THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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SC Court of Appeals

Case No. 2018-CP-23-05088
Appellate Case No. 2019-000887

Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries,

Respondents,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville,

Appellants.

RECORD ON APPEAL

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

POLIAKOFF & ASSOCIATES, PA
Gary W. Poliakoff
Raymond P. Mullman, Jr.
215 Magnolia Street
Spartanburg, SC 29306
and
CHRISTIAN & DAVIS, LLC
Matthew W. Christian
1007 E. Washington Street
Greenville, SC 29601
And
(cont on next page)

MCGOWAN, HOOD & FELDER, LLC
Jordan C. Calloway,
1539 Health Care Drive
Rock Hill, SC 29732
Attorneys for Respondents

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23-05088 **ORDER DENYING MOTION TO COMPEL ARBITRATION**

This matter came before the Court on December 18, 2018 for Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville's Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, for the reasons more fully set forth below, the Court hereby denies the Motion to Compel Arbitration as to "Survival Action" and the "Wrongful Death Action".

I. BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home neglect and corporate negligence resulting in the wrongful death of Mozana Clinkscales ("Decedent"). Charlie Clinkscales was Decedent's son and serves as the personal representative of Decedent's estate. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC (d/b/a Magnolia Place – Greenville), as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and

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Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two entities being hereinafter referred to as the "Corporate Defendants."

Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Decedent. Plaintiffs allege the Corporate Defendants are related entities[1] of the nursing home and have a significant relationship in the operation and management of the nursing home, and derive significant economic benefits from its revenue.[2] Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory."[3] Plaintiffs allege the Corporate Defendants should be included in the arbitration proceedings if the Court compels arbitration because the Court finds the Corporate Defendants were intended beneficiaries of the Arbitration Agreement as the allegations against them are based on the same facts and are inherently inseparable from the claims made against the Facility.[4]

Decedent was admitted to Magnolia Place-Greenville ("Facility") on January 15, 2011 according to the original Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Decedent's financial obligation to pay for those

[1] Related entity is an industry term that means the entities are have common ownership, management, and control.

[2] A parent company has been forced to arbitrate under a theory of equitable estoppel even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App., 2012).

[3] Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)).

[4] Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); see also Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012).

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services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement"[5] provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Decedent's admission to the Facility. The date on this document is January 15, 2011.

A contract called "Arbitration Agreement" was signed on August 30, 2013. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Decedent, provides for alternative dispute resolution to any claim a party may bring against another arising out of Decedent's care at the Facility. Defendant has admitted agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement was allegedly signed by Charlie Clinkscales on **August 30, 2013**—more than 30 months after the original Admission Agreement was signed.

II. BURDEN OF PROOF

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.[6] Of those courts that have decided this question, most have held the proponent of the waiver bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[7] A party seeking judicial enforcement of a contract

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[5] "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties."

[6] 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 (Ct. App. 2008).

[7] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F. Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F. Supp. 1379, 1384 (D. Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed

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bears the burden of persuasion.[8] Defendant carries the burden to prove a valid and enforceable arbitration agreement was signed in a "knowing, voluntary and intentional" capacity. In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[9] When faced with a motion to compel arbitration that is opposed based on whether an agreement to arbitrate has been made between the parties, the court must give to the opposing party the benefit of all reasonable doubts and inferences that may arise.[10] Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract. Whether the parties agreed to arbitrate is a question of substantive state law.[11] In Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007), the Supreme Court stated: "Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis."

The parties agree the FAA applies and that it represents pro-arbitration federal policy. "Congress's purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[12] However, the policy only applies in instances where a valid arbitration agreement has been established. See 9 U.S.C. § 4. ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue."). When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration

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burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F. Supp. 428, 429 (D. Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

[8] Hinson-Barr, Inc. v. Pinckard, 292 S.C. 267, 268, 356 S.E.2d 115, 116 (1986).

[9] Nat'l Acceptance Co., 381 F. Supp. at 271).

[10] See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).

[11] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007) ("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

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disappears.[13] The FAA requires state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. 9 U.S.C. § 2. Moreover, while it is true the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[14] The FAA requires the Court to look to South Carolina law to decide the threshold questions of contract formation.[15] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[16] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[17] Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of consideration, fraud, duress, or unconscionability. Id. A court should only decide as a matter of law whether the parties entered into an agreement to arbitrate when there is no genuine issue of material fact concerning the formation of the agreement.[18] In determining whether adequate consideration exists in a contract or arbitration agreement under the FAA guided by principles of contract law, we must examine and stay within the confines of the four corners of the instrument.[19]

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[13] Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).
[14] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).
[15] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").
[16] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir. 2001).
[17] Rent-A-Center, West. Inc., 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[18] See Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).
[19] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

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III. LEGAL REASONING

A. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.*

The necessary elements of a contract are an offer, acceptance, and valuable consideration.[20] To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent or meeting of the minds on all material terms. It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration.[21] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[22] Consideration is a promise to do something that a party has no legal obligation to do or to forbear from doing something it has a legal right to do. A valid contract requires that both sides provide consideration. The Arbitration Agreement is only enforceable if it contains bargained for consideration and a mutuality of obligations between its parties. The Court finds these essential contract formation requirements are not met here. Many of the arguments Defendant raises in support of the Arbitration Agreement are misguided because they conflate the Arbitration Agreement and the Admission Agreement which, for the reasons discussed above, are distinct documents that do not merge.

The Arbitration Agreement was signed on August 30, 2013, but the Admission Agreement was signed on January 15, 2011.[23] Thus, the Admission Agreement and Arbitration Agreement

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[20] Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003).
[21] Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984).
[22] Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)).
[23] No family member had Power of Attorney when Mozana was admitted on January 15, 2011.

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are separate contracts that do not merge.[24] Our Supreme Court in Coleman refused to apply the merger doctrine when language in the contracts "recognized the 'separateness' of the admission and arbitration agreements."[25] Our Supreme Court went further in Thompson and Hodge applying Coleman and providing further examples of factors demonstrating "separateness" and preventing merger including the fact that the Arbitration Agreement was not necessary for admission and that *there was no bargain for exchange nor consideration to the Arbitration Agreement.*[26]

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this Admission Agreement *or* in the Arbitration Agreement."[27] In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract."[28] Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home.[29]

The "Admission Agreement" in this case contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission

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[24] See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

[25] 407 S.C. at 355, 755 S.E.2d at 455.

[26] 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

[27] Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

[28] Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

[29] Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

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Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger.[30] The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. There was no consideration given for Charlie Clinkscales to sign the Arbitration Agreement, because Mozana Clinkscales had already been admitted and received care.

In its most elemental sense, the doctrine of mutuality of obligation means that unless both parties to a contract are bound by its terms, neither is bound. Mutuality of obligation in bilateral contracts is but another way of stating that consideration is essential. 25 Richard Lord, Williston on Contracts § 67:42 at 332 (4th ed.2002)). Mutuality becomes a nonissue when consideration has otherwise been conferred upon one of the parties. There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise—something of value. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other. Where there is a mutual promise to arbitrate, there must be additional consideration. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and

[30] Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman).

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elder abuse claims are to be arbitrated. Defendants argue the Arbitration Agreement meets the mutuality requirement because both sides are forced to arbitrate. However, while the Arbitration Agreement purports to require arbitration for any "dispute over care," the reality is that this obligation falls almost exclusively on the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mrs. Clinkscales received from the Arbitration Agreement alone. Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."[31] The contract is also silent as to any consideration exchanged between the parties. The Arbitration Agreement itself contains insufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract.

In sum, Defendants have not met their burden to prove merger, consideration, or any other benefit for the Arbitration Agreement. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a single contract. If the jury waiver was not a precondition to admission, then it fails for lack of consideration. The Court finds it would

[31] 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

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be inconsistent for Defendants to argue that agreeing to arbitrate was not consideration for the admission but, on the other, argue that the admission was valuable consideration to support arbitration. For the proposed arbitration contract to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself.

The Arbitration Agreement was not part of the Admission Agreement and thus, separate consideration was required for the Arbitration Agreement to be valid. See Thompson v. THI of N.M. at Casa Arena Blanca, LLC, No. CIV 05-1331 JB/LCS, 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006); THI of N.M. at Vida Encantada, LLC v. Archuleta, No. CIV 11-399 LH/ACT, 2013 WL 2387752 (D.N.M., 2013).

Plaintiffs also rely upon the fact that the federal government at the time prohibited a nursing home from requiring a current resident to sign an arbitration agreement as a condition of continued residency, relying on a policy set forth by the Center for Medicaid and State Operations ("CMS") on January 9, 2003. The memorandum states: "A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal regulations, at 42 C.F.R. § 483.12(a)(2) limit the circumstances under which a facility may discharge or transfer a resident."

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The Court is further persuaded by Plaintiff's argument that to construe admission as valid consideration to support the Arbitration Agreement would be inconsistent with federal law. The parties agree Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full and *expressly forbid* acceptance of additional consideration for nursing home services. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Such facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission. See Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993) (noting general rule that courts will not enforce a contract which is "violative of public policy, statutory law, or provisions of the Constitution").

B. *The Arbitration Agreement does not govern the wrongful death claim*

The Court further finds the Arbitration Agreement should not include the wrongful death cause of action because no one with legal authority could enter an agreement that waives the right to a jury trial on behalf of Decedent's statutory beneficiaries. Only the court-appointed personal representative can waive the beneficiaries' rights.

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A wrongful death claim is separate from a Decedent's personal injury/survival claim and an individual's wrongful death beneficiaries are defined by statute. S.C. Code Ann. § 15-51-20 (1977). South Carolina law provides that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute.[32] It appears the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina, and there is a split in authority in other jurisdictions. This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement.[33]

For example, in Ping v. Beverly Enterprises, the Supreme Court of Kentucky held:

> [W]e are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants.

376 S.W.3d 581, 599-600 (Ky. 2012).

In line with these principles, the Court finds the Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the

[32] See Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).

[33] See e.g., Woodall v. Avalon Core Ctr.-Fed. Way, LLC, 231 P.3d 1252, 1258 (Wash. App. Div. 1 2010) (refusing to compel arbitration of wrongful claim because wrongful death claim never belonged to decedent); Lawrence v. Beverly Manor, 273 S.W.3d 525, 528-29 (Mo. 2009) (en banc); Peters v. Columbus Steel Castings Co., 873 N.E.2d 1258, 1262 (Ohio 2007) (concluding decedent "could not restrict his beneficiaries to arbitration of their wrongful death claims, because he held no right to those claims"); Bybee v. Abdulla, 189 P.3d 40, 43 (Utah 2003) ("a decedent does not have the power to contract away the wrongful death action of his heirs").

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Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries. Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, South Carolina's federal district court has analyzed this issue in the damages context.[34] Boyle concluded wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims from that of the survival action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, is DENIED.

AND IT IS SO ORDERED.

Signature to Follow

[34] Boyle v. U.S., 944 F.Supp.2d 577 (D.S.C. 2012).

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Greenville Common Pleas

Case Caption: Mozana Clinkscales , plaintiff, et al vs. Fundamental Clinical And Operational Services LLC , defendant, et al

Case Number: 2018CP2305088

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP2305088

Mozana Clinkscales et al
PLAINTIFF(S)

Fundamental Clinical And Operational Services LLC et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

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

☐ **STAYED DUE TO BANKRUPTCY**

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

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

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

This matter came before the Court on three Defendants' Motions to Alter or Amend the Order Denying Motion to Compel Arbitration entered February 5, 2019. Pursuant to a hearing and discussions with the attorneys, and with their express request, the Order of February 5, 2019, is hereby vacated. The Order is replaced with the Ruling below.

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 05/11/2019 .

Probate Court Greenville County

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2019 May 13 8:50 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Court Reporter:

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

This matter came before the Court on December 18, 2018 on Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville's Motion to Dismiss and to Compel Arbitration. These were considered along with the remaining Defendants' attendant Motions to Stay. The Court has fully considered all arguments asserted by the parties at the hearing and asserted in respective memoranda and briefs. Having listened to oral arguments from counsel and reviewed the parties' legal memoranda, the Court hereby denies the Motion to Compel Arbitration as to "Survival Action" and the "Wrongful Death Action". The attendant motions of the additional Defendants are denied.

ELECTRONICALLY FILED - 2019 May 13 8:50 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

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Greenville Common Pleas

Case Caption: Mozana Clinkscales , plaintiff, et al vs. Fundamental Clinical And Operational Services LLC , defendant, et al

Case Number: 2018CP2305088

Type: Order/Electronic Form 4

So Ordered

s/ Robin B. Stilwell 2158

ELECTRONICALLY FILED - 2018 Oct 04 11:02 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville; and Rusty Flathmann, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23- **SUMMONS** (Wrongful Death/Survival Action)

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at their offices, 215 Magnolia Street, Post Office Box 1571, Spartanburg, South Carolina, 29306 (29304) within thirty (30) days after service thereof, exclusive of the date of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/Raymond P. Mullman, Jr.
GARY W. POLIAKOFF S.C. Bar # 4488
atty@gpoliakoff.com
RAYMOND P. MULLMAN, JR. S.C. Bar #8662
rmullmanjr@gmail.com
Poliakoff & Associates, P.A.
215 Magnolia Street
P. O. Box 1571
Spartanburg, SC 29304
(864) 582-5472

AND

Matthew Christian, Esq. S.C. Bar # 70516
mchristian@christiananddavis.com
Christian & Davis, LLC
1007 E. Washington St.
Greenville, SC 29601

Attorneys for Plaintiffs

Date: October 4, 2018.

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ELECTRONICALLY FILED - 2018 Oct 04 11:02 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville; and Rusty Flathmann, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23- **COMPLAINT** (Wrongful Death/Survival Action)

The Plaintiffs, Mozana Clinkscales, decedent and resident, and Charlie Clinkscales, Individually and on behalf of statutory beneficiaries, by and through the Personal Representative, do hereby respectfully allege as follows:

PARTIES & JURISDICTION

1. That the Plaintiff, Charlie Clinkscales, is a citizen and resident of the County of Greenville, State of South Carolina, and was duly appointed as the Personal Representative of the Estate of Mozana Clinkscales (Claimant #1), deceased, and as a representative for her children as statutory beneficiaries: Charlie Clinkscales (Claimant #2), Bobby Lee Clinkscales (Claimant #3), Annie Abraham (Claimant #4), Mozana Clinkscales (Claimant #5), and Andre Clinkscales (Claimant #6).

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2. Plaintiff brings this action on behalf of the Estate of Mozana Clinkscales for damages recoverable pursuant to § 15-5-90, Code of Laws of South Carolina (1976) and for damages recoverable by the statutory beneficiaries of decedent pursuant to § 15-51-10, et seq, Code of Laws for South Carolina (1976, as amended).

3. That the Plaintiff, Mozana Clinkscales was a resident of THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a Magnolia Place – Greenville ("Magnolia Place-Greenville") during the relevant time period.

4. That Hunt Valley and its agents created Fundamental Clinical and Operational Services, LLC (FCOS) and Fundamental Administrative Services, LLC (FAS) to manage and operate the facilities on its behalf, and act as the Home Office pursuant to the Medicaid Home Office Cost Reports.

5. Upon information and belief, the "Fundamental family of companies," through its individual actions and acts of their agents FCOS and FAS, and in concert with the other Defendants, manages and operates a chain of nursing homes in at least 17 states, which includes Magnolia Place-Greenville, and derives substantial revenue therefrom.

6. That through its individual actions and the acts of its agents, and in concert with the other Defendants, FCOS and FAS engaged in oversight, management, direction, and operation of nursing home facilities in Spartanburg County, South Carolina, deriving substantial revenue therefrom.

7. In addition to the direct liability of the Defendants as alleged elsewhere in this Complaint, Defendants are each vicariously liable and legally responsible for the harm to Plaintiffs as the Facility is a mere instrumentality, agency, conduit or adjunct of Defendants.

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8. That Defendants, through its officers and agents, entered into a Revolving Credit Agreement (Credit Agreement) with a lender to create a line of credit for the nursing homes to use for operating costs. The agreement was signed on behalf of the facility at the direction of Murray Forman.

9. The Credit Agreement also states that Defendants are jointly and severally liable for the debt.

10. That the Credit Agreement signed by Defendants FAS, through its officers and agents, on behalf of Magnolia Place-Greenville exerts significant control by requiring each facility to maintain certain occupancy rates and profit margins thereby showing FAS' control of the facility, and participation in a joint venture.

11. That the Credit Agreement allowed Defendants FCOS and FAS to control how the facility's revenue was used and stripped from the facility any right it may have had on its revenues, which by the means of the central cash management system was commingled with monies from other nursing homes in the national for-profit chain, and controlled exclusively at the corporate level.

12. That the Administrative Policies and Procedures of the chain found in the Resource Manual for New Management show that FAS and FCOS have significant control over the policies and procedures, budgets, staffing, training, and operation of the facility through agents, the Regional Director of Operations and/or Vice-President of Operations or similarly named titles and positions, who at all times relevant hereto was an employee of either FAS and FCOS.

13. That the Fundamental chain's federal tax return show the following:

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a. each facility in the chain is treated as a disregarded entity for tax purposes;
b. the product/service provided by Defendants is "nursing services and personal care;" and
c. the annual gross revenue exceeds $1 billion.

14. That during the residency period of April 10, 2013 and October 2, 2015, FAS and FCOS used the trademark 'Fundamental' which was used on the "Fundltc" website and on the policies and procedures of the facility including, but not limited to, the following policies:

a. Fundamental Fire and Disaster Plan;
b. Fundamental Resident Alarm System;
c. Fundamental Weight Management;
d. Fundamental Paid Time Off;
e. Fundamental Policy on Illegal Drugs and Abuse on Alcohol;
f. Fundamental Corporate Compliance;
g. Fundamental Employee Benefit Enrollment Plan;
h. Fundamental Time Clock and Meal Deduction;
i. Fundamental Direct Payroll Deposit.

15. That, upon information and belief, FCOS is a Delaware limited liability company operating on behalf of the national for-profit chain as its agent within the State of South Carolina, but has no registered agent in the State of South Carolina.

16. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FCOS engaged in the oversight, management, direction, and operation of the Defendants' facility in Spartanburg County, South Carolina, deriving substantial revenue therefrom.

17. That, upon information and belief, FAS is a Delaware limited liability company operating on behalf of the national for-profit chain as its agent within the State of South Carolina, but has no registered agent in the State of South Carolina.

18. At times relevant hereto, FAS is listed on the cost reports of the Defendants' facility as the Accounting Firm and as the Home Office pursuant to CMS regulations.

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19. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FAS engaged in the oversight, management, direction, and operation of the Defendants' facility in Greenville, South Carolina, deriving substantial revenue therefrom.

