NHC to be admitted as a patient of NHC, the Arbitration Agreement, must be executed and is a contingent requirement before a patient is admitted to Defendant NHC.

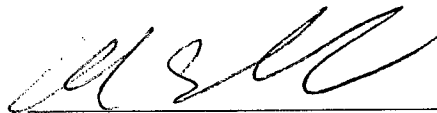
11. That Kathryn Parrish has a diagnosis of dementia, and her daughter Cleo Bertiaux has been appointed her guardian pursuant to an Order issued by the Horry County Probate Court.

12. That Cleo Bertiaux signed the Pre-admission Agreement and Arbitration Agreement as Guardian for Kathryn Parrish. Ms. Bertiaux did not revoke the Arbitration Provision.

FURTHER AFFIANT SAYETH NAUGHT.

[Signature on following page]

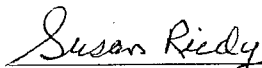
This 23 day of January, 2019.



Alex Sellars
NHC Healthcare/Garden City, LLC
9405 Highway 17 Bypass
Murrells Inlet, SC 29576

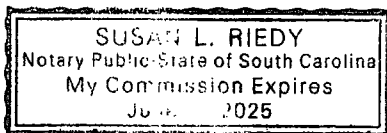
Sworn to and subscribed before me

This 23 day of January, 2019.



Notary Public for South Carolina

My Commission Expires: 6/11/2025



STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Cleo Bertiaux as Guardian for Kathryn G. Parrish,	)	Docket No.: 2018-CP-26-06576
	)	
Plaintiffs,	)	
	)	MEMORANDUM OF LAW IN
versus	)	OPPOSITION TO DEFENDANT'S
	)	MOTION TO DISMISS AND
NHC Healthcare/Garden City, LLC,	)	COMPEL ARBITRATION
	)	
Defendant.	)	
	)	

Defendant's Motion to Dismiss and Compel Arbitration should be denied because there is no arbitration agreement between the parties to this lawsuit. The Arbitration Agreement Defendant relies on is between different parties and not the named Defendant to this action. In essence, Defendant asks this Court to rewrite the Arbitration Agreement and rename the parties to the Arbitration Agreement to include the Defendant, NHC Healthcare/Garden City, LLC. Respectfully, the Court should deny Defendant's request because the Defendant to this action, NHC Healthcare/Garden City, LLC, was never a party to the Arbitration Agreement and the Court should not rewrite the contract to suit Defendant's pending Motion.

FACTUAL BACKGROUND

Kathryn G. Parrish was seriously injured and hospitalized when she fell out of a shower chair when Defendant's staff left her unattended. Defendant's medical records for Ms. Parrish note multiple times that she should not be left unattended in the shower but that is exactly what Defendant's staff did.

Prior to her admission to Defendant's nursing home, Cleo Bertiaux was appointed Guardian for Ms. Parrish by the Horry County Probate Court. Ms. Bertiaux is Ms. Parrish's

daughter. Upon admission, Ms. Bertiaux signed the Arbitration Agreement at issue. The Arbitration Agreement is specific and limited. In relevant part it provides:

This is an Agreement to arbitrate any dispute that might arise between Kathryn Parrish (“Patient”) [and] National Healthcare Garden City, LLC and (“Center”).

Defendant’s Exhibit 2A, p. 5. The other parts of the document also refer only to National Healthcare Garden City, LLC. **The Defendant to this action, NHC Healthcare/Garden City, LLC, is never listed as a party to the arbitration documents it submitted.** Ms. Bertiaux never signed any documentation agreeing to arbitration against the named Defendant, NHC Healthcare/Garden City, LLC.

Defendant’s pending Motion is premised on this Court rewriting the contract Defendant drafted to now include NHC Healthcare/Garden City, LLC as a party to the contract even though NHC Healthcare/Garden City, LLC is not and was never a party to the Arbitration Agreement. Defendant’s request that the Court rewrite its contract to suit its pending Motion contravenes well established law.

LEGAL STANDARD

The party seeking to enforce an arbitration agreement has the burden of establishing the existence of a valid arbitration agreement. *See Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 149, 644 S.E.2d. 705, 708 (2007); *MBNA America Bank, N.A. v. Christianson*, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008). While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid and enforceable arbitration agreement between the parties. *EEOC v. Waffle House*, 534 U.S. 279, 293-294, 122 S.C. 754, 764, 151 L.Ed.2d 755 (2014); *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc.*, 355 S.C. 605, 612 (2003). It is well established that “where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement

exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 667 (S.C. 2007)(internal citation omitted). Whether a valid arbitration agreement exists is a matter of judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.C. 2d 139, 144 (S.C. Ct. app. 2013). Whether the parties agreed to arbitration is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007)(“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”). “A court has no authority to rewrite a contract and impose unwanted obligations and under the guise of specific performance or judicial construction.” Lowcountry Open Land Trust v. Charleston Southern University, 376 S.C. 399, 411, 656 S.E.2d 775, 781 (S.C. Ct. App. 2008). “Arbitration is ‘a matter of contract,’ and courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.” Am. Express Co. v. Italian Colors Restaurant, 570 U.S. 228, 233, 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013).

ARGUMENT

Defendant is not and never has been a party to the Arbitration Agreement at issue. Defendant cannot compel Plaintiff to arbitration under an Arbitration Agreement that Defendant is not a party to.

Defendant’s attempts to compel arbitration is a legal game of three-card monte. With one hand, Defendant reveals an arbitration agreement. Defendant seeks to bind the Plaintiff to the Arbitration Agreement it drafted. Defendant concludes its Memorandum of Law writing: “this Court should enforce the terms and conditions of the Arbitration Agreement against Plaintiff...”