20. That, upon information and belief, Magnolia Place-Greenville is a Delaware corporation operating within the State of South Carolina, with a registered agent in the State of South Carolina.

21. At all times relevant to this case, Magnolia Place-Greenville operated a nursing home facility on behalf of the Fundamental chain, and did business in Greenville, South Carolina, deriving substantial revenue therefrom.

22. That, upon information and belief, Defendant Rusty Flathmann (hereinafter "Flathmann") is a citizen and resident of South Carolina and is doing business in the County of Greenville, State of South Carolina, and is a member of the governing body.

23. Pursuant to 42 C.F.R. § 483.75(d), Flathmann is liable and legally responsible for the operation of the facility.

24. Upon information and belief, Defendant Flathmann, at all times relevant hereto, was an employee of FCOS as a regional supervisor.

25. According to applicable rules related to the governing body at §483.75(d):

> (1) The facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility; and
> (2) The governing body appoints the administrator who is--
> (i) Licensed by the State where licensing is required; and
> (ii) Responsible for the management of the facility.

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26. That, upon information and belief, Defendants FCOS and FAS manages, operates, and controls the nursing home facility in question as part of a national for-profit chain as defined by CMS-15 §2150, and exerts control over the other Defendants including the acts and delicts by agents/subsidiaries relating to the operation of Magnolia Place-Greenville.

27. Upon information and belief, all or most of the following factors exist between FAS and FCOS and its subsidiaries/agents:

a. Common ownership;
b. Common directors or officers;
c. Financing of the subsidiary by the parent through loan agreements;
d. Gross inadequacy of capital for the subsidiaries;
e. Incorporation and/or organization of the subsidiaries by the parent;
f. Payment by the parent of the salaries and other expenses or losses of the subsidiaries;
g. Lack of business dealings by the subsidiary except with the parent and lack of assets except those conveyed to it by parent;
h. Lack of independent action by the executives of the subsidiaries, who instead take their orders from the parent corporate in the latter's interest.

28. That, upon information and belief, Defendants deliver nursing home care for a profit and executed the delivery of nursing home care to Plaintiff Mozana Clinkscales during her residency at Magnolia Place-Greenville.

29. That, upon information and belief, Defendants were involved in a joint venture to operate and manage nursing homes for profit including the Fundamental facility where Mozana resided.

30. That, upon information and belief, Defendants were involved in controlling the revenue and the budget which affected the care, services, staffing, training, supervision, development and/or implementation of policies and procedures for Magnolia Place-Greenville.

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31. These Defendants implemented a business plan for Magnolia Place-Greenville that sought to maximize profits at the expense of patient care.

32. Defendants controlled all aspects of Magnolia Place-Greenville, including but not limited to preparing the budget, financing, developing policies and procedures, and establishing staffing levels.

33. In order to maximize profits, Defendants excessively and dangerously underfunded Magnolia Place-Greenville such that neither nursing staff in adequate numbers nor adequate training of such staff could be provided to protect residents from known and foreseeable harm.

34. Despite the legal obligation that "A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial wellbeing of each resident" (42 CFR §483.75), Defendants withheld resources from Magnolia Place-Greenville to the physical, mental, and psychosocial detriment of its residents.

35. Funds which were required by law to be used for the protection of residents were instead intentionally diverted to increase the profits of Defendants. In fact, Defendants saved millions of dollars by understaffing during the residency.

36. Defendants made matters worse by encouraging the admission of residents whose care needs were higher than average, which resulted in higher financial gain from those residents.

37. However, Defendants failed to provide the increased resources necessitated by admitting these high acuity residents, and did not adequately staff, or provide the necessary training

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to accommodate the level of care these residents required which put all residents of the facility at even greater risk of harm.

38. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Defendants, including but not limited to, FCOS and FAS, and Flathmann acted on behalf of the Fundamental chain, and not on their own behalf.

39. That, upon information and belief, FCOS and FAS at all times relevant hereto totally dominated and controlled the facility through loans, leases, and contracts.

40. The management of the facility was so organized and controlled, and their business conducted in such a manner, that they were merely an agency, instrumentality, adjunct, and/or alter ego of FCOS and FAS who is therefore liable and responsible for the acts and delicts of all Defendants.

41. That, upon information and belief, all Defendants or their agents have engaged in substantial business activities in South Carolina, including the management, operation, and control of the facility at various times, and derived substantial revenue from services provided in South Carolina.

42. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of FCOS, FAS, and Flathmann, acted on behalf of themselves and on behalf of their affiliate and/or parent companies.

43. That, upon information and belief, at all times relevant herein, FCOS, FAS, and Flathmann as well as their agents, employees, servants, and apparent agents owed a duty to Plaintiffs and were all jointly, directly, and vicariously liable for the care and treatment Mozana received as a resident at the facility.

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44. That, upon information and belief, at all times relevant herein, FCOS, FAS, and the facility are and have been operating as an amalgamation of interest creating a blurred corporate identity by sharing an internet website, officers, shareholders, and locations, policies and procedures, ownership, headquarters, in-house counsel, and by commingling funds and revenue.

45. That the Court has jurisdiction over the parties and subject matter.

46. That the acts and delicts referred to herein occurred at Defendants' facility in the County of Greenville, State of South Carolina.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

47. Relevant and consistent allegations contained in paragraphs 1-46 are incorporated by reference as if written verbatim herein.

48. On or about April 10, 2013, Mozana Clinkscales was admitted to the skilled nursing facility with the understanding that she would be provided with the care that her health conditions and individual needs reasonably required.

49. During her residency, Mozana suffered falls, assaults, and harassment.

50. Throughout August to October 2015, Mozana was harassed, annoyed, and intimidated by a male resident with a known history of aggressive and intimidating behavior.

51. On October 1, 2015 at 3:00 PM, Defendants' nurse's note states, "Nurse noted another resident in pt. room and on bed with several boxes of gloves. Pt stated, 'I'm scared of him'. Resident redirected out of pt. room with ease. Pt reassured by nurse."

52. There is no documentation of interventions to provide privacy and safety for Mozana.

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53. Mozana's family members repeatedly requested that the resident harassing their mother be monitored and supervised as to not harm Mozana and the other residents.

54. Defendants failed to keep Mozana safe from a known danger.

55. On October 2, 2015 at 23:28 an EMS report regarding Ms. Clinkscales states, "Fell getting out of bed. Has a fractured hip."

56. Prior to the injury, Mozana attempted to contact the staff via the call bell system but no staff appeared to protect her from the assailant.

57. Mozana was finally transferred and admitted to Greenville Hospital with a Left Femoral Neck Fracture and underwent surgery on October 5, 2015.

58. There is no nurse's note to indicate the circumstances of the fall on 10/2/15, an assessment for injury, the notification to the MD, the notification to the family, or the EMS arrival and transportation to the hospital. This is evidenced by the differing statements of two Physicians providing care to Ms. Clinkscales.

59. The GHS Surgeon documented, "Mrs. Clinkscales presented two days ago after a fall from standing in which she sustained a displaced left femoral neck fracture."

60. The Hospice Physician wrote, "Respiratory distress secondary to multiple pulmonary Emboli status post left hip fracture in an 88-year-old. Admitted 10/5/15 after a fall at her nursing facility where she rolled out of bed and fractured her left leg."

61. As is typical for vulnerable adults, Mozana developed complications during surgery and was under Hospice care until her condition improved.

62. Although the family insisted on Mozana not returning to the facility, Mozana was forced to return to the facility and was readmitted to Magnolia Place Greenville on October 12,

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2015 until arrangements could be made to find another facility. She was discharged to another nursing facility on December 18, 2015.

63. Federal Regulation for long term care, appendix PP, 483.12, F150 defines abuse as, "The willful infliction of injury, unreasonable confinement, intimidation, or punishment with result of physical harm, pain or mental anguish."

64. 483.12 Freedom from abuse states the intent as, "Each resident has the right to be free from abuse, corporal punishment, and involuntary seclusion. Residents must not be subjected to abuse by anyone including, but not limited to, facility staff, other residents, consultants or volunteers, staff of other agencies serving the resident, family members, legal guardians, friends, or other individuals."

65. That the Defendants, their subsidiaries, related entities, officers, agents, servants, and employees negligently and carelessly failed to properly manage, operate, and provide care to Mozana, and keep Mozana safe from known or foreseeable injury.

66. That, upon information and belief, Mozana's health conditions were aggravated and exacerbated by the Defendants' repeated failure to properly supervise the residents and monitor their safety from known or foreseeable injuries.

67. These deviations from the standard of care were the proximate causes of conscious pain and suffering, mental distress, medical bills, and loss of dignity.

68. Upon information and belief, Defendants failed to provide adequate and proper custodial and nursing services to Mozana contributing to a preventable fall and traumatic injury and ultimately her premature and wrongful death.

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69. Further, that the Defendants, directly or indirectly, received federal and state funds as reimbursement for the care of residents including Mozana Clinkscales.

70. That while residing at Defendants' facility, Mozana Clinkscales was damaged and injured, and eventually died as a result of neglect, negligence, recklessness, and violations of the standard of care for nursing and custodial care.

71. That during Mozana's residency at Magnolia Place-Greenville, the acts and delicts of Defendants caused, and were the proximate causes of Mozana's conscious pain and suffering, mental distress, medical bills, disability, loss of dignity, and loss of quality of life to decedent.

72. Pursuant to S.C. Code § 15-5-90, said causes of action survive the death of decedent and are properly brought by the Personal Representative on behalf of decedent's estate.

73. That the provisions of the Omnibus Reconciliation Act of 1987 ("OBRA") were applicable with regard to the administration and operation of the facility and the provision of care and services to Plaintiff throughout the residency.

74. Defendants were under an obligation to follow all rules and regulations of OBRA as well as all applicable state and federal laws, rules, regulations, and guidelines including S.C. Regulations 61-17, the Board of Nursing Advisory Opinions, the South Carolina Adult Protection Act, the South Carolina Nurse Practice Act, S.C. Code § 40-33-5 et. seq., and the South Carolina Long Term Health Care Administrators statute, S.C. Code 40-35-5 et seq.

75. Defendants were under an obligation to follow the provisions and standards of the Federal Nursing Home Act applicable to the administration and operation of the facility and the

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provision of services, care and treatment as well as all applicable state laws, rules, regulations, and guidelines including but not limited to The Adult Protection Act of South Carolina Code § 43-35-5, et. seq.; South Carolina Department of Health and Environmental Control regulations for Nursing Homes at Regulation 61-17, et. seq.; the South Carolina Nursing Practice Act; Board of Nursing Advisory Opinions; South Carolina Code of Laws Title 40 Chapter 35; and South Carolina Code of Regulations Chapter 93.

76. That the Defendants were liable and responsible for the acts and delicts of their employees, agents, and servants under the principle of respondeat superior, and actual and apparent agency.

77. That the Defendants held the facility out to the State of South Carolina, the South Carolina Department of Health and Environmental Control, the public at large, and to Mozana and her family, specifically, as being:

a. skilled in the performance of nursing, rehabilitative, and other medical support services;
b. properly staffed, supervised and equipped to meet the total needs of its residents;
c. able to specifically meet the total nursing, personal care, medical, and physical therapy needs of its residents; and,
d. Licensed by the South Carolina Department of Health and Environmental Control and complying on a continual basis with all state and federal rules, regulations, and standards established for nursing homes in South Carolina.

78. That the Defendants held the facility out to the United States of America, the Centers for Medicare and Medicaid Services, the public at large, and Mozana and her family, specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.

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79. To protect nursing home residents like Plaintiff, the federal government mandates that if a nursing home voluntarily accepted Medicare or Medicaid funds, the nursing home would be required to follow strict mandates for patient safety, documentation, and costs and expenditures.

80. These mandates became known as the OBRA regulations at 42 CFR 483.1- et seq. For example, one of the regulations simply states, "skilled nursing facilities participating in Medicare must meet certain specified requirements." 42 C.F.R. 483.1.

81. The regulations are designed to reduce or eliminate accidents, assure proper staffing and supervision, and establish and maintain a reasonable quality of life for each resident.

82. OBRA regulations go to great lengths to ensure nursing home patients will be "in an environment that promotes maintenance or enhancement of each resident's quality of life." 42 C.F.R. 483.10.

83. They state that each patient "must" receive, and the facility "must" provide the necessary care and services to "attain or maintain the highest practicable physical, mental, and psychosocial well-being." See e.g. 42 C.F.R. 483.24.

84. The OBRA regulations require that each nursing home has sufficient staff to provide the necessary care and services. 42 C.F.R. 483.30.

85. Defendants specifically violated the applicable standard for the administration of a nursing home found at §483.75 which expressly states: "A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."

86. Defendants must submit "cost reports" to both state and federal agencies which include

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additional staffing information as well as the expenditures of the Defendants on staffing costs, facility costs, supplied, operating and management fees, etc submitted by Defendants to government agencies under penalty of perjury. 42 C.F.R. 413.24(f)(4)(iv).).

87. These regulations and reporting have a distinct purpose: "Collectively, these reports establish a basis for evaluation of the reasonableness of the rate paid to the nursing homes and determination of what constitutes an economically and efficiently operated facility." Nursing Home Cost Report Instruction Manual.

88. In particular, Defendants use their multiple limited liability company business structure as a means to evade the federal requirement that their nursing homes, including the subject Facility, be administered in a manner that enables them to use their resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. See 42 CFR § 483.75.

89. By siphoning profits to related entities in non-arms' length transactions, Defendants deny the Facility sufficient resources to care for its residents.

90. Additionally, Defendants' use of "shell" limited liability companies and trusts serves to further the unjust practice of concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest, or concealment of personal business activities.

91. This is an integral part of Plaintiffs' corporate negligence claim which include allegations that Defendants siphoned profits away from resident care to related parties.

92. This is a concept noted in the federal regulations and seen in nursing home operations across the country.

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> . . .when services, facilities, or supplies are furnished to a provider by a "related organization," there is "a significant likelihood that charges incurred by providers . . . will be artificially inflated because of the absence of bona fide arms-length bargaining." *American Hosp. Management Corp. v. Harris*, 638 F.2d 1208, 1212 (9th Cir. 1981). . . "Reasonable costs" for such a provider are the actual costs incurred by the related supplier, rather than the amount the provider pays to it. 42 C.F.R. § 405.427(a) (1982).
>
> ***Biloxi Reg'l Med. Ctr. v. Bowen***, 266 U.S. App. D.C. 281, 835 F.2d 345, 349-50 (1987).

93. Part of determining an economically and efficiently operated facility includes disclosure of "related organizations."

94. Federal Regulations, 42 CFR 447.284, requires the nursing home to identify related organizations and to summarize costs incurred in transactions between the facility and such related organizations." ("A related organization is one in which there is a common ownership or controlling interest existing between the vendor and the nursing home".) Cost Report Manual.

95. Defendants are also required to report "related organizations" under 42 CFR §420.206.

96. The cost reports mentioned supra include information regarding transactions with what are referred to as "related parties".

97. CMS considers a party to be "related" to a nursing facility when the nursing facility "to a significant extent is associated or affiliated with or ... is controlled by the organization furnishing the services, facilities, or supplies." 42 C.F.R. §413.17(b)(1).

98. By definition, FCOS and FAS, are among a group of corporations that would be considered "related parties" as admitted on the Medicare Cost Reports for 2014-2015:

	PART I. COSTS INCURRED AND ADJUSTMENTS REQUIRED AS A RESULT OF TRANSACTIONS WITH RELATED ORGANIZATIONS OR CLAIMED HOME OFFICE COSTS:					
1.00		31,102	0	31,102		1.00
2.00		454,928	490,453	35,525		2.00
3.00		76,901	0	76,901		3.00

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PART II. INTERRELATIONSHIP TO RELATED ORGANIZATION(S) AND/OR HOME OFFICE:

The Secretary, by virtue of the authority granted under section 1814(b)(1) of the Social Security Act, requires that you furnish the information requested under Part B of this worksheet.

This information is used by the Centers for Medicare and Medicaid Services and its intermediaries/contractors in determining that the costs applicable to services, facilities, and supplies furnished by organizations related to you by common ownership or control represent reasonable costs as determined under section 1861 of the Social Security Act. If you do not provide all or any part of the request information, the cost report is considered incomplete and not acceptable for purposes of claiming reimbursement under title XVIII.

1.00	FAS, LLC & FCOS, LLC	0.00	SUPPORT SERVICES

99. Federal law requires nursing facilities to disclose information on related parties that meet the following criteria:

a. anyone with direct or indirect ownership in the nursing facility of 5% or more;
b. officers, director, and partners;
c. managing employees; and
d. anyone who is an "additional disclosable party" which is defined as any person or entity who
    1) exercises operational, financial, or managerial control over the nursing facility or a part thereof, provides policies or procedures for any of the operations, or provides financial or case management services to the nursing facility;
    2) leases or subleases real property to the nursing facility, or owns a whole or part interest of 5% of more of the total property value of the nursing facility; or
    3) provides management services, administrative services, clinical consulting services, accounting services, or financial services to the nursing facility.
    (See 42 U.S.C. §1320a-3).

100. "Cost Reports" submitted by or on behalf of the facility show overpayments to related parties by the facility in 2015.

101. Plaintiffs allege that while holding the facility out to Mozana Clinkscales and other members of the public as providing excellent care, Defendants and their related parties extracted considerable profits through the management and operation of the facility by overpaying Defendants herein and other related parties from funds which should have been utilized instead to hire, train, and retain a sufficient number of qualified staff to meet the needs of all of their residents including Mozana.

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102. Plaintiffs allege that these overpayments to related parties left the facility with insufficient cash to provide sufficient and qualified staff to meet the individual needs of the residents in their facility during Mozana's period of residency therein.

103. Plaintiffs allege that throughout 2015, Defendants, through their operational, budgetary, consultation, and managerial decisions and actions, provided grossly inadequate capitalization as measured by the nature and magnitude of the corporate undertaking of ensuring that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with each residents' comprehensive assessments and plans of care including those of Mozana Clinkscales.

104. In other words, Defendants' actions in 2015 resulted in an underfunded nursing home during Mozana's residency.

105. Plaintiffs allege that this underfunding and corresponding understaffing, although profitable for Defendants and their related parties, directly resulted in their failure to provide the necessary and basic services to Mozana that she needed in order to prevent foreseeable injuries from a preventable fall.

106. The term used by caregivers and health science literature to describe the intensity of nursing care required by a resident is "acuity level".

107. The cost reports provide information about the number of patients, acuity of patients, and the self-reported staffing of the facility.

108. The reported HPPD is actually an inflated number due to the fact that hours paid includes sick pay and vacation pay. By removing the sick pay and vacation pay from the hours paid

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the resulting HPPD would be closer to the actual HPPD provided by caregivers to residents in nursing facilities.

109. The long-term care industry typically measures nursing department staffing in "hours per patient day", often cryptically referred to as "HPPD" or "PPD".

110. Expected hours are calculated by summing the nursing times in minutes (from the CMS Time Study found in Appendix Table A1) connected to each RUG category across all residents in the category and across all categories. The total minutes are then divided by the number of residents included in the calculations. The number of minutes per resident is converted to hours by dividing by 60. The result is the "expected" number of hours per resident day for each nursing category.

111. The government has recognized the "considerable evidence of a relationship between nursing home staffing levels and resident outcomes." (CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide). A government staffing study found "a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems."

112. In conjunction with these facts, Medicare has promulgated staffing 'expectations' based on the number and acuity of patients as reported by nursing homes. These expected staffing numbers drive higher quality of care and also serve as a basis for how much nursing homes are paid.

113. The staffing data is in the public domain via the CMS website and provides notice to nursing homes of CMS' expectations and estimated staffing requirements based on the

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facilities' average RUG scores.

114. That labor is the biggest component of the nursing home budget.

115. That nursing labor is the biggest component of the labor budget.

116. That RNs are the highest paid employees among the nursing staff.

117. That experienced, more senior, RNs cost more on an hourly basis than less experienced, less senior RNs.

118. According to the Federal Nursing Home Act at 42 CFR 483.35, the facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).

119. The federal requirement for staffing is that the nursing home must provide sufficient staffing to meet all of the needs of all of the residents at all times. 42 CFR 483.30(a).

120. Providing adequate and appropriate staffing, resources and financial solvency to a facility is crucial to meeting the needs of the residents.

121. The regulations are exact in what information must be provided:

> (i) **Staffing data for each facility (including resident census data and data on the hours of care provided per resident per day) based on data submitted under section 1128I(g) [42 USCS § 1320a-7j(g)],** including information on staffing turnover and tenure, in a format that is clearly understandable to consumers of long-term care services and allows such consumers to compare differences in staffing between facilities and State and national averages for the facilities. Such format shall include--
>
> (I) concise explanations of how to interpret the data (such as a plain

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> English explanation of data reflecting "nursing home staff hours per resident day");
> (II) **differences in types of staff (such as training associated with different categories of staff);**
> (III) **the relationship between nurse staffing levels and quality of care**; and
> (IV) an explanation that appropriate staffing levels vary based on patient case mix.

122. The actual HPPD for any given nursing facility can be determined by examining the data that nursing facilities use to track the number of hours their employees work. This information is easily accessed through reports that are commonly referred to as "Time Detail Reports", "Punch Detail Data Reports", or some other similarly named report depending on the time-keeping system used by the particular nursing facility. This information can reveal the actual HPPD for any period of time including a year, a quarter, a month, or even a day.

123. Defendants are required to report their staffing levels for RNs, LPNs and aides, the combination of which is commonly called "direct-care providers."

124. The understaffing of the facility was particularly egregious as to RN staffing levels. Indeed, CMS presently rates Defendants' Facility as being "Below Average" as to this particularly important RN staffing ratio.

125. This flagrant understaffing is of particular import, as it is indisputable that highly trained RNs are required to perform comprehensive assessments, to create patient care plans, and to provide a greater level of care to patients in need.

126. By failing to provide adequate RN and other staffing, Defendants saved millions of dollars, and put their residents, including Mozana at greater risk of falls and assaults.

127. Indeed, Mozana's injuries and death are directly attributable to a lack of assessment and

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care planning because of the lack of RN staffing

128. According to CMS expectations, in the third quarter of 2015 Defendants failed to provide the level of staffing necessary to meet the needs of their residents including Mozana. The following chart reflects the difference between CMS' expected level of staffing and the reported level of staffing provided by Defendants expressed in HPPD during the residency for the facility:

Third Quarter 2015 RN, LPN & CNA Time			
Reported Hours Per Resident Per Day			
Aides	**LPNs**	**RNs**	**Total Nursing**
1.98905	**0.93048**	**0.68714**	**3.61**
1 hour 59 minutes	**56 minutes**	**41 minutes**	**3 hours 36 minutes**
Expected Hours Per Resident Per Day			
Aides	**LPNs**	**RNs**	**Total Nursing**
2.42643	0.63559	1.10466	4.16669
2 hours 36 minutes	**38 minutes**	**1 hour 6 minutes**	**4 hours 10 minutes**
Fourth Quarter 2015 RN, LPN & CNA Time			
Reported Hours Per Resident Per Day			
Aides	**LPNs**	**RNs**	**Total Nursing**
1.98905	**0.93048**	**0.68714**	**3.61**
1 hour 59 minutes	**56 minutes**	**41 minutes**	**3 hours 36 minutes**
Expected Hours Per Resident Per Day			
Aides	**LPNs**	**RNs**	**Total Nursing**
2.46107	.65775	1.08477	4.20358
2 hours 27 minutes	**39 minutes**	**1 hour 5 minutes**	**4 hours 12 minutes**
Difference in Reported and Expected – Total Nursing Time			
Data Set--2015	Reported Time	Expected Time	Difference	% Below/Above Expected
Third Quarter	3 hours 36 minutes	4 hours 10 minutes	34 minutes	- 13.36%
Fourth Quarter	3 hours 36 minutes	4 hours 12 minutes	36 minutes	- 14.12%

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129. This chart shows that the staffing at the facility was about 13% below what CMS expected based on the acuity of the residents who resided therein during the residency. If sick time and vacation time were removed from the "hours paid" in each of these categories of caregivers the actual level of understaffing would turn out to be greater than these numbers indicate.

130. Additionally, whenever more accurate staffing information is made available to Plaintiffs, by way of employee time cards, the percentage of understaffing will likely increase significantly.

131. Additionally, there are reporting mandates to the entity for information such as staffing and expenditures. See 42 CFR 413.20 (Cost reports are required from providers on an annual basis) and 42 CFR 413.24 (Providers must submit adequate cost data).

132. Not only do the cost reports contain information on expenditure, they must contain information about the facility's residents, in particular their acuity levels as determined by the RUG scores. CMS 2540 Cost Report Instruction Manual.

133. Acuity levels are reflected in the resident's 'Resource Utilization Group" classification or "RUGs". RUGs are mutually exclusive categories that reflect the amount of resources that will be needed in order to meet the needs of a particular resident in nursing facilities. They are assigned to residents based on data derived from an assessment tool referred to as a "Minimum Data Set" (MDS").

134. An MDS is prepared for each resident of a nursing facility regardless of who is paying for their stay in the nursing facility.

135. MDSs are required to be prepared when a resident initially arrives at the facility and

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periodically thereafter depending on the course of the resident's medical profession.

136. At a minimum, an MDS is to be prepared for every resident in a nursing facility on a quarterly basis.

137. The completion of an MDS by a nursing facility is a part of the federally mandated process for clinical assessments of all residents in nursing facilities.

138. MDSs need to be as detailed and comprehensive as possible so that they reflect all of the needs of each of the residents in the nursing facility.

139. When done properly, an MDS provides a comprehensive assessment of each resident's functional capabilities and helps the staff of a nursing facility identify all of the health problems of each of their residents.

140. The information contained in an MDS is used to slot the resident into a RUG.

141. RUGs are organized in a hierarchy from residents who will need the greatest amount of resources to residents who will need the least amount of resources during their stay at the nursing facility.

142. Residents who will need the greatest amount of resources are assigned to higher groups in the RUG hierarchy.

143. RUGs also determine the level of compensation a nursing facility will receive in order to provide the level of care necessary for each of their residents.

144. Residents in higher RUGs place higher demands for care and services on the nursing facility and its staff.

145. Providing care to residents in higher RUGs requires more staff and is, therefore, reimbursed at a higher level.

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146. The RUG assigned to a resident can be found in section Z of each resident's MDS.

147. The only way to determine the total acuity level and corresponding RUG of each of the residents at Millennium Post-Acute Rehabilitation on any given day is by examining section Z of ***every*** MDS in effect on that day.

148. Using the information contained in the MDSs of every resident in a nursing facility, CMS is able to determine an HPPD that is expected for each nursing facility in the country. This is referred to as the "expected HPPD" and can be found on the CMS.gov website. They are also able to adjust the HPPD per facility on a quarterly basis based on the updated MDSs that are provided to them.

149. 70% of RUG reimbursement rate is attributable to the labor requirements associated with the RUG score.

150. Defendants knew or should have known that CMS publishes quarterly the facility's expected HPPD for direct care caregivers at CMS.gov.

151. The CMS "expected" staffing associated with the monthly or quarterly reports and the CMS "estimated" staffing associated with RUG scores are notice of potential under-staffing and knowledge of the dangers associated therewith.

152. The Centers for Medicare and Medicaid Services ("CMS") is the federal agency that is tasked with regulating all nursing facilities in this country. Through the years, CMS has sponsored multiple studies to determine the amount of time that RNs, LPNs, and CNAs in nursing facility spend providing direct care to residents as well as other elements of resident care.

153. Because of these studies, CMS is able to set a number of hours of direct care that they

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expect to be provided to residents by RNs, LPNs, and CNAs based on the nursing facility's total acuity level. This expectation is expressed in terms of "hours per patient day" or "HPPD".

154. Defendants knew or should have known that a number of studies have found that for-profit ownership is related to poorer quality of care than nonprofit ownership (Hillmer et al. 2005; Comondore et al. 2009).

155. Defendants knew or should have known that there is evidence that nursing home chains, defined as companies that own or operate two or more facilities, also have lower staffing, poor resident outcomes, and more deficiencies (violations of regulations) (Cohen and Spector 1996; Grabowski 2001a, b; Harrington et al. 2001; Banaszak- Holl et al. 2002; O'Neill et al. 2003; Harrington, Mullan, and Carrillo 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).

156. Defendants knew or should have known that the US GAO (2009a) found that the most poorly performing nursing homes in the United States tended to be owned by for-profit chains.

157. Defendants knew or should have known that studies have found that poor nursing home quality is directly related to inadequate staffing levels (Harrington et al. 2000; US Centers for Medicare and Medicaid Services [CMS] 2001; Schnelle et al. 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).

158. Defendants knew or should have known that nurse staffing levels have been documented to have a positive impact on both the process and the outcomes of nursing home care, such as fewer pressure ulcers, improved functional status, better mortality rates, and fewer

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deficiencies for poor quality (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Castle and Engberg 2007, 2008; Castle 2008).

159. Defendants knew or should have known that a systemic review of 87 research articles and reports from 1975 to 2003 found that high total staffing levels, especially licensed staff, were associated with higher quality of care (Bostick et al. 2006).

160. Defendants knew or should have known that the Relationship of Nursing Home Staffing to Quality of Care at HSR: Health Services Research 39:2 (April 2004) study is supported by other correlational data documenting a relationship between staffing (particularly RNs) and a variety of outcomes, including: lower death rates, higher rates of discharges to home, improved functional outcomes fewer pressure ulcers, fewer urinary tract infections, lower urinary catheter use, and less antibiotic use (Linn, Gurel, and Linn 1977; Nyman 1988; Munroe 1990; Cherry 1991; Spector and Takada 1991; Aaronson, Zinn, and Rosko 1994; Bliesmer et al. 1998; Harrington et al. 2000; U.S. Department of Health and Human Services 2000b).

161. Defendants knew or should have known that inadequate staffing has been associated with inadequate feeding assistance during meals, poor skin care, lower activity participation, and less toileting assistance (Spector and Takada 1991; Kayser-Jones 1996, 1997; Kayser-Jones and Schell 1997).

162. Defendants knew or should have known that lower staffing levels, especially RN staffing, translate into lower labor costs, which appears to be a management strategy by the top 10 chains as well as other for- profit facilities to reduce costs. Nurse Staffing and Deficiencies

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in the Largest For- Profit Nursing Home Chains and Chains Owned by Private Equity Companies. DOI: 10.1111/j.1475-6773.2011.01311.x

163. Defendants knew or should have known that low staffing levels are a major concern because low staffing, especially RN staffing, have been associated with more federal deficiencies and poorer resident outcomes as noted in previous studies (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Bostick et al. 2006; Castle and Engberg 2007, 2008; Castle 2008; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).

164. Defendants knew or should have known that a clear link has been demonstrated between lower nurse staffing levels in nursing homes and adverse patient outcomes.

165. Defendants knew or should have known that numerous studies have shown positive relationships between staffing levels for different types of staff (RN, LPN, nursing assistant) and a range of quality measures (e.g. number of deficiencies, functional improvement, pressure ulcer rates, and discharged home). See Feuerberg M, Reilly K, Kramer AM, Kane RA. "Review of selected research on nursing home staffing and resident outcomes. Chapter 6 in Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes." Health Care Financing Administration, 2000; Bliesmer MM, Smayling M, Kane RL, Shannon I. The relationship between nursing staffing levels and nursing home outcomes. J Aging Health 1998; 10(3):351-371; Cohen JW, Spector WD. The effect of Medicaid reimbursement on quality of care in nursing homes. J Health Econ 1996; 15:23-48; Harrington C, Zimmerman D, Karon S, Robinson J, Bjorkling F. Nursing home staffing and its relationship to deficiencies. (This research was funded by the Health Care Financing

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Administration and the Agency for Health Policy & Research). 1999; and Spector WD, Takada HA. Characteristics of nursing homes that affect resident outcomes. J Aging Health 1991; 3(4):427-454.

166. According to the CMS Technical User Guide for Design for Nursing Home Compare Five-Star Quality Rating System, there is considerable evidence of a relationship between nursing home staffing levels and resident outcomes.

167. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at a substantially higher risk of quality problems." Nursing Home Compare Five Year Report. The staffing rating is a combination of RN and total nurse staffing.

168. The CMS Nursing Home Compare program serves to provide consumers of long-term care services "easily accessible, readily understandable" information about nursing facilities. 42 CFR § 1395i-3(i)(1)(A).

169. The information that must be made available includes specific staffing information – which is reported by the facilities themselves.

170. This information on "Nursing Home Compare" is compiled into what is commonly called a "Star Rating."

171. A portion of the CMS Star rating formulation includes a calculation of the differential between reported and expected staffing levels for a facility.

172. Medicare/CMS clearly states on their website and in their manuals to providers, including Defendants, that part of the reason for their star rating system is that there "is evidence of a relationship between nursing home staffing levels, staffing stability, and resident

outcomes.

173. Staffing is the biggest issue in the star rating system as CMS has noted that "staffing has the lowest proportion of any domain receiving five stars."

174. CMS gives a Star rating based in large part on RN staffing provided by the facility:

Table 5
Staffing Points and Rating (updated February 2015)

RN rating and hours		Total nurse staffing rating and hours (RN, LPN and nurse aide)				
		1	2	3	4	5
		<3.262	3.262 – 3.660	3.661 – 4.172	4.173 – 4.417	≥4.418
1	<0.283	★	★	★★	★★	★★★
2	0.283 – 0.378	★	★★	★★★	★★★	★★★
3	0.379 – 0.512	★★	★★★	★★★	★★★★	★★★★
4	0.513 – 0.709	★★	★★★	★★★★	★★★★	★★★★
5	≥0.710	★★★	★★★	★★★★	★★★★	★★★★★

Note: Adjusted staffing values are rounded to three decimal places before the cut points are applied.

175. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems. See Kramer AM, Fish R. "The Relationship Between Nurse Staffing Levels and the Quality of Nursing Home Care." Chapter 2 in Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes: Phase II Final Report. Abt Associates, Inc., Winter 2001.

176. Defendants knew or should have known that more RN direct care time per resident per day (examined in 10-minute increments up to 30 to 40 minutes per resident per day) was associated with fewer pressure ulcers, hospitalizations, and UTIs; less weight loss, catheterization, and deterioration in the ability to perform ADLs; and greater use of oral

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standard medical nutritional supplements.

177. Defendants knew or should have known that more certified nursing assistants and licensed practical nurse time was associated with fewer falls and assaults.

178. Because of their joint venture, Defendants had a joint obligation to sufficiently fund the facility to ensure that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with their residents' comprehensive assessments and plans of care.

179. This joint obligation required Defendants to sufficiently fund the facility so that there would be enough staff and resources in order to meet the needs of their residents.

180. This joint obligation required Defendants to base the number of Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Certified Nurse Aides (CNAs) to be provided at the facility not only upon the number of residents residing in their facility (commonly referred to as "resident census") but also on the intensity of nursing care required by their residents.

181. Nursing facilities are required to submit an annual "Medicare Cost Report" to CMS known as "CMS Form 2540-10". The cost report is a financial report that identifies the cost and charges related to healthcare treatment activities in a particular nursing facility.

182. Included in the costs are extensive details as to how much money the nursing facility spent on RNs, LPNs, and CNAs during that year based on payroll records.

183. The cost report also reports the resident census, hours paid, and the hourly rate that the nursing facility paid each category of direct caregivers during that year. By dividing the paid hours by the resident census it is possible to determine how many hours the nursing

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facility paid for each category of direct caregivers per resident, per day for the time period covered by that particular cost report. This number is referred to as the "reported HPPD".

184. Based on the CMS cost reports, the facility's understaffing allowed them to profit from the short-staffing.

185. The lack of RN staffing leads to lack of assessments or allowing unqualified LPNs to assess which is outside their scope of practice in violation of the Board of Nursing's Advisory Opinions.

186. According to the South Carolina Board of Nursing Advisory Opinion #21 which constitutes competent and safe nursing practice, the State Board of Nursing for South Carolina has determined that it is NOT within the role and scope of practice for the licensed practical nurse (LPN) to perform physical assessments. It is within the role of the LPN to assist with the collection of patient health data to be used for the complete physical assessment. However, the analysis and synthesis of clinical information and the formulation of problem statements and/or nursing diagnoses requires the knowledge base and skills that are within the scope of practice of the registered nurse (RN) and may NOT be delegated to the LPN.

187. S.C. Code 40-33-20 (48) states the scope of practice for registered nursing which means the performance of health care acts in the nursing process that involve assessment, analysis, intervention, and evaluation. This practice requires specialized independent judgment and skill and is based on knowledge and application of the principles of biophysical and social sciences.