Defendant's Memorandum of Law, p. 9. The card Defendant keeps hidden is that there is no Arbitration Agreement between the Plaintiff and Defendant to this lawsuit.

On the one hand Defendant asks this Court to "protect the contractual rights of the parties, which requires courts to enforce 'rigorously' those terms upon which private parties have agreed." Defendant's Memorandum of Law, p. 6. It argues extensively that the Plaintiff be bound to the exact terms of the Arbitration Agreement. On the other hand, Defendant wants the Court to apply a different standard to them – A standard that would effectively require the Court to pull out a pencil or pen and rewrite portions of the Arbitration Agreement Defendant wrote to include NHC Healthcare/Garden City, LLC as a party to the Arbitration Agreement. Defendant makes this request even though it drafted the original Arbitration Agreement and it was Defendant's representatives who included only National Healthcare Garden City, LLC but did not include the Defendant to this action, NHC Healthcare/Garden City, LLC, as a party to the Arbitration Agreement. *See* Defendant's Exhibit 2A, pp. 1 and 5.

In determining whether there is an enforceable arbitration agreement between the parties, the principles of South Carolina law apply. Weckesser v. Knight Enterprises S.E., LLC, 735 F. App'x 816 (4th Cir. 2018). Under South Carolina law, a court cannot rewrite a contract to suit a party due to their inability to create a valid and enforceable arbitration agreement. Id.

Respectfully, Defendant cannot have it both ways. It cannot plausibly argue that Plaintiff is bound to the terms and conditions found in the four corners of the document but at the same time argue it is not bound to what is in the same four corners of the document. Defendant drafted the Arbitration Agreement and related documents. It named only National Healthcare Garden City, LLC as a party to those documents. There is no legal entity named National Healthcare Garden City, LLC. *See* Plaintiff's Exhibit 1. Even if such an entity exists, National Healthcare

Garden City, LLC is not a party to this lawsuit and never has been. The Arbitration Agreement at issue never named the current Defendant to this action, NHC Healthcare/Garden City, LLC, as a party to the Arbitration Agreement. *See* Defendant's Exhibit 2A, pp. 1 and 5.

While Defendant will no doubt claim that the Arbitration Agreement is broadly worded to apply to "affiliates, ... management companies...predecessors, successors,..." etc. such arguments are unpersuasive. These arguments miss the mark because National Healthcare Garden City, LLC does not exist. *See* Plaintiff's Exhibit 1. There is no such legal entity. An entity that does not legally exist cannot be an "affiliates, ... management companies...predecessors, successors,..." etc. for the very reason that it does not exist.

Even a review of Defendant's Motion and the attachments thereto, show the flaws with Defendant's argument. The only Affidavit submitted by Defendant makes attestations related to "Defendant NHC Healthcare/Garden City, LLC" only. Nothing is said about the party listed in the actual Arbitration Agreement, National Healthcare Garden City, LLC. For example, in his Affidavit Alex Sanders states: "I am currently employed by Defendant NHC Healthcare/Garden City, LLC, a skilled nursing center located in Garden City, South Carolina." Defendant's Exhibit 3, paragraph 2." In his entire Affidavit, Mr. Sellars makes no reference at all to National Healthcare Garden City, LLC, the party named in the Arbitration Agreement. Indeed, he could make no attestation about National Healthcare Garden City, LLC because such an entity does not exist. The only way to enforce an Arbitration Agreement between a non-existent entity is for the Court to re-write the Arbitration Agreement for Defendant. However, that is not the proper role of Courts. As Defendant even notes in its brief the role of the courts is "to enforce 'rigorously' those terms upon which private parties have agreed." Defendant's Memorandum, p. 6. In this

case, the parties to this lawsuit never agreed to arbitrate. Instead, only a non-existent entity is named in the Arbitration Agreement.

Recently, in Weckesser v. Knight Enterprises S.E., LLC, 735 F. App'x 816 (4th Cir. 2018) the Fourth Circuit addressed an identical issue on appeal from the South Carolina District Court. In that case the Fourth Circuit held that under South Carolina law the arbitration clause at issue could not be enforced because it was not signed by the parties to case. As the Fourth Circuit explained, the arbitration clause identified one party "as signing not on behalf of Knight Enterprises, but on behalf of its parent company, 'Jeffrey Knight, Inc. d/b/a Knight Enterprises.'" In holding the arbitration agreement was not enforceable, the Fourth Circuit rejected arguments that the misidentified parties was: 1. a "clerical error that had no effect"; 2. that one party was entitled to enforce the arbitration clause as a "third-party beneficiary"; and 3. that "the court should use its powers of equity to force the parties to arbitrate." While an unpublished Fourth Circuit opinion is not binding precedent upon this Court, the Fourth Circuit's reasoning affirming the South Carolina District Court's denial of arbitration is sound and the relevant facts are identical to those now before this Court.

The simple fact is there is no Arbitration Agreement between Plaintiff and NHC Healthcare/Garden City, LLC. The only way for Defendant's to prevail on the current Motion is for the Court to rewrite the Arbitration Clause for them. Respectfully, this Court should decline Defendant's invitation to rewrite their contract for them to suit the pending Motion.

CONCLUSION

For the reasons argued above, Defendant's Motion to Dismiss and Compel Arbitration should be denied.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Circuit Court Judge

Case No. 2018-CP-26-06576

Cleo Bertiaux as Guardian for Kathryn G.
Parrish,

Appellant,

v.

NHC Healthcare/Garden City, LLC,

Respondent.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all materials
proposed to be included by any of the parties and not any other material.



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March 10, 2020