188. S.C. Code 40-33-20 (48) states the scope of practice of registered nursing includes, but is not limited to:

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a. assessing the health status of persons and groups;
b. analyzing the health status of persons and groups;
c. establishing outcomes to meet identified health care needs of persons and groups;
d. prescribing nursing interventions to achieve outcomes;
e. implementing nursing interventions to achieve outcomes;
f. administering and delivering medications and treatments prescribed by an authorized licensed provider;
g. delegating nursing interventions to qualified others;
h. providing for the maintenance of safe and effective nursing care rendered directly or indirectly;
i. providing counseling and teaching for the promotion and maintenance of health;
j. evaluating and revising responses to interventions, as appropriate;
k. teaching and evaluating the practice of nursing;
l. managing and supervising the practice of nursing;
m. collaborating with other health care professionals in the management of health care;
n. participating in or conducting research, or both, to enhance the body of nursing knowledge;
o. consulting to improve the practice of nursing; and
p. performing additional acts that require special education and training and that are approved by the board.

189. Plaintiffs allege that Defendants jointly exercised control over the operation and management of the facility during Mozana's period of residency therein, including but not limited to, the creation, setting, funding and/or implementation of budgets; the monitoring of resident acuity levels; the monitoring of staffing levels; control over resident admissions and discharges; and control over the number of hours of direct care provided to the residents by RNs, LPNs, and CNAs.

190. Plaintiffs allege that each of these managerial and operational functions had a direct impact on the amount and quality of care delivered to Mozana while she resided at the Fundamental facility in Greenville, and were taken in furtherance of operational and managerial objectives set out by Hunt Valley and Murray Forman.

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191. Plaintiffs allege that Defendants engaged in a systematic process of inadequately staffing the facility making it impossible to keep the residents safe and to meet the individual needs of their residents during Mozana's period of residency therein.

192. Plaintiffs allege that this understaffing, although quite profitable for Defendants, directly resulted in their failure to provide the necessary and basic services Mozana needed in order to prevent injuries from falls and assaults.

193. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(6) "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services. Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death. Noncompliance with regulatory standards alone does not constitute neglect.

194. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for her own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death.

195. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11), a "Vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and

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physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

196. Plaintiff decedent was a resident of Defendant facility and was therefore a vulnerable adult under the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11).

197. S.C. Regulation 61-17 Section 603(A) states that the facility must meet the following standard: "There shall be direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs.[care plans]"

198. S.C. Regulation 61-17 Section 803(B) states that the facility must meet the following standard regarding the resident's Individual Care Plan (ICP): The ICP shall describe:

> 1. The needs of the resident, including the services that are to be furnished, *i.e.*, what assistance, how much, who will provide the assistance, how often, and when;
> 2. Advance directives and healthcare power-of-attorney, as applicable;
> 3. Recreational and social activities that are suitable, desirable, and important to the resident;
> 4. Dietary needs and preferences of resident as approved by a physician;
> 5. Discharge planning, to include assessing continuing care needs and developing a plan designed to assure the resident's needs will be met after discharge or transfer.

199. S.C. Regulation 61-17 Section 805(B) states that the facility must meet the following standard regarding the resident's Electronic Resident Records: "A facility that maintains electronic records shall:

> 1. Retain the hard copy originals of any materials that cannot be electronically stored;
> 2. Employ an off-site backup storage system as protection in the event that the on-site system is damaged or destroyed;
> 3. Use an imaging mechanism that is able to copy documents with signatures;
> 4. Assure that records, once put in electronic form, are unalterable.

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200. .S.C. Regulation 61-17 Section 805(C) states that the facility must meet the following standard regarding the resident's Electronic Resident Records:: "Electronic signatures may be used any place in the resident or outpatient record that requires a signature, provided signature identification can be verified and an electronic signature may be legally used. Electronic authorization shall be limited to a unique identifier (confidential code) used only by the individual making the entry to preclude the improper or unauthorized use of any electronic signature.

201. The facility as a health care provider maintains electronic records which requires the facility to maintain an audit trail. See the requirements of 45 CFR §164.312.

202. The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's electronic health records (EHR). For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record.

203. The audit trail shows what the provider did with the records—e.g., simply reviewed them, prepared a note, or edited a note. Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail.

204. The audit trail cannot be erased and all events related to the access of a patient's EHR are permanently documented in the audit trail.

205. 45 C.F.R. § 164.306(a)(1) commands the facility . . . to "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information [that it] creates, receives, maintains, or transmits."

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206. 45 C.F.R. § 164.304 provides that "availability" in this context means "that data or information is accessible and useable upon demand by an authorized person."

207. 45 C.F.R. § 164.308(a)(7)(ii) provides that a facility . . . must "[e]stablish and implement procedures to create and maintain retrievable exact copies of electronic protected health information."

208. 45 C.F.R. § 164.312(b) provides that a facility . . . must "[i]mplement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information."

209. 45 C.F.R. § 170.210(b) requires that "[t]he date, time, patient identification, user identification . . . must be recorded when electronic health information is created, modified, accessed, or deleted; and an indication of which action(s) occurred and by whom must be recorded."

210. 21 C.F.R. § 11.10(e) provides that a facility shall employ procedures and controls including the "[u]se of secure, computer generated, time-stamped audit trails to independently record the date and time of operator entries and actions that create, modify, or delete electronic records" and that "[s]uch audit trail documentation shall be retained for a period at least as long as that required for the subject electronic records . . . ."

211. 21 C.F.R. § 11.10(k)(2) states that a facility shall employ appropriate controls over systems documentation including "[r]evision and change control procedures to maintain an audit trail that documents time-sequenced development and modification of systems documentation."

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212. 42 U.S.C. §1320d-2(d)(2) provides that a facility . . . "shall maintain reasonable and appropriate administrative, technical, and physical safeguards —(A) to ensure the integrity and confidentiality of the [health] information; (B) to protect against any reasonably anticipated—(I) threats or hazards to the integrity of the information; and (ii) unauthorized uses or disclosures of the information . . . ."

213. 42 U.S.C. § 1320d(6) [provides that] "individually identifiable health information" is defined to include "any information . . . created or received by a health care provider . . . [that] relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and . . . identifies the individual; or . . . can be used to identify the individual."

214. Plaintiffs have repeatedly requested Defendants produce the audit log for any electronic Health Records for Mozana Clinkscales but Defendants refuse to provide in violation of federal regulations.

215. S.C. Regulation 61-17 Section 605(A) states that the facility must meet the following standard: "An adequate number of licensed nurses shall be on duty to meet the total nursing needs of residents. Licensed nursing staff shall be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation.

216. S.C. Regulation 61-17 Section 605(B) states that the facility must meet the following standard for unlicensed Nursing Staff: "The required number of nurse aides and other unlicensed nursing staff shall be determined by the number of residents assigned to beds at

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the facility. Additional staff members shall be provided if the minimum staff requirements are inadequate to provide appropriate care and services to the residents of a facility."

217. S.C. Regulation 61-17 Section 601(E) states that the facility must meet the following standard regarding staffing information: "Time schedules shall be maintained indicating the numbers and classification of all staff, including relief staff, who work on each shift of duty. The time schedules shall reflect all changes so as to indicate who actually worked."

218. S.C. Regulation 61-17 Section 601(H) states that the facility must meet the following standard regarding third party providers: "When a facility engages a source other than the facility to provide services normally provided by the facility, *e.g.*, staffing, training, recreation, meal service, social services, professional consultant, maintenance, transportation, there shall be a written agreement with the source that describes how and when the services are to be provided, the exact services to be provided, and the requirement that these services are to be provided by qualified individuals. The source shall comply with this regulation in regard to resident care, treatment, services, and rights.

219. S.C. Regulation 61-17 Section 607(A) states that the facility must meet the following standard regarding training: "Staff members shall be provided the necessary training to perform the duties for which they are responsible."

220. S.C. Regulation 61-17 Section 607(B) states that the facility must meet the following standard regarding training: "Before performing any duties, all newly-hired staff members shall be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members shall be instructed in the provisions of S.C. Code Section 43-35-5 et seq., "Omnibus Adult

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Protection Act", and S.C. Code Section 44-81-10 et seq.; "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in this regulation.

221. S.C. Regulation 61-17 Section 607(C) states that the facility must meet the following standard regarding training: "All staff shall be provided in-service training programs that identify training needs related to problems, needs, care of residents and infection control and are sufficient to assure staff's continuing competency. Training for the tasks each staff member performs shall be conducted in order to provide the care, treatment, procedures, and/or services delineated in Section 1000."

222. S.C. Regulation 61-17 Section 601(D) states that the facility must meet the following standard regarding employee information: "There shall be accurate current information maintained regarding all staff members of the facility that shall include:

1. Name, address and telephone number;
2. Date of hire;
3. Past employment, experience, and education;
4. Professional licensure or registration number or certificate or letter of completion;
5. Position in the facility and job description;
6. Documentation of orientation to the facility, including residents' rights, regulation compliance, policies and procedures, job duties, in-service training and on-going education;
7. Health status, health assessment, and tuberculin testing results;
8. Evidence that a criminal record check has been completed;
9. For former staff members, the date of separation;
10. Date of initial resident contact may be maintained by the facility.

223. According to §483.20 applicable to nursing homes, a Resident Assessment requires the facility to provide with ongoing assessment information necessary to develop a care plan, to provide the appropriate care and services for each resident, and to modify the care plan

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and care/services based on the resident's status. The facility is expected to use resident observation and communication as the primary source of information when completing the RAI. In addition to direct observation and communication with the resident, the facility should use a variety of other sources, including communication with licensed and non-licensed staff members on all shifts and may include discussions with the resident's physician, family members, or outside consultants and review of the resident's record.

224. According to CMS' Long-Term Care Facility Resident Assessment Instrument 3.0 User's Manual Section 2.4, the Federal regulatory requirement at 42 CFR 483.20(d) requires nursing homes to maintain all resident assessments completed within the previous 15 months in the resident's active clinical record.

225. According to Defendants' own Nursing Policies and Procedures regarding physician communication and changes of condition, the facility is required to documents all assessments and changes in condition:

> Notify the physician of the change in medical condition. (The physician notification grid may be used as a reference tool regarding acceptable notification timeframes.) The nurse will document all assessments and changes in the patient's/resident's condition in the medical record.

226. According to §483.20(k) applicable to nursing homes related to Comprehensive Care Plans: (1) The facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment. The care plan must describe the following:

> (i) The services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under §483.25; and
> (ii) Any services that would otherwise be required under §483.25 but are not

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> provided due to the resident's exercise of rights under §483.10, including the right to refuse treatment under §483.10(b)(4).

227. Defendants' facility had a duty to properly assess, care plan, and attempt interventions to prevent pressure ulcers, falls, and other preventable injuries.

228. According to §483.25 related to Quality of Care requires the facility to provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

229. According to §483.25(h) related to Accidents, the facility must ensure that:

> (1) The resident environment remains as free from accident hazards as is possible; and
> (2) Each resident receives adequate supervision and assistance devices to prevent accidents.

230. S.C. Regulation 61-17 Section 701(A) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall maintain a record of each accident and incident, including each serious accident and incident as defined in Section 701.B, involving residents or staff members or volunteers, occurring in the facility or on the facility grounds. A facility's record of each accident and incident shall be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures, and retained by the facility for six (6) years after the resident stops receiving services.

231. S.C. Regulation 61-17 Section 701(E) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall retain a copy of every serious accident and incident with all of the information provided to the Department and the names, injuries, and treatments associated with each resident, staff, and/or visitor involved. A

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facility shall retain all serious accident and incident records for six (6) years after the resident stops receiving services."

232. S.C. Regulation 61-17 Section 801(B) states that the facility must meet the following standard regarding documentation in the resident record: "Contents of the resident record may be stored in separate files, in separate areas within the facility, and the record shall include the following information:

1. Medical history and physical examination;
2. Consent form for treatment signed by the resident or legal representative;
3. Care and services agreement;
4. Healthcare directives and special information, *e.g.*, advance directive information, do-not-resuscitate (DNR) orders, and allergies;
5. **Incidents involving the resident**;
6. Medical treatment;
7. Orders, including telephone and standing orders, for all medication, care, services, therapy, procedures, and diet from physicians or other legally authorized healthcare providers, which shall be completed prior to, or at the time of admission, and subsequently, as warranted;
8. Individual Care Plan;
9. Provisions for routine and emergency medical care, to include the name and telephone number of the resident's physician;
10. **Assessments and progress notes**, *e.g.*, dietary, activity, therapy;
11. Record of administration of each dose of medication;
12. Record of the use of restraints, if applicable, including time, type, reason and authority for applying;
13. Treatment, procedure, wound care report (dictated or written into the record after treatment, procedure, or wound care) to include at least:
    a. Description of findings;
    b. Techniques utilized to perform treatments and procedures;
    c. Specimens removed, if applicable;
    d. Name of provider;
    e. Progress notes generated by physicians and healthcare professionals;
    f. Notes of observation, including temperature, pulse, respiration, blood pressure and weight when indicated by physician's orders or by a change in the resident's condition;
    g. Special procedures and preventive measures performed, *e.g.*, isolation for symptoms, diagnosis, and/or treatment of infectious conditions including but not limited to tuberculosis, influenza, pneumonia, therapies;

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h. Reports of all laboratory, radiological, and diagnostic procedures along with tests performed and the results appropriately authenticated;
i. Consultations by physicians or other healthcare professionals;
j. Photograph of resident, if the resident or responsible party approves;
k. Date and hour of discharge or transfer, as applicable;
l. Discharge and/or transfer summary, including care and condition at discharge or transfer, date and time of discharge or transfer, instructions for self-care, instructions for obtaining post-treatment or procedure emergency care, and signature of physician authorizing discharge or transfer;
m. Date and circumstances of death, as applicable.

233. The federal regulation at §483.75(l) related to documentation in the clinical records requires:

> (1) The facility must maintain clinical records on each resident in accordance with accepted professional standards and practices that are--
> (i) Complete;
> (ii) Accurately documented;
> (iii) Readily accessible; and
> (iv) Systematically organized.

234. Defendants' facility had a duty to document the respective interventions and incidents adequately in the nurses' notes.

235. S.C. Regulation 61-17 Section 701(D) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall submit a written report of its investigation of every serious accident and incident to the Department within five (5) days of the serious accident or incident. A facility's written report to the Department shall provide at a minimum:

1. Facility name;
2. License number;
3. Type of accident or incident;
4. Date accident or incident occurred;
5. Number of residents directly injured or affected;
6. Resident record number or last four (4) digits of Social Security Number;
7. Resident age and sex;
8. Number of staff directly injured or affected;

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9. Number of visitors directly injured or affected;
10. Name(s) of witness(es);
11. Identified cause of accident or incident;
12. Internal investigation results if cause unknown; and
13. Brief description of the accident or incident including the location of occurrence and treatment of injuries."

236. S.C. Regulation 61-17 Section 701(B) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall report every serious accident and incident that results in resident's death or significant loss of function or damage to a body structure, not related to the natural course of a resident's illness or underlying condition or normal course of treatment, and resulting from an accident or incident occurring to resident within the facility or on the facility grounds. Serious accidents and incidents requiring reporting include, but are not limited to:

1. Crime(s) against resident;
2. Confirmed or suspected cases of abuse, neglect, or exploitation;
3. Medication error with adverse reaction;
4. Hospitalization as a result of the accident or incident;
5. Severe hematoma, laceration, or burn requiring medical attention or hospitalization;
6. Bone fracture or joint fracture;
7. Severe injury involving use of restraints;
8. Attempted suicide; or
9. Fire.

237. S.C. Regulation 61-17 Section 500(A) states that the facility must meet the following standard: "There shall be written policies and procedures addressing the manner in which the requirements of this regulation shall be met. The written policies and procedures shall accurately reflect actual facility practice regarding care, treatment, procedures, services, record keeping and reporting, admission and transfer, physician services, nursing services, social services, resident rights and assurances, medication management, pharmaceutical

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services, meal service operations, emergency procedures, fire prevention, maintenance, housekeeping and infection control, the operation of the facility, and other special care and procedures as identified in this section. The policies and procedures shall address the provision of any special care offered by the facility that would include how the facility shall meet the specialized needs of the affected residents such as Alzheimer's disease and/or related dementia, physically or developmentally disabled, in accordance with any laws that pertain to that service offered, for example, Alzheimer's Special Care Disclosure Act."

238. S.C. Regulation 61-17 Section 500(C) states that the facility must meet the following standard: "All policies and procedures shall:

> 1. Establish a time period for review of policies and procedures in writing and such reviews shall be documented;
> 2. Be revised as appropriate in order to reflect actual facility practice; and
> 3. Be accessible to staff, printed or electronically, at all times."

239. The facility Administrator shall be licensed as a nursing home Administrator in accordance with S.C. Code Section 40-35-30. In addition, all other applicable provisions of S.C. Code Title 40, Chapter 35, shall be followed.

240. S.C. Regulations applicable to nursing homes found in 61-17 Section 602 requires that "each facility shall have a full-time licensed Administrator".

241. S.C. Code Section 40-35-110 states that "Misconduct" includes the following:

> (1) acting in a manner inconsistent with the health or safety of the patients of the nursing home or community residential care facility;
> (2) failing to ensure that the nursing home or community residential care facility in which he is an administrator complies with the provisions of law and regulations of the licensing or supervising authority or agency, whether federal, state, or local, having jurisdiction over the operation and licensing of the nursing home or community residential care facility;

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(3) intentional or knowing, direct or indirect, violation of or the aiding and abetting in the violation of this chapter or a regulation promulgated under this chapter;
(4) failing to operate a nursing home or community residential care facility in a manner that ensures the safety, health, and welfare of the patients;
(5) use of a false, fraudulent, or forged statement in the practice of nursing home administration or community residential care facility administration.

242. The federal regulation at §483.25(l) states that: "Each resident's drug regimen must be free from unnecessary drugs."

243. An unnecessary drug is any drug when used:

(i) In excessive dose (including duplicate therapy); or
(ii) For excessive duration; or
(iii) Without adequate monitoring; or
(iv) Without adequate indications for its use; or
(v) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or
(vi) Any combinations of the reasons above.

244. Based on a comprehensive assessment of a resident, the facility must ensure that:

(i) Residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and
(ii) Residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

245. The intent of requirement 483.25(l) is that each resident's entire drug/medication regimen be managed and monitored to achieve the following goals:

• The medication regimen helps promote or maintain the resident's highest practicable mental, physical, and psychosocial well-being, as identified by the resident and/or representative(s) in collaboration with the attending physician and facility staff;
• Each resident receives only those medications, in doses and for the duration clinically indicated to treat the resident's assessed condition(s);
• Non-pharmacological interventions (such as behavioral interventions) are considered and used when indicated, instead of, or in addition to, medication;
• Clinically significant adverse consequences are minimized; and
• The potential contribution of the medication regimen to an unanticipated decline

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> or newly emerging or worsening symptom is recognized and evaluated, and the regimen is modified when appropriate..

246. The federal regulation at §483.25(j) requires that: "The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

247. The intent of this regulation is to assure that the resident receives sufficient amount of fluids based on individual needs to prevent dehydration.

248. "Sufficient fluid" means the amount of fluid needed to prevent dehydration (output of fluids far exceeds fluid intake) and maintain health. The amount needed is specific for each resident, and fluctuates as the resident's condition fluctuates (e.g., increase fluids if resident has fever or diarrhea).

249. The federal regulation at §483.75(j) requires that: "The facility must ensure that

> (1) The medical care of each resident is supervised by a physician; and
> (2) Another physician supervises the medical care of residents when their attending physician is unavailable."

250. The intent of this regulation is to ensure the medical supervision of the care of nursing home residents by a personal physician.

251. The federal regulation at §483.75(k) requires that: "The facility must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services."

252. That while at the facility, Mozana suffered a preventable fall and assault that caused mental anguish, pain and suffering, including one that resulted in a fractured hip requiring surgery.

253. That the facility failed to keep Mozana safe from a preventable fall.

254. That the facility failed to monitor another resident with a history of harassing Mozana and other female residents in the facility.

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255. That the facility failed to implement safety devices to keep Mozana safe.

256. That the facility failed to monitor Mozana to keep her free from harassment.

257. Defendants' facility had a duty to ensure that proper preventative measures were in place to keep the resident safe and free from abuse, neglect, harassment, and falls.

258. Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Mozana.

259. That at all times relevant hereto, Defendants were required to exercise due care in the supervision and care of their residents to prevent the occurrence of new adverse health conditions and to prevent currently existing adverse health conditions from deteriorating.

260. That the facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet the resident's medical nursing, nutritional, mental, and psychological needs as identified in the comprehensive assessment.

261. That the facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.

262. That the nursing home had a duty to ensure that Mozana was kept safe and free from abuse, neglect, and harassment by providing the necessary treatment and services to prevent injury.

263. That the acts and delicts of Defendants caused, and were the proximate causes of Mozana's fall, abuse, harassment, surgery, loss of dignity, hospitalization, conscious pain and suffering, mental distress, medical bills and disability to the decedent.

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264. Pursuant to S.C. Code § 15-5-90, said causes of action survive the death of decedent and are properly brought by the Personal Representative on behalf of decedent's estate (Claimant #1).

265. That the Plaintiffs institute this action in order to recover for decedent's injuries and wrongful death, and for damages to the statutory heirs of Mozana Clinkscales, deceased, pursuant to and under the authority of S.C. Code § 15-51-10.

266. Pursuant to S.C. Code § 15-51-20, the wrongful death beneficiaries and claimants as defined by S.C. Code § 15-31-26(2) are decedent's children: Charlie Clinkscales (Claimant #2), Annie Abraham (Claimant #3), Bobby Lee Clinkscales (Claimant #4); Mozana Clinkscales (Claimant #5), and Andre Clinkscales (Claimant #6).

267. As a result of the death of Mozana Clinkscales, the wrongful death beneficiaries as individual claimants have suffered grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of the decedent's society. These damages were the proximate result of the acts and delicts of Defendants.

268. That the Defendants were jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants.

269. That the Defendants hold themselves out as specialists in the field of adult - geriatric care with the expertise necessary to maintain the health, safety, and highest practicable quality of life of persons unable to adequately care for themselves.

270. That the Defendants were under a duty to provide reasonable, appropriate and adequate care to Mozana pursuant to state and federal laws, rules, regulations, guidelines, and existing industry standards.

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a. Defendants failed to provide the highest practicable level of care, training, competency. (42 CFR § 483.75)
b. Defendants repeatedly failed to maintain nursing and other staffing at levels necessary to meet the needs of Mozana Clinkscales. 42 CFR §§ 483.30 and 483.25)
c. Defendants failed to provide proper and timely assessments, and provide a 1:1 sitter, throughout Mozana's stay and on the days of the assault and harassment. 42 CFR §§ 483.35, and 483.25
d. Defendants repeatedly failed to follow proper skilled nursing care standards to maximize the health, safety, and well-being of Mozana.
e. Defendants repeatedly failed to ensure that Mozana was safe, free from abuse, neglect, and accorded the dignity and respect owed.

271. Defendants failed to follow, implement, and adhere to all physician's orders.

272. Defendants failed to establish and implement an adequate resident care plan for Mozana based upon her needs, and to protect her from a known and foreseeable danger to her health, safety, and well-being.

273. That at all times pertinent hereto, Mozana resided at the above-named facility and as such was under the exclusive control and care of Defendants and their employees, agents, officers, and servants while a resident.

274. That the Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Mozana to keep her safe and prevent known or foreseeable injuries.

275. That, upon information and belief, at all times during Mozana's residency, the facility was understaffed, suffered a high turnover rate, and failed to properly screen, train, supervise, and discipline their staff, and failed to put them in suitable positions for their skills, experience, and competence.

276. That, upon information and belief, Defendants FCOS, FAS, and Flathmann were involved in the budget and staffing decisions of the facility, and were more concerned about profits

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and siphoning funds to the Fundamental chain than creating a budget that provided adequate custodial care, and quality care to the residents.

277. That, upon information and belief, at all times during Mozana's residency, the facility was underfunded, under-supplied, and under-equipped to care for residents, and was forced to operate on a budget that did not allow for the best care of the residents, including Mozana..

278. That, upon information and belief, Defendants FCOS, FAS, and Flathmann were jointly, directly, and vicariously liable and also liable as alter ego defendants in creating the budget for the facility and siphoning money away from the facility to related entities with common ownership to the Defendants.

ALLEGATIONS REGARDING DEFENDANTS' JOINT VENTURE

279. Relevant and consistent allegations contained in paragraphs 1-278 are incorporated by reference as if written verbatim herein.

280. Plaintiffs allege that Defendants were engaged in a joint venture in the management and operation of the facility.

281. Defendants' joint venture in the operation of the facility included:

a. an agreement, express or implied, among the members of the group;
b. a common purpose to be carried out by the group;
c. a community of pecuniary interest in that purpose, among the members; and
d. an equal right to a voice in the direction of the enterprise, which give an equal right of control.

282. Because of the joint venture, Defendants owed a joint duty to Mozana to provide the same level of care and treatment as any other reasonable, prudent, similar nursing home business that operate, manages, and/or controls a nursing facility would have provided under the same or similar circumstances taking into consideration Mozana's known condition.

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FIRST CAUSE OF ACTION
(Negligence/Recklessness)

283. Relevant and consistent allegations contained in paragraphs 1-282 are incorporated by reference as if written verbatim herein.

284. That Defendants FCOS, FAS, Magnolia Place-Greenville, and Flathmann had a duty of due care to their patients and residents, to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from foreseeable harm.

285. The Defendants by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Mozana. More particularly the Defendants were negligent in the following particulars:

a. failing to properly supervise as required, and as promised to the family upon admission;
b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Mozana, which was required by law and which was necessary for her health and safety;
c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Mozana;
d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Mozana;
e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
f. failing to hire a sufficient number of trained and competent staff;
g. failing to follow the licensing and regulatory rules of the State of South Carolina;
h. failing to develop and follow an appropriate Plan of Care;
i. failing to properly train employees to deal with residents who were unable to care for themselves;
j. failing to follow physicians' orders;
k. failing to prevent a resident with a known history of harassment to assault Mozana;

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l. failing to properly monitor the safety of Mozana;
m. failing to provide timely emergency services to Mozana;
n. failing to update the written plan of care to include necessary interventions to promote the safety and well-being of Mozana;
o. failing to prevent Mozana from suffering a preventable fall;
p. failing to monitor and assess Mozana adequately for pain and discomfort;
q. failing to treat Mozana with dignity and respect;
r. failing to exercise due care; and
s. by other negligent acts and/or omissions yet to be determined or defined.

286. That the Defendants independently and through their agents, servants, and employees demonstrated conscious and intentional disregard of and indifference to the rights and safety of Mozana and other patients at the Fundamental facility in Greenville as demonstrated by:

a. Their business practice of attempting to care for residents with an inadequate number of trained staff, which their officers and managers knew or should have known was reasonably likely to result in injury to Mozana and their other patients; and
b. Their business practice of failing to supervise and train their staff in order to ensure that their policies and procedures were known to and adhered to by licensed staff, and that licensed staff practiced within their scopes of practice.

287. That as a result, Mozana experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills and wrongful death. As a further result, Mozana's wrongful death beneficiaries suffered the damages and injuries stated herein above.

288. That the aforesaid acts and delicts were the sole and proximate cause of Mozana's damages, injuries and death, and were the sole and proximate cause of the damage and injuries sustained by the wrongful death beneficiaries.

SECOND CAUSE OF ACTION
(Corporate Negligence)

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289. Relevant and consistent allegations contained in paragraphs 1-288 are incorporated by reference as if written verbatim herein.

290. That Defendants had a duty of due care to residents; to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.

291. That the Fundamental facility was negligently managed and administered by Defendants, FCOS, FAS, and Flathmann who were working together to manage and operate the facility.

292. That the facility was negligently administrated in violation of 42 C.F.R. 483.75 by Defendants FCOS, FAS, and Flathmann who were working together to govern, administer, control, manage and operate the facility.

293. That the Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Mozana. More specifically, the Defendants were negligent in the following particulars:

a. failing to properly supervise as required, and as promised to the Plaintiffs upon admission;
b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Mozana, which was required by law and which was necessary for her health and safety;
c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Mozana;
d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Mozana;
e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
f. failing to hire a sufficient number of trained and competent staff;
g. failing to follow the licensing and regulatory rules of the State of South Carolina;
h. failing to develop and follow an appropriate Plan of Care;

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i. failing to properly train employees to deal with residents who were unable to care for themselves;
j. failing to follow physicians' orders;
k. failing to properly monitor a resident with a known history of harassment and assault;
l. failing to appropriately assess the danger and fear Mozana was suffering;
m. failing to prevent Mozana from suffering preventable harassment and fall;
n. failing to prevent Mozana from being hospitalized;
o. failing to prevent Mozana from sustaining a hip fracture;
p. failing to treat Mozana with dignity and respect;
q. failing to exercise due care; and
r. by other negligent acts and/or omissions yet to be determined or defined.

294. That as a result, Mozana experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills and death. As a further result, Mozana's wrongful death beneficiaries suffered the damages and injuries stated herein above.

295. That the aforesaid acts and delicts were the sole and proximate cause of Mozana's injuries and wrongful death.

THIRD CAUSE OF ACTION
(Joint Venture)

296. Relevant and consistent allegations contained in paragraphs 1-295 are incorporated by reference as if written verbatim herein.

297. That a joint venture is an association of two or more individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation.

298. That the elements of joint venture in the State of South Carolina are:

a. an agreement;
b. a joint interest in a common business;
c. an understanding that profits and losses will be shared, and;
d. a right to joint control.

299. That a joint venture exists when there is:

a. contribution of resources by both parties;

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b. joint proprietorship and control over the subject matter of the property engaged in the venture;
c. sharing of profits by express or implied agreement, and;
d. an express or implied contract showing joint venture.

300. That Defendants FCOS, FAS, and Flathmann were involved in a joint venture to manage, administer, and operate the facility.

FOURTH CAUSE OF ACTION
(Alter Ego/Piercing the Corporate Veil)

301. Relevant and consistent allegations contained in paragraphs 1-300 are incorporated by reference as if written verbatim herein.

302. That, upon information and belief, Magnolia Place-Greenville was dominated and controlled by Defendants FCOS and FAS before, during, and after Mozana's residency.

303. FCOS and FAS and its related entities, agents, and managers siphoned profits from the nursing home chain through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries, death and suffering, including that of Mozana Clinkscales at Magnolia Place-Greenville..

FIFTH CAUSE OF ACTION
(Amalgamation of Interests)

304. Relevant and consistent allegations contained in paragraphs 1-303 are incorporated by reference as if written verbatim herein.

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305. That Defendants FCOS, FAS, Magnolia Place-Greenville and Flathmann are and have been operating as an amalgamation of interest creating a blurred corporate identity through an integrated enterprise and/or joint venture.

306. That Defendants FCOS, FAS, and Magnolia Place-Greenville share a common internet website and intranet site.

307. That Defendants FCOS, and FAS share a common location at The Highlands, Ridgebrook Road, Sparks, MD 21152; common headquarters; common policies and procedures; and common in-house counsel, and share many officers and directors.

307. That Defendants FCOS, FAS, and Magnolia Place-Greenville participate in the commingling of funds and revenue and file one tax return for all related entities.

SIXTH CAUSE OF ACTION
(Neglect of a Vulnerable Adult)

308. Relevant and consistent allegations contained in paragraphs 1-307 are incorporated by reference as if written verbatim herein.

309. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Mozana was considered a vulnerable adult.

310. That, according to the South Carolina Adult Protection Act, "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

311. That Defendants failed to provide care to Mozana and keep her safe to prevent foreseeable injuries and death.

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312. That Defendants failed to supervise the residents and allowed a known harasser to annoy, harass, and assault Mozana causing her to suffer a preventable fall.

313. That Defendants failed to provide care, goods, and services to Mozana in the form of fall prevention and fall prevention devices.

314. That Defendants failed to provide custodial care and nursing services to Mozana by not transferring her to the hospital in a timely manner after an obvious change of condition.

315. That Mozana and her family trusted in, confided in and relied upon Defendants to use their expertise and discretion for Plaintiff's care and safety.

316. That Defendants FCOS, FAS, Magnolia Place-Greenville, and Flathmann accepted Mozana's trust and reliance and so became responsible for Mozana's health while residing at the nursing home facility.

317. That as a result of aforementioned reliance and trust upon Defendants FCOS, FAS, Magnolia Place-Greenville, and Flathmann, Mozana's physical, mental and emotional health was placed in the hands of Defendants.

318. That Defendants received compensation for the care and treatment they were responsible for providing to Mozana during her residency but did not provide that care and treatment.

SEVENTH CAUSE OF ACTION
(Wrongful Death)

319. Relevant and consistent allegations contained in paragraphs 1-318 are incorporated by reference as if written verbatim herein.

320. That as a direct and proximate result of Defendants' negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and

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employees, Mozana was severely injured in suffering a hip fracture which led to her wrongful death.

321. That the injuries so inflicted on the decedent were the cause of decedent's wrongful death.

322. That the sole and proximate cause of all the harms, losses, injuries and death suffered by Mozana and by the wrongful death beneficiaries was the combined and concurrent acts and delicts of all the Defendants and their agents acting in a joint venture and integrated enterprise.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual and punitive damages in the sums deemed appropriate by the jury, for the costs of the action, and for such other and further relief as this Court may deem just and proper.

s/Raymond P. Mullman, Jr.
GARY W. POLIAKOFF S.C. Bar # 4488
atty@gpoliakoff.com
RAYMOND P. MULLMAN, JR. S.C. Bar #8662
rmullmanjr@gmail.com
Poliakoff & Associates, P.A.
215 Magnolia Street
P. O. Box 1571
Spartanburg, SC 29304
(864) 582-5472

AND

Matthew Christian, Esq. S.C. Bar # 70516
mchristian@christianandavis.com
Christian & Davis, LLC
1007 E. Washington St.
Greenville, SC 29601

Attorneys for Plaintiffs

Date: October 4, 2018.

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	2018-CP-23-05088
	)	
	)	
	)	
MOZANA CLINKSCALES, ET AL	)	
PLAINTIFFS	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
FUNDAMENTAL CLINICAL AND	)	
OPERATIONAL SERVICES, LLC, ET AL	)	
DEFENDANTS	)	

December 18, 2018
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

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

RAYMOND P. MULLMAN, JR, ESQ.
MATTHEW W. CHRISTIAN, ESQ.
Attorneys for the Plaintiffs

PERRY M. BUCKNER, IV, ESQ.
Attorney for the Defendants

APRIL HERRON
Official Court Reporter

THE COURT: Okay, before we get started I just wanted to state that Mr. Mullman is in the doghouse for putting a 50 pound binder on my desk this morning.

MR. MULLMAN: I apologize.

THE COURT: This is an uphill battle for you this morning, I can tell you.

MR. MULLMAN: Well, that's for tomorrow.

THE COURT: I know, I know. But you're already tainted by that.

MR. MULLMAN: I apologize in advance. It's actually shorter than it was originally.

THE COURT: Is that right?

MR. MULLMAN: Yeah.

THE COURT: Well, you know, you just know that we judges are once dubious when you tell me that there are undisputed facts and it takes 50 pounds to make that assertion.

MR. MULLMAN: There's a lot of undisputed facts. But it's a evidentiary hearing saying there's no evidence.

THE COURT: All I can tell you is that I'm very opened minded. That's all I can tell you. Very.

MR. MULLMAN: I apologize in advance.

THE COURT: Okay. All right. Looks like the

next case up is Mozana Clinkscales vs. Fundamental Clinical and Operational Services, LLC, et al. And if I'm not mistaken, there are four motions to dismiss; is that correct?

MR. BUCKNER: Your Honor, I think we're now down to three.

THE COURT: Okay.

MR. BUCKNER: I've had a chance to confer with Mr. Mullman and Rusty Flathmann's motion to dismiss, I believe, has come to a resolution and we're going to enter a stipulation of dismissal with prejudice upon my agreement not to remove the case. Which I'll state on the record we will not do. And we'll sign and execute those stipulations of dismissal sometime after today.

THE COURT: Okay.

MR. BUCKNER: Your Honor, the other three motions, one motion to compel arbitration by THI of South Carolina Magnolia Place and then two motions to stay by Fundamental Clinical and Operational Services and Fundamental Administrative Services remain before the court.

THE COURT: Okay.

MR. BUCKNER: If it pleases the Court, I'll address the primary motion first.

THE COURT: Yes, sir.

MR. BUCKNER: And that is the motion to compel arbitration. Your Honor, I just apologize briefly, the motions to compel arbitration, specifically the ones with a power of attorney signing on behalf of the resident. And, you know, a little bit different, I guess, than you're other dispositive motions or motions to dismiss. And I don't know, I can file a brief that says offer acceptance consideration but until I know what the objections are to the agreement, it's hard to somewhat file a brief. So, it's normally in the form of a reply. Mr. Mullman filed his brief yesterday which included a little bit of that 50 page binder type materials, which is certainly his prerogative and I'm casting blame against him, but there were, I think, 32 or 33 exhibits. I would like, if possible, obviously, I've come from Charleston, Mr. Mullman's come from Spartanburg, if the Court would indulge an additional, maybe a week, to address some of the issues by supplemental briefing if the Court has anything they want to look into. Because we've tried to put together a reply brief yesterday--

THE COURT: What's the date, the 18th?

MR. BUCKNER: Yeah.

THE COURT: All right, add seven to 18.

MR. BUCKNER: Christmas day.

THE COURT: Yeah. Okay, your brief is due on Christmas day I won't except it on Christmas eve or the day after.

MR. BUCKNER: We can do it by Friday, Your Honor, if that would work.

THE COURT: Okay. Well, we'll see. I think y'all can give me the substance of the argument. And maybe we'll need it, maybe we won't.

MR. BUCKNER: In all fairness, we did file something yesterday and tried to address all those arguments that I think we're going to be able to cut through some of those. Because first and foremost, Your Honor, obviously now in the last five years and some of to my chagrin, the appellate courts in South Carolina is filled with nursing home arbitration opinions. We've got five last in the last six years starting with Coleman. The majority of issues in those cases have to do with authority of a signatory, brother, sister, son, father binding a loved one without a power of an attorney. And those have become an uphill battle for defendants who represent skilled nursing facilities. And that is not what is before the court. We don't intend to argue merger,

we don't intend to argue equitable estoppel, we don't intend to bootstrap authority from any other agreement in this case.

The Plaintiff, Charlie Clinkscales, held the power, the general double power of attorney over his mother starting in January 24th, 2011. This agreement was signed two years later. There is no dispute in the Plaintiff's brief about the authority of Mr. Clinkscales. They're what, I believe, are five issues that I plan to address in turn, which they do dispute the validity of the agreement on. I suppose if there was some argument presented today that the power of attorney wasn't valid, that I might have the resort of estoppel and merger but I certainly do not plan to.

THE COURT: Okay.

MR. BUCKNER: And the first premises that is argued by Plaintiff's counsel of why the agreement should be voided is a lack of consideration. Which seems to be a poplar argument that invalidate these agreements and we've argued them several times. And, I believe, as black letter law in South Carolina, not just in the nursing home arbitration context but in any context, mutually exchanged promises are valid, legal consideration. I agree to submit my claims to

arbitration and waive my right to a jury trial and you do the same. And is valid quid pro quo.

There's a citation by Plaintiff's counsel two cases. One is Riedman v. Jarosh and the second one is O'Neil vs. Hilton Hospital System. Quite frankly, Your Honor, I do not understand, we've cited these same cases in briefs in the past. We've cited O'Neil in this case. O'Neil stands for the proposition that nothing more is needed for valid legal consideration for mutual exchange of promises. I don't think there's any wiggle room here. The Plaintiff's lawyer also cited to a trial court order by Judge Goodstein which cited those cases for the proposition that more was needed for valid legal consideration than a mutual exchange of promises.

I've looked into this because I was before Judge Goodstein two months ago and Plaintiff's lawyer submitted that very same order. And I have no explanation other than it was inherently entered. In that case she found, the one that I had before her, she found the mutual exchange of promises were valid consideration. I'm aware of no appellate or persuasive authority to the contrary. We think that as long as both parties are mutually bound, you have complete mutuality of remedies, you have valid

consideration.

THE COURT: In consistent orders, it's amazing how facts will booger up good law, right?

MR. BUCKNER: I think, Your Honor, because of the situation that we were in, I think that maybe it was a proposed order that maybe just slid by. And that she discovered that in the hearing with the same lawyers.

THE COURT: Okay.

MR. BUCKNER: So, it was an interesting day. I'll leave it at that.

The second ground upon which they seek to invalidate the agreement is that there was no meeting of the minds as to material terms. Such that the argument -- I suppose somebody will call this a void or vagueness argument. The arbitration agreement states, obviously, who the parties are, what claims must go to arbitration, that the arbitration should take place in accordance with the South Carolina ADR rules, enforcement should be governed by the FAA and a very detailed process of how you pick an arbitrator. Both sides can pick a certain number of arbitrators that have a healthcare experience background. And if they cannot come to an agreement the Court will pick one. There's no bias that's

factored in there. Both sides have it. The court, obviously, is vested with the authority to make that decision if they're unable to, you know, mutually agree upon one.

Plaintiff's counsel has suggested that because issues such as scheduling, discovery rights and evidentiary rules are not set forth in the arbitration agreement that it should be void for vagueness. There is no legal authority cited for that proposition in this arbitration context. I've never seen an arbitration agreement that contains that kind of detail in terms of scheduling, discovery or evidentiary rules. I can say with complete confidence that Rule 12 of the South Carolina ADR rules, which is incorporated by reference, does contain the compelling of witnesses, how subpoenas are issued, where the trial should take place, how the arbitrator's compensated, all those details are set forth therein.

I don't know how just because -- obviously, we have an agreement that a jury trial is waived, here's how we're going to proceed with arbitration. I think that's a meeting of the minds under the contract. Again, there's no appellate authority, much less South Carolina authority for anything to the

contrary. So, we do not think that should cancel a contrary result.

Next, the third ground is unconscionability. Obviously, the Plaintiff's burden here is to prove unconscionability, not the defendants burden. They have to prove both procedural and substantive unconscionability under the Simpson case. Obviously, both are required. And under Simpson on you have to show both absence of a meaningful choice and procedural and in substantive that the agreement is not geared toward resulting in an unbiased, neutral decision. Plaintiff's counsel has cited to nothing specific about this procedural unconscionability that could convince maybe a court to find it. Because we have no details about Charlie Clinkscales claiming that this was shoved into a stack of papers before him or he wasn't told what it was. This is a separate agreement, it's not part of the admissions contract. It says, Please read carefully. It has its that on paragraph about each provision of the arbitration process. There's an affidavit from Mr. Clinkscales that claims he cannot afford the arbitration. But there is no affidavit that I saw that regards anything about the procedural process of how this agreement was presented. And I think that

shortcoming has failed the Plaintiff's argument.

Touching more on substantive unconscionability, Your Honor, this is, obviously, when we get into the terms of it there's nothing about this agreement that is anything but geared towards reaching a mutual unbiased decision. Again, the parties jointly select a third party arbitrator. And if they can't agree to an arbitrator the Court's select it. Neither party is given an advantage whatsoever. There is a notion from Plaintiff's counsel that because Mr. Clinkscales does not have the certain financial wherewith all in arbitration, you know, it would be unfair to him. That's briefed in their arguments under substantive unconscionability. There's also an affidavit from Mr. Poliakoff, counsel of record, that in his experience these arbitrations are very expensive. We've had these arguments advanced in other cases. I know the Gilbert federal court case we cited in our brief in front of Kevin McDonald. That argument was presented and rejected. And I think it's been similarly rejected in a couple other federal court cases that we've cited.

The long story on that, Your Honor, is that those types of arguments that arbitration's expensive so we should invalidate it or I can't afford it; or

my typical experience is that these are not as economically efficient as they claim to be. Or in violation of United States Supreme Court precedent with Allied Bruce, Moreman Health Care and two other cases, Kindra [ph], I believe, is the most recent that says we have to treat arbitration contract on equal footing with other contracts. And if we're going to have an agreement signed and then show up and say, well, I don't want to do this because I think it's going to be expensive in advance, then you're violating that mandatory United States Supreme Court precedent treating them differently.

I realize that Mr. Clinkscales may not have the certain financial situation but I think in reality we all know and Plaintiff's counsel would concede, that the costs in this case are probably being covered by Plaintiff's counsel and that he actually suffers no financial exposure from that if there were no recover even. And if there were recovery, obviously, it would be taken from that. We have arbitrated pursuant to this agreement with this firm before. And including with Mr. Mullman's to their success. So, I don't think it was prohibitively expensive in that case for them.

The next argument that they have touched on is

that even if the survival claims that are brought by Ms. Clinkscales estate are arbitral, the wrongful death would not be. And they cited a trial court order from Your Honor in 2014 addressing this. The one thing I would like to bring up, Your Honor, that I think has changed since then is the Dean vs. Heritage Healthcare case. It came out right around that same time. There's a footnote in Dean that we addressed in our brief. And that was a case where the trial court denied the defendant's motion to compel arbitration for the reason that the wrongful death claim was involved. And I think the quote was that Wrongful death claims are not submitted to arbitration. And the Dean court and Supreme Court on appeal, obviously, in that context you had additional sustained grounds. So they had every opportunity to take this up and decide if wrongful death claims in South Carolina are not derivative, they're not sufficiently independent, that they're not bound by the decadent's execution of an arbitration agreement, they did not. And not only did they not do that, they reversed the trial court.

And by footnote, I think it's footnote three, said that Courts may not refuse to compel arbitration simply because a wrongful death claim's involved.

Since that time, the Gilbert opinion that I just referenced, which was with Plaintiff's counsel and myself, Kevin McDonald found that Dean stood for that exact proposition. That in South Carolina, wrongful death claims are similarly arbitral to survival claims where you have valid authority. Because here we have a power of attorney. In Gilbert DSS had legal custody over the residence in that case.

So, I this the law has changed since 2014, respectfully, since Your Honor issued that opinion. Your order acknowledges the split of authority and there was. We think South Carolina law, unlike some states, the statute is derivative in nature. Because the way it's crafted, a lot like Michigan, a lot like New Mexico, a lot like Florida is that the only rights that the wrongful death beneficiaries have are those rights akin to the decedent. In other words, had the decedent taken the claim when she was alive, it would be subject to the same exact defenses. And in this case, one of those defenses is arbitration.

And I was looking it up as Your Honor pointed out in 2014, besides this little bit of authority out there nationwide, the only case that's addressed this, and it's in my footnote, is Dean but South Carolina jurisprudence says, A wrongful death action

is derivative in nature. That's the first thing it say in Section 32 -- 26 South Carolina jurisprudence limitations Section 32. And that's the decision the court has to make. If it's a independent cause of action, then we would agree that it would be a tougher, more difficult battle. But if it's derivative and the rights of the wrongful death statutory beneficiaries are akin to that of the decedent, which in South Carolina we believe they are. They have to be submitted the same. We think Dean and Swirly [ph] address that. And courts that followed Dean since then.

The next argument, Your Honor, I believe the last argument is that there has been a waiver of arbitration rights because when the records request was sent by plaintiff's counsel, which is an exhibit but it's not dated. This, obviously, predates my involvement, but before a claim is filed, obviously, they have to get a complete copy of the records. They allege that they asked for all records and they did not receive the arbitration agreement. Such that that started the clock for there being an unreasonable delay and waiver.

Your Honor, this argument is, obviously, commonly presented but it baffles me that two parties

to a contract, which in this case it would have been Charlie Clinkscales on behalf of his mother and my nursing home client, that there's somehow more of an obligation on my client to preserve. Mr. Clinkscales was given a copy of the admissions paperwork. Then I don't know what he did with that copy. But he sent a records request four years later, did not receive it. And this argument that that would start some sort of a waiver argument is beyond me. What I can state to the court is that the NOI was filed in January of this year. And that by March, March 7th, I believe, and we filed it as a court's exhibit, our office provided Plaintiff's counsel with it. So, they've had it for the last eight months. It was no surprise.

Again, Dean vs. Heritage Healthcare is instructive on this point. Engagement in the NOI process is not a waiver of arbitration rights. You're perfectly entitled to, you know, contend pre-suit mediation, see if you can get the case settled, talk about things like arbitration. And if it's not resolved the South Carolina appellate courts have said you're not waiving arbitration. You have to have an invocation, the litigation, machinery and prejudice here. Certainly, we don't think there's

been prejudice, they've had this agreement since almost a year now. And we did not spring it on them at the last minute. But I think under Dean, as long as you raise it in a responsive pleading once the summons and complaint is filed, you're okay. And that's exactly what we've done.

The other arguments, I think that are again, not -- I'm not casting blame because they didn't know exactly what our argument would be here today. There was a bunch of briefing about estoppel and merger. And as I stated at the beginning, we don't intend to argue those, we're relying solely on Charlie Clinkscales actual authority. And I think that covers it for the facility's motion.

For the other two defendants, they are not invoking arbitration rights. They're asking the court under the FAA to stay the case against them until the arbitration proceedings against the facility have been completed. The application of the Federal Arbitration Act in this case is inescapable because the agreement says the FAA applies. And obviously, it does concern Interstate Commerce. And under section three, I believe, of the Federal Arbitration Act, there is statutory mandate for a stay that states once the -- a finding arbitration

agreement has been located and found and a motion to compel it has been filed with any court in the country, that a stay is warranted for all parties. Not just the party asserting the arbitration. Obviously, they would be entitled to a stay -- arbitration but also these other parties -- the facility's arbitration rights are not effected.

Again, that's Nine USC section three. We cited case law finding that and case law expanding that. Not just to the signatory who's enforcing it but also to the co-defendants. Because proceeding with litigation against them effects the arbitration rights of the facility. And we think under federal law they're entitled to a stay.

And I'll answer any other questions the Court may have but just to address everything else in reply. Thank you--

THE COURT: Okay.

MR. BUCKNER: -- for the Court indulging me.

THE COURT: Okay, thank you.

MR. MULLMAN: Thank you, Your Honor, Ray Mullman and Matt Christian for the Plaintiffs. There's a lot to cover here, I'll try to be real quick. I think our memo handles most of the issues. The problem that Mr. Buckner doesn't address is Mozana

Clinkscales was admitted into the facility January 15th, 2011. Charlie Clinkscales didn't become power of attorney until after that date. So, she's admitted into the facility January 15th, 2011. By the way, Your Honor, this was never provided to us by the Defendant. Nor was any other admission agreement provided to us. Instead, they just provided the one-page arbitration agreement dated August 30th, 2013. Thirty months after she was admitted to the facility. That's where there's a lack of consideration, Your Honor. Typically--

THE COURT: How long after the admission, 30 months did you say?

MR. MULLMAN: Thirty months. January 15th, 2011 was admission, August 30th of 2013 was the arbitration agreement. And apparently, there was no admission agreement signed on August 30th, 2013. And you can see from this arbitration agreement they didn't even explain it to them. They just put a little sticky on the signature and said sign here. Along with 50 to 60, I think it's 56 pages, of other things to sign in August 30th that's in our footnote 19.

Well, it's hard to tell if that was signed on -- in August 30th or if it was signed January 2011 when

he was power of attorney. And that's on footnote 19, it's a list of the documents consent to treatment, pharmacy, medical director -- they just handed a bunch of documents with little -- sign here. So, the lack of consideration, the mutual promise to arbitrate is a hallow promise. There's no intention that the Defendant will ever sue any of the statutory beneficiaries for the wrongful death. So, that shouldn't be included. They certainly didn't get any consideration.

There's no benefit to arbitration for them under the Hodge case, Thompson case, Judge Buckner's order in Holmes vs. Bayview, which is exhibit four. Judge Goodstein talks about this in exhibit five, Rawl vs. West Ashley. And Judge McKinnon just recently in the Murphy case, which is exhibit six, that that mutual promise is a false promise. There's no way that the Defendant is ever going to sue the Plaintiff for the care provided at the facility. They're not going to be suing them for collections because they're paid by Medicaid or Medicare. In fact, they can ask for additional consideration if they agree to accept Medicaid and Medicare under the federal statute.

So, the lack of consideration is key here. That's going to determine if it's enforceable or not,

really. But then what is enforceable? Is the survival enforceable only and then we got to go to the wrongful death for the right for a jury trial? Because the statutory beneficiaries clearly didn't waive their right to a jury trial. It's FAS and FCOS, the management companies. Are they part of the survival or can we go ahead with them with the wrongful death or take them out of it and proceed? There's no reason to do a stay. That actually increases the unconscionability. Because I can't get true justice for my client without all the indispensable parties being part of either the arbitration or a jury trial.

But in his theory or in the Defendant's theory, we have to go through all arbitration, the appeal and then we get to sue FCOS and FAS and they say that promotes judicial economy. That's absurd. Plus we'll be stuck with the damages. Because they'll get a setoff for whatever damages there are. The only thing we would be seeking then is punitive damages.

So, the lack of consideration and the unconscionability kind of fit in here together. Because the procedural nature and how this was done 30 months after she was named. But all these other all documents without any explanation, I find it very

interesting that the admission director didn't do an affidavit explaining how he explains this arbitration agreement to Charlie Clinkscales and how it worked. So, I think the lack of consideration talks about the enforceability.

The second is the missing material terms. I am shocked that defense is quoting Rule 12 of the South Carolina ADR. For two reasons. One, Rule 12 of the South Carolina ADR only applies to nonbinding arbitrations. So, it doesn't apply. Further, in the past when we have raised the ADR rules, they have taken the position that the FAA preempts it. And as the cannons of arbitration under the South Carolina ADR clearly state, ten and one(f), When the arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor any less than is required to exercise that authority.

So, the arbitrator has to look at the arbitration agreement. The arbitration agreement says FAA applies. FAA Section 7 says you don't get discovery unless the contract specifically says you get discovery. There's nothing in this that talks about who, what, when, where, why, how. How are we going to do discovery? How are we -- what are the

rules of evidence? Who is the arbitrator? You know, do other non-signatories that have a contractual relationship -- so, the Pearson case they should be bound by FCOS and FAS. And then, of course, wrongful death.

So, all those things mitigate missing material terms. They don't -- you know, the arbitration agreement says the parties shall select an arbitrator from a panel. Having experience and knowledge of the healthcare industry. Well, what panel? Who creates that panel? How are we going to agree and then it forces me to have to file a lawsuit just to get a judge to help us pick somebody. And obviously, under South Carolina law, judges shouldn't be applying omitted terms to a contract. If the contract's valid and enforceable.

So, we don't think it's valid and enforceable because of the vagueness and the indefiniteness of all the missing material terms. We don't know the rules of evidence. We don't know the rules of discovery. There's no mention of scheduling within 30, 60, 90 days. Which often arbitration's have. I was surprised that the Defendant said they'd never seen that before. Why the Manner has it, NHC has it. There's several companies, major chains that have

very explicit rules of discovery, scheduling and how to pick an arbitrator. Oftentimes, the plaintiff will be pick one, the defense will pick one then those get together and pick a third. Which is very expensive. Which goes into the unconscionability the cost of this. I don't know how he just assumes that Plaintiff's counsel agreed to pay for the arbitration on behalf of our client. He has no evidence of that, there's no evidence that supports that and it's incorrect.

The Powell case, which is also in here by the Honorable Judge Kristi Harrington, talks about that very issue that courts should not supply omitted terms. Clearly, the South Carolina ADR is preempted by the FAA. Clearly, the FAA, Section 7, says you don't get any discovery. The only thing that you can get is you can beg the arbitrator to subpoena people to the actual hearing to bring documents. It's unworkable when most of the documents are not in South Carolina. FAS and FCOS, who manage this place, are not in South Carolina and they have all the records. So, who do I send a subpoena to that's enforceable? There's no way to enforce that subpoena. I can send it to you and send it to the side with the judge's arbitrator signature, they can

just ignore it. There's no way to enforce it.

Further, the unconscionability is worse in this case. Remember, the FAA has been for two sophisticated business who have equal access to the information. Here, they have all the information in their position. Not only because they have the nursing home chart but when we filed the notice of intent, Your Honor, we specifically say that if you claim arbitration, let us know now so I don't have to give you an expert affidavit. I don't have to give you all my medical records, my medical bills and participate in a frivolous pre-suit mediation. I've already given them everything they would seek in an arbitration. So, I'm, you know, screwed. I've given them everything that they needed. And they don't have to give me anything.

And we've tried this before where we had arbitration by ambush. Nobody had discovery. And it was unworkable. I think they would agree it was just unworkable. They didn't even know who my experts were. They didn't know who my witnesses were. So, if you choose to enforce this arbitration agreement, there's not going to be any discovery. Because they'll take the position that there is no discovery unless we agree. And we'll just never agree to any

discovery because they -- I mean, to be honest with you, they don't give us stuff when judges order it. So, they're not going to give it to us with an arbitrator and we agree to it.

THE COURT: You're particularly cynical today, aren't you, Mr. Mullman?

MR. MULLMAN: Yeah, I apologize.

THE COURT: It's the Christmas season.

MR. MULLMAN: Yeah.

MR. BUCKNER: He's the grinch.

MR. MULLMAN: Then the -- so, the wrongful death, I think it's clear that Charlie Clinkscales has the power of attorney, did not have the authority to waive the statutory beneficiaries right to a jury trial on behalf of wrongful death.

Dean and Hodge, I agree with Perry, it's a little confusing but, you know, I think it all depends on how the arbitration agreement is written. And in this one, they did refer to personal representatives and successes. But related to that, that same paragraph, the first one talks about Magnolia Place Greenville, its agents. Well, if it's going to be bound the statutory beneficiaries signing, then certainly FAS and FCOS should be bound by it as the facility's agents. They sign a

contract, so the facility has a contractual relationship where they say, hey, you're my agent, you're providing back office support, human resources, budget, staffing, consulting. So, we think that they should be included in any arbitration if you find it enforceable. If not, then the stay issue is moot.

It really should be all or nothing. Everybody's in arbitration or nobody's in arbitration. Or you're going to have a split where the facility's in with survival but not wrongful death. FCOS and FAS are not with survival or wrongful death. And it makes the whole thing a mess.

I do have one objection to defending using my emails as an exhibit. We didn't get that memo until late last night. It was my little girl's birthday so I didn't really get a chance to read it until this morning. And I was little offended that they were using some of the email exchanges but not all of them. To try to say well just because we tried to figure out if we could agree on a arbitrator, that somehow lessens my argument that there's no valid arbitration agreement. That's like me saying he offered to do this all nine jury, therefore, obviously, he knows there's no really enforceable

arbitration. That was supposed to be settlement talk, trying to resolve this. But I'll be more careful next time communicating with defense counsel.

We can't agree on an arbitrator. We, obviously, want a plaintiff's lawyer, he wants a defense lawyer. And they say what judges are around in Greenville? It has to be somebody from Greenville according to the South Carolina ADR. And we prefer a judge instead of a defense attorney. But you would have to pick that person, Your Honor.

The unconscionability, you know, the lack of discovery, the indefiniteness, the lack of bargaining power that this an adhesion contract. The fact that it was signed 30 months after her admission. The fact that we can include indispensable parties like FCOS and FAS, all make this unconscionable. And further, the cost alone is unconscionable. Oftentimes, these cost 50,000, 100,000, 150,000 to arbitrate these cases. Obviously, a court would be $150 filing fee which has already been paid and a lot cheaper. So, we believe it's unconscionable, we don't believe it applies to the wrongful death. And we believe strongly that there's a lack of consideration in this case.

THE COURT: Did any of the alleged tortuous

conduct occur before the appointment of Mr. Clinkscales as POA?

MR. MULLMAN: No, sir.

THE COURT: Okay.

MR. MULLMAN: I think it's mostly -- and we can get into the facts of the case, we can talk about this. And that's one of the problems why we'll need discovery. There is a resident over at Magnolia Place or was when Mozana was there that often assaults or bothers, harasses certain women over there. And Mozana was one of those women that was being bothered. So, we're going to need his chart and the incidents related to that to prove the notice. And without discovery, we're never going to be able to prove notice unless we get former employees to tell us the truth.

So, one day this gentleman went into her room, uninvited. She kept taking the call bell. Nobody came. She attempted to get out of the bed to go get somebody at the nurses station and she fell. So, it's a combination of them not dealing with this resident assault and also the lack of assessment, lack of fall prevention from the bed. And I believe that happened sometime in 2015, Your Honor.

THE COURT: Okay. Am I correct that you have

not asked for a jury trial?

MR. MULLMAN: I asked for a jury trial.

THE COURT: You did?

MR. MULLMAN: Oh yeah. In the compliant. I believe I did.

THE COURT: You may have in the substance, I'm just looking at the -- I'm looking at your summons and complaint. That doesn't mean it's not there, I just didn't see it.

MR. MULLMAN: At very the end it says, Appropriate by the jury--

THE COURT: Okay. Okay. Which begs the question, it's a variation of the same question for both sides.

And that is, Mr. Buckner, are you sure that your client doesn't want a jury trial in Greenville, South Carolina?

MR. BUCKNER: Well, Your Honor--

THE COURT: The question to the Plaintiff would be, Mr. Mullman, Mr. Christian, are sure your client wants a jury trial in Greenville, South Carolina?

MR. MULLMAN: We're fine with--

THE COURT: That's a rhetorical question.

MR. MULLMAN: I mean, we're fine with nonjury or arbitration with discovery and with everybody

involved that's supposed to be involved. Here you get half a loaf either way.

THE COURT: I'm with you. And I'll say in all candor, Mr. Buckner quoted the previous ruling that I had made regarding the distinction between wrongful and survival the bifurcation of the proceedings. I didn't like that order. And what I'm looking for and what I've been looking for and what I would like to have in that instance is some guidance from the higher courts as to what our process would be in the State of South Carolina.

Mr. Buckner, I think you suggested the Dean case. The Dean case gives me that guidance, correct?

MR. BUCKNER: I think Dean tells us that in South Carolina the wrongful death statute and the wrong claims under the derivative in nature and that the statutory beneficiaries must be bound the same as the decedent.

MR. CHRISTIAN: Your Honor, real quick, I actually think that Dean basically says you can't deny or not enforce an arbitration agreement simply because a wrongful death claim is involved. And the distinguishment there is that's assuming that the statutory beneficiaries were parties to that arbitration agreement.

THE COURT: Right.

MR. CHRISTIAN: So, if they were parties to the arbitration agreement, you can't say well just because it's a wrongful death claim, then we're going to strike down the arbitration agreement. But if you have another valid contractual reason for striking down the arbitration agreement, like the statutory beneficiaries were not parties to the arbitration agreement, then that's -- and, of course, that issue was never addressed in Dean. An Dean's holding really didn't apply to the wrongful claim. And I think the Hodge case clearly distinguishes between the wrongful death claim and the survival action claims when it talks about -- it's actually in Judge Nettles order that he just recently issued for us with the NHC case at Tab 15. And he addresses how that talks about the personal representative in their individual capacity will not hold against the other beneficiaries of the estate their actions. And that's from the Hodge case. And I think--

THE COURT: So, what did Nettles do? Did he bifurcate or did he say it was all going to go to a jury trial?

MR. CHRISTIAN: He struck down the arbitration agreement on --

THE COURT: On other grounds?

MR. CHRISTIAN: On other grounds and held that even if it was enforceable it would be bifurcated. So, that was--

THE COURT: If it were enforceable it would be bifurcated?

MR. CHRISTIAN: Yes, sir.

THE COURT: You know, I think right now the trial courts are kind of stuck with that. I think that's the least efficient way of proceeding. And that's why I say I don't like it but, you know, absence some further guidance, I don't know what other option you have.

MR. MULLMAN: And the Supreme Court says -- even talks about that saying that sometimes you're going to have bifurcate--

THE COURT: Yeah, I don't like that but what the heck.

MR. MULLMAN: We don't need it.

THE COURT: I know you don't. That's a terrible way to run a railroad, I know.

Okay, Mr. Buckner, I know you wanted to respond.

MR. BUCKNER: Yeah, I'll try to be brief. The first point I'd like to make is this notion that August 30th, 2013 arbitration agreement came in the

middle of the night when nobody was around, they called Charlie Clinkscales in the room and had him sign it. These are probably two of the most experienced plaintiffs nursing home lawyers in the state. I know very well that they understand how this works. What happens here as it does often is Ms. Clinkscales had a hospital stay that required her to leave the facility for what that I believe was 12 days after she had been there for two and a half years. She was readmitted. So, a lot of the readmission process starts again. And when she came back in an arbitration agreement, along with other admissions paperwork was presented to her.

There's another notion this arbitration agreement was anything but a standalone document. And the idea that that somehow effects consideration is a complete misnomer because all we need to worry about, Judge, is this single document, all right. We're not arguing, as the Defendants apparently tried to argue in the trial court order that Mr. Mullman cited from Judge Buckner, which I'm sure he did gleefully, that the healthcare services were rendered as consideration. That's not our argument. Our argument is the mutual promises exchanged to arbitration are quid pro quo.

And so, this idea that the admission back and was signed later and lacks consideration, all we got to do is look at the four corners of the document to provide consideration and we have it here. So, none of that time chronology matters at all in terms of consideration.

The second thing that I want to touch on is this idea that there's no direct benefit. So, there's no meeting of the minds or mutuality. They are confusing and ejecting an element of equitable estoppel into the idea of mutuality and consideration. I don't have to prove a direct benefit under this contract to bind them to arbitration. What I have to prove is valid legal consideration, mutualities and remedies. That's available. I don't have to show -- If I were going to argue estoppel I'd have to show direct benefit. They can't just -- then what will happen, Judge, in every case we would say, well, we don't want to arbitrate, we're not getting a benefit out of this. Certainly, their claims, including the collection of monies that could be brought by the facility, would be subject to arbitration.

The issue of the stay and FAS and FCOS, Your Honor, they have not moved to compel arbitration,

they are not invoking arbitration rights. The Plaintiff's have not moved to compel arbitration. There is no motion before the court for Your Honor to rule upon. They don't want to go to arbitration. If Plaintiff's counsel wants to move to compel them, they're more than welcome to do so. But there's nothing before this court that provides a vehicle for them to go to arbitration now. If they want to file it today before they leave and we can come back and argue about it, I'm happy to do that.

THE COURT: Do you represent them?

MR. BUCKNER: I do.

THE COURT: Okay.

MR. BUCKNER: And they have made a decision not to invoke arbitration, which they have every right to do.

THE COURT: Okay. Would you agree to arbitrate it if the court ordered that it go to arbitration?

MR. BUCKNER: For FAS and FCOS?

THE COURT: Yes, sir.

MR. BUCKNER: If the court orders it, doesn't seem like I'm going to have a choice.

THE COURT: But you said that it's an automatic stay and there's no indication of the arbitration. So, I'm saying as to the first defendant --

MR. BUCKNER: An order the facility -- I can tell you that they would ask for a stay until that arbitration process can be completed. But not, obviously, that long of a time. That's exactly what Section 3 of the FAA authorizes them to do.

THE COURT: Okay.

MR. BUCKNER: And I -- you know, the idea that the admissions coordinator, Mr. Richey, did not provide an affidavit, it's not my burden, Your Honor. If they had an affidavit I would have been happy to have presented one regarding procedural unconscionability. But unconscionability is their burden to meet. I don't think I have to come in here with any evidence to show that a signed document that on its face is valid, was presented in some sort of manner so as to combat an argument of unconscionability for the record.

I know that Mr. Mullman has been citing to a 2014 case involving a different facility and what happened with FAA and what happened with discovery. I'd like to deal in this case and in this arena and what's happened so far. Which is none of that. All I can point to is the terms of the agreement, which is Exhibit A to our brief, which says that, The parties are unable to resolve claims and negotiations

and parties agree that such dispute shall be resolved by arbitrations provided by the South Carolina Alternative Dispute Resolution and mediation rules.

And then it goes on to say that The enforcement of the arbitration agreement, heed enforcement, is not subject to South Carolina Uniform Arbitration Act and shall be governed by the Federal Arbitration Act.

So, whatever positions were taken at the different cases, obviously, are not proper grounds to attack the contents of this agreement and what might happen later. Those rules, The South Carolina ADR rules, include provisions of the material terms that he says are lacking.

I don't think that you -- there was a notion that you would be supplying omitted terms by selecting a arbitrator. I think that you would be simply be enforcing the contract. We have an arbitration contract, it tells us to select from a panel. We've had a conversation already about these arbitrators, that's why I included this as an exhibit because there was at least one name that I thought was being considered, you know, as a possibility. And if we can't, we come to the court. And us coming to the court is not you supplying a term, it's acting in accordance with the binding valid contract. Which

is trying to provide an unbiased, neutral way to do it.

Mr. Mullman cited to the Powell case in support of -- the trial court order from Judge Harrington, that had to do with the unavailability or forum, arbitral forum. I'm sure Your Honor has had those motions before him whether it be the Triple A or the NHLA or I don't know, there's a half a dozen of them that we see and use to see in some of these agreements. And when sometimes those organizations shut down, when you file a motion to compel arbitration, the court there found that the fact that the arbitral forum wasn't available, was omitted meaningful term.

Here we don't have that issue because I think that this nursing home was smart enough to say we probably ought to avoid that, let's come up with a different process where the parties can agree to one. If not, the court can supply it. I don't think there's anything else, Your Honor, besides that and I'll just rest on my brief.

THE COURT: Just let you know that I feel your pain with respect to opposing counsel quoting your father's rulings. That happened to me once or twice as well. My stock position was, hey, I never

listened to him before why should I do that now?

MR. BUCKNER: I'm sure he would tell you the same thing.

THE COURT: All right, Mr. Mullman, you look very pregnant with anticipation, I'll give you two minutes.

MR. MULLMAN: Obviously, if you find for enforcement, we're going to come back before you and move to compel that FCOS and FAS. That's one. Two, I encourage you to read our exhibits, especially Rawl vs. West Ashley, where she talks about, Judge Goodstein, consideration. That there has to be some kind of detriment or benefit or forbearance by one or the other party. And I find it amusing that they did not say that FCOS and FAS shouldn't be part of the arbitration because in the past they always said they should be. And under the Pearson case that should be even if they're non-signatories. And I refer you to Exhibit 16, the Hawthorne case where they pretty much laid out why FCOS and FAS should be part of any arbitration if you find it enforceable.

THE COURT: Well, the consideration aspect is curious. You know, one would ask is it akin to non-compete agreements? Which are entered into during the course of someone's employment. But I

recognize Mr. Buckner says that this is distinguishable because there was a gap in the first two weeks where she was readmitted. So, I'll look at that.

MR. MULLMAN: But there's no admission paperwork provided to us, at least on that time period. So, I don't know that to be true.

THE COURT: Okay.

MR. MULLMAN: And I think the burden is on him to produce the admission paperwork.

THE COURT: Okay.

MR. MULLMAN: The August 30th, 2013 admission. And we've asked for the chart several times. And we're still missing several parts of the chart.

MR. BUCKNER: Well, Your Honor, they have provided additional signature page for a different agreement for the August 30th, 2013 time period. So, there in possession of it. I don't know whether they got it from me or independent of that. Obviously, again, they're in possession of all these records. They're given a copy of everything that's signed.

THE COURT: So, I suppose, you know, as I think about it again, you know, when y'all are telling me that there's a lack of consideration argument, I start thinking about non-compete agreements where the

law is very clear that they're not binding for lack of consideration if they're signed during the course of someone's existing employment. Am I correct in that assertion? So, I think that it might be important to know whether there was a gap and readmission.

MR. BUCKNER: There was. I can state on the record as an officer of the court, that I believe there was a 12 day gap. She was discharged August 18th and readmitted on August 30th. And that has to do in some part with Medicaid and Medicare regulations and bed holds and all this kind of stuff. But I have a dozen cases on my desk right now with multiple admissions agreement, multiple arbitration agreements, cases where they signed the first time and not. We just think that it was presented and it's signed. The document itself contains that it's a signature.

THE COURT: Yeah.

MR. BUCKNER: And I would like to apologize regarding the emails between Ray and I. The reason one of those emails was submitted is because they said we didn't provide the arbitration agreement. And the only way I can show the court that we did is by an email. The other one should not have been

included regarding the proposed order so I do apologize.

THE COURT: Okay. All right.

MR. MULLMAN: Just to go back to your question about that employment, I thought the continued employment was the consideration.

THE COURT: I think the courts have determined that that's not sufficient consideration.

MR. MULLMAN: Okay.

THE COURT: For non-compete.

MR. MULLMAN: Had we continued admission be--

THE COURT: I'm arguing -- well, I'm not arguing anything, I'm just saying I think that if you look at it akin to the employment situation, then you would win.

MR. MULLMAN: Okay, I see what you're saying.

THE COURT: So, it wouldn't be sufficient consideration. Now, I could be wrong about that but I think that if you sign a non-compete agreement while you're employed, say you're working for somebody for a year and they present you with a non-compete agreement and say the only consideration is your continued employment, then that's unenforceable.

MR. MULLMAN: Okay.

MR. BUCKNER: Judge, would like me to confirm for you that there was a discharge and readmission?

THE COURT: That's entirely up to you. I'm not saying that that's the dispositive issue. But I am saying that if, in fact, it was presented to them during -- while she was a -- while she was at the assisted living center and it was essentially extended gratuitously to make sure that the file was complete and had all of the attendant and necessary documents, then maybe, maybe, and I think perhaps as a matter of public policy, the Supreme Court would look at that and say that's very similar to what we have looked at in the past with non-competes during the course of employment. I don't know if that's true or not, that just came to mind. So, you know, if there was a gap, I think that it could, I'm not saying it will, it could make a difference. But I don't know if it makes a difference or not. Because I got to read everything you've given me. And there's going to be a lot of issues that bear upon that issue.

MR. MULLMAN: I would just request that if there is admission paperwork related to the August 30th, 2013 arbitration agreement, that you would let me know what Bates number it is because I don't see it.

So far.

MR. BUCKNER: I don't know that we produced anything at this point other than what you got from the records request.

MR. MULLMAN: It should be part of the chart, though. And it's our -- the chart is our property.

THE COURT: Okay.

MR. MULLMAN: We should be getting it including the audit trail but.

THE COURT: Okay. Well, gentlemen, all I can tell you is once, again, thank you for giving me one that I have to think about.

MR. MULLMAN: Tomorrow is going to be worse.

THE COURT: All I can tell you is that Mr. Touma has a lot to read and brief for me over Christmas.

MR. BUCKNER: I apologize. Thank you, Judge.

THE COURT: Thank you. Y'all have a great holiday.

MR. MULLMAN: See you tomorrow.

MR. BUCKNER: Thank you, Judge, good to see you.

THE COURT: Yes, sir.

(WHEREUPON, the proceedings were concluded.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 18th day of December, 2018.

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

October 1, 2019

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APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) 2018-CP-23-05088
)
)
)
MOZANA CLINKSCALES, ET AL)
PLAINTIFFS)
vs.)TRANSCRIPT OF RECORD
)
FUNDAMENTAL CLINICAL AND)
OPERATIONAL SERVICES, LLC, ET AL)
DEFENDANTS)

April 22, 2019
Greenville, South Carolina

B E F O R E:

THE HONORABLE ROBIN B. STILWELL, Judge.

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

RAYMOND P. MULLMAN, JR, ESQ.
MATTHEW W. CHRISTIAN, ESQ.
Attorneys for the Plaintiffs

PERRY M. BUCKNER, IV, ESQ.
Attorney for the Defendants

APRIL HERRON
Official Court Reporter

There were no exhibits.

There were no exhibits.

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Certificate of Reporter 29

THE COURT: Okay, so the first case up is Mozana Clinkscales vs. Fundamental Clinical and Operational Services, LLC, 2018-CP-23-05088.

I recognize, Mr. Buckner, this is your motion to reconsider. And I have had the opportunity to go back and read the order and I've read your motions for all three Defendants. So, joking aside, let's not argue the entire motion again. So, if you can be just as surgical as you can, I'd appreciate it, okay.

MR. BUCKNER: Thank you, Your Honor, I will do my best. And I apologize for inviting the parties together for a second time.

THE COURT: You are to blame, there's no question.

MR. BUCKNER: And I will say I will be as brief as possible, be as direct as possible.

THE COURT: Just let me say when I looked at the docket, I saw this on the calendar and I said, who in the heck consented to having a motion on this thing? Then I went back to my email and I found out that I was the one who consented to it. So, really I'm to blame and I apologize to everybody for that.

Go ahead, Mr. Buckner.

MR. BUCKNER: Your Honor, I couldn't help but tempt myself when you asked Mr. Mullman to prepare an

order and he said he thought about it for a long time. I found myself thinking maybe I can push him over the edge. I will be as direct as possible.

THE COURT: Well, it's not a clear cut answer to this. It really isn't.

MR. BUCKNER: Certainly not, Your Honor, on several issues. More specifically on the wrongful death. Starting with the facility's motion, which obviously is the majority of the legal issues before the court. The first issue that we have in the order that was entered was the idea of consideration in the context of this. As Your Honor is well aware of in having reviewed everything, that this case is one that involves a power of attorney. There is no issue whatsoever regarding authority. And our position has been, remains today, that we're two parties, both swapped, quid pro quo, mutual promises to arbitrate that as valid consideration. I think the Fourth Circuit of South Carolina are very clear on that.

And going back through the order in preparation for today, most of the order, I would say probably somewhere between 50 to 75 percent of it on this consideration issue, inject these issues of merger, and suggests based on the Coleman opinion, the Thompson, the Hodge opinion, that we are trying to

bootstrap consideration from the admission agreement here that was signed also by Mr. Clinkscales on behalf of his mother for consideration for the arbitration agreement. That is not happening whatsoever. This is not a merger case. Coleman, Thompson, Hodge all deal with admissions agreement where they have a incapacitated nursing home resident and someone without a power of attorney admits their loved one, rightfully so, visa vie an admission agreement; and then they say, oh, these are the doctrine of merger, equitable estoppel or third party beneficiary, we have the right to waive their right to a jury trial. That is not what we are suggesting at all.

We are suggesting that because he has the power of attorney, the arbitration agreement is a standalone document. They swap mutual promises to arbitrate and that's consideration. I'm not aware of any appellate opinion in South Carolina or elsewhere, and I don't think it's contained in Your Honor's order, that says more is needed. We talked a lot a the hearing, Your Honor broached the idea that maybe that liking this situation to the employment context where we've seen how covenants not to compete not enforced where they're signed during the duration of

employment. Because here we have a prior admission. But that has never been applied to the arbitration agreement consideration context. And even if it were, I think it would run a foul of the United States Supreme Court precedent, which has told us continually, most recently in the Marmet Healthcare case that arbitration agreements have to be, you know, enforced like any other contracts and requiring additional consideration would not do that. And even if we were to accept that premise that like employment covenants not to compete, I think this is drastically different because Ms. Clinkscales, factually this is important, this came up after the hearing. With all due respect to Mr. Mullman and myself, I did not submit this because I did not anticipate it was going to be an issue. We submitted proof that she left our facility and then came back and signed a new arbitration agreement and a new admissions agreement. The reason that's important is because it wasn't like she had been there for three years and they brought the arbitration agreement to her.

So, we think the notion that more is needed for consideration based on what Your Honor has found in the order is improper. And that mutual promises to

arbitrate is more than enough and there is no authority to suggest otherwise. All the citations, the Coleman, the Thompson, and Hodge are right, if I were making the argument to Your Honor that I needed consideration from the admissions agreement. Which almost -- the order almost reads as if I were saying we got consideration because we provided nursing care. And, you know, we provided services and you got arbitration. That is not what's going on.

The second part of this argument of consideration is the Court's made findings that my client's promise to arbitrate was illusory. Such that it shouldn't be enforceable and the Court found no consideration on my client's part either. And our problems with that are at least twofold. One, the Court engaged in some analysis that said the probability of your client commencing proceedings, legal proceedings, against Ms. Clinkscales or her family or something in the like on the offensive claims is very, very low. Such that they really haven't maid a promise here. And I don't think that's what illusory promise in the context of arbitration agreements mean, Your Honor. I don't think you're allowed to say well one side is more likely to benefit from this than the other so it's

illusory.

I think what makes it illusory is if one side has the ability to opt out. Such that Mr. Mullman says, all right, let's go to arbitration. We go to arbitration and my client says I'm not bound by it. Or if he tries to enforce it and get to selectively opt out. Here, that is not what is going on. Just the idea that it's unlikely that we would ever sue a nursing home, rather, that does make it illusory -- doesn't make it illusory.

The second part of that argument, and probably the more important argument for Your Honor today is that just because my client is unlikely to sue nursing home -- Ms. Clinkscales or her family, that's not the only quid pro quo promise here. The legal right that is being forfeited also is my client's right to a jury trial for claims against it. Which is important. I realize that in the world that Mr. Christian and Mr. Mullman and Your Honor and I live in, the Defendants like arbitration more than plaintiffs lawyers. But that's not relevant consideration for the doctrine of consideration. When we walked in here to argue this motion before Your Honor the first time, you joked to Mr. Mullman and I and said, Mr. Buckner, you sure you want

arbitration and not a jury trial? And you said the same thing to Mr. Mullman. And that's indicative of what I'm talking about. My client waived their right to a jury trial for claims against it as well.

And so, even if -- let's say the arbitration agreement excluded claims that I might bring against them, I still think it would be mutual such that it wouldn't be illusory. Because my client has to take into consideration, do we really want to do that? I waive our right to a jury trial. So, in that sense I think that's valid consideration as well.

The next part of the argument that is primarily concerns the facility, the first motion on today's docket before Your Honor is regarding wrongful death. We discussed this at length the first time. The only thing that we tried to do persuade Your Honor further is to cite ten states that have almost identical statutes as South Carolina and show that they have all found that wrongful death claims can be arbitrated because those statues are derivative in nature. The only case that talks about this issue substantively in the Court's order is Ping case from Kentucky. Kentucky does not have a derivative wrongful death statute like South Carolina.

In South Carolina, PR that brings the wrongful

death claim is bound by the defenses that would have been incumbent or incurred on the decedent. Such that if they got a statute of limitations defense for the injury that gives rise to the wrongful death, the wrongful death claim is barred to the same extent it would be had the injured person brought the claim. And I don't think that the arbitration defense, which I guess in the most broadest sense is what it is, should be treated any differently. If the decedent is bound to arbitration under South Carolina's derivative wrongful death statute, and there are plenty of states that don't have derivative statutes, we don't live in a state that doesn't. But in this state the wrongful death beneficiary and the PR are subject to the same defenses that the decedent was. And that includes arbitration.

Obviously, since the only South Carolina, as you mentioned at the beginning of the hearing, there's not a lot of law in South Carolina discusses this substantively at all except the Dean opinion, which I think came out in 2014, that says you cannot by footnote, deny arbitration simply because wrongful death claims are involved. Per se. So, with that, Your Honor, I think I can rest on my brief regarding that motion.

The other two items and the other reason we wanted to bring those and gather everybody here today, again, is sort of some housekeeping matters. I guess, more or less, for the other two Defendants which is Fundamental Administrative Services and Fundamental Clinical and Operational. Those parties filed motions to stay, not only pending any arbitration proceedings that we hoped would go forward, but also they -- they also move for a stay during any litigation regarding the enforceability of it under the FAA. The Court's order did not actually make any findings regarding those motions to stay. Of course, we think they should be granted regardless of what you decide to do because we believe this matter is going on appeal. And such that there's going to be litigation surrounding whoever wins or loses. And we would still ask for a stay because there have been no findings regarding those motions. But nonetheless, there's also some items in each of -- I guess in the Court's order that seems to pertain to these two Defendants that I was a little unclear about.

THE COURT: Yeah, I read your --

MR. BUCKNER: Yeah, I --

THE COURT: -- I had to go back and read to see

what exactly you were talking about but I understand what you're saying after having gone back and looked at it.

MR. BUCKNER: Yes, sir.

THE COURT: I don't think I meant to say it like you interpreted it or as you suggest it could be interpreted. But go ahead, we can clean that up.

MR. BUCKNER: Yeah, there's really just two items with regard to both of these Defendants. FCOS and FAS, I'll call them for shorthand. But the Court has denied arbitration but then made some findings that suggests that had arbitration been ordered and an award be given to the Plaintiffs in arbitration, these two entities might be related entities such that the reward can be enforceable against them. Which we think becomes more or less an advisory opinion by the Court. I can't fault Mr. Mullman maybe for trying to get that in there in some form or fashion but I don't think it has any place in a order denying arbitration. And a order where my part, my two clients here, FAS and FCOS, don't want to be in arbitration, they just want the matter stayed.

And then also there were some findings or at least some reference to them being third party beneficiaries of this agreement. Again, they have

not moved to enforce the agreement, nobody argued that before Your Honor the first time whether or not, that's not an issue that's really before the Court. And I just don't want this order to be used as some sort of finding that those parties might be third party beneficiaries in the agreement, they're not even seeking to enforce it. Neither for that matter is Plaintiffs counsel because they would argue that the agreement is not enforceable. So, with think with regard to those two issues the order goes a little further than we expected.

THE COURT: Okay.

MR. BUCKNER: Thank you, Your Honor.

THE COURT: Yes, sir.

All right, Mr. Mullman.

MR. MULLMAN: Thank you, Your Honor. Ray Mullman for the Plaintiffs and Matthew Christian is here. Let me deal with the stay at first. I think there's no reason for the stay because the agreement is unenforceable. And if there's going to be an appeal, this case will be automatically stayed. So, there's really no reason for the stay unless you're going to send it arbitration, in which case we then will move to lift the stay and ask you to include FCOS and FAS as parties because they're related

entities and agents of the facility. I think the stay issue can be resolved with you cleaning it up and taking out that language about third party beneficiary because that's not before you just yet. So, I think we can kind of agree on that language.

THE COURT: Yeah and I thought that that part might be fairly easy. We can kind of segregate that and make sure we're not making any substantive findings.

MR. MULLMAN: I'm doing the easiest ones first.

THE COURT: Yeah.

MR. MULLMAN: The wrongful death, you know, he's try to equate it but the contractual defense is that there is no legal authority for Mozana or Charlie Clinkscales to waive the half a dozen statutory beneficiaries that exist. That's the defense is lack of authority. And defense counsel mentioned that this issue wasn't about legal authority but it was.

If you remember, Your Honor, Mozana was competent when she went in the facility January 15th, 2011. For some unknown reason, because we weren't allowed to have any discovery, they did not allow Mozana to sign the admission paperwork or any arbitration agreement. That would have been the best intent of the principle. What she wanted. Instead,

they waited until after Charlie became the POA January 24th, 2011. So, 11 -- nine days after she was admitted. Then they didn't have him sign it even then, they waited until August 30th, 2013.

Because they now claim she was readmitted. I'm not really sure what that mean by that. She had been admitted since 2011 until she left in 2015. There were numerous times that she went in and out. And they've only given us that August 30th, 2013. She left for more than ten days in 2015. So, under their theory there should be another admission contract and arbitration agreement signed in 2015. So, we're a little confused by his argument that there's no lack of authority. We do believe Charlie Clinkscales had a lack of authority to bind Mozana and the statutory beneficiaries January 15th, 2011, he was not power of attorney at that point.

But let's get into the meat issue here, the consideration issue. And, you know, you and I in the previous hearing and even the order, kept talking about additional consideration. And I think that's kind of arguing semantics. It's not additional consideration, it's adequate. And to be adequate there has to be value. And to have value there has to be a benefit. And there's no benefit here to the

resident or the statutory beneficiaries of this arbitration agreement. There's also no benefit to the defendant because they can opt out any time they want. And one, because as we know right now they're opting out. FCOS and FAS are saying, hey, it's not us. We're opting out, you can't compel us. Even though they're agents, even though they manage and operate the facility.

Further, the facility itself, in all the facilities, I think there's 912 fundamental facilities, never has one of these facilities, in all the years they've been in operation, over 20 I believe now, have they ever initiated an arbitration against a resident when there's an arbitration agreement. They still file a collection agency in magistrate court. Hoping that nobody knows about the arbitration agreement, I assume.

So, you're exactly right in the order saying there's no benefiting, there's no mutuality here. They've never done it in the history of their chain, did they ever initiate an arbitration on behalf of a facility against the resident. And we think that's very important.

Instead of additional consideration, the consideration has to be -- have value, have benefit.

And typically, you see it when there's a merger or when there's an employment contract. Or when there's some other agreement attached to the arbitration agreement. When it is just a arbitration agreement that has mutual promise, the promise can be illusory if one party will never initiate the arbitration against the other and opt out when they can. And I know you kind of did bring this up in your order, the two other arguments I had is the meeting of minds argument that I won't get into.

But also, the fact that none of the defendants are actually on the contract. It says, Magnolia Place Greenville. And that's not the name of any of the defendants. I just want to reiterate that that's an important distinction because that's how they opt out. They'll say, well, that's not us. We're THI of South Carolina at Magnolia Place Greenville, not Magnolia Place Greenville. I think they add At Greenville or Of Greenville certain years to make it easier for them to opt out.

I'm not going to reiterate the new meeting of the minds argument. I didn't win on that one, I think we should have. I'm not sure -- because even if you grant it, we're going to before you again, Your Honor, asking you to pick the arbitrator. And I

just don't think it's a proper place for the court to rewriting the contract with such an essential material term. And I think your order was reasonable, appropriate and followed all the necessary law and we look forward to the appeal, Your Honor. Thank you.

THE COURT: Okay.

All right, Mr. Buckner, anything you want to put on the record?

MR. BUCKNER: Just briefly, Your Honor. That regarding the idea that there is no authority as a contested issue, I'm a bit confused. Because I think I understand that in 2011 when she first came to our facility there may be some argument because Charlie Clinkscales didn't have power of attorney at that time, had one of them signed it would be. But in 2013 when she -- when Mr. Clinkscales signed the arbitration agreement as well as a new admission agreement, he had power of attorney. So, I don't know why, other than it being what's effectively a policy argument, that that should have given it to her when she had capacity two years before, what that matters. It just doesn't matter. Because in 2013 when the two contracts at issue, really just the one at issue are signed, he has power of attorney over

her.

Now, the question of wrongful death, obviously, goes to another level but for her I don't understand how that can be contested. And the one thing I do want to clear up in response to Mr. Mullman's argument that I think is perfectly clear is in South Carolina there is no case law that says there has to be a benefit for there to be valid consideration. That is not true whatsoever. There has got to be a benefit for equitable estoppel, which I think is what he's sort of conflating from the Coleman, Thompson and Hodge but what there does has to be is some legal right forfeited. We cited the Preswick case in our brief, it says, A forbearance to exercise a legal right is valuable consideration.

So, we think that's perfectly enough here where they waived their right to a jury trial. I'm not aware, Mr. Mullman clearly has been taking every magistrate's court filing in the entire state for the last 20 years. I don't know that that's any proper evidence before the court. I have not represented in any of those matters but I don't think that that would matter for making a promise illusory or not. What would matter is if someone who had been sued in that collection case said, all right, we're going to

arbitration. And they say, no, we can opt out. That's on the individual party to whom arbitration would be asserted or they would want to bring it to raise it.

Just like if Mr. Mullman's client routinely consented to arbitration or didn't. I took the position that, well, these other nursing home residents don't enforce these arbitration agreements so they should be bound. There is no, obviously, record before this court that any of these entities should just be treated as one. Some other nursing home that is not a defendant in this case may or may not have taken some action with regard to arbitration. I don't think that matters. As Mr. Mullman said we haven't done any discovery on that. But that's all I have you.

THE COURT: Okay. All right, good enough.

MR. MULLMAN: May I?

THE COURT: Sure, you may.

MR. MULLMAN: One thing I think we might have to do discovery on though, Page 10 of your order state and quotes the memorandums from the CMS, January 19th, 2003, that states, A current resident is not obligated to sign a new admission agreement that contains binding arbitration. Federal

regulations at 42CRF Section 43.12(a)(2). So, that's where that comes in. So, if she, if Mozana came in January 15, 2011, then she comes back August 30th, 2013 after a ten day hospital stay, you can't then make her do arbitration for the first time because she had been a resident for the last two years without an arbitration agreement tending the care and services without any kind of consideration for arbitration. Thank you, Your Honor.

THE COURT: Okay. All right. So, let's clean up what we can agree to clean up. And I know that in some of the preface of the order we're talking about the relationships by and among the defendant parties to the action. So, let's take out those findings that define relationships among the parties. That is third party beneficiaries or anything else that might bind other parties to the order of the court who did not have specific business before the court in these motions, okay. So, I think y'all talked about that and clean that up, okay. And y'all can amend the language and just look at it and see if it satisfies both of you. And to the extent that it doesn't, just send me competing orders with that specific -- that specific portion of it redline and/or deleted so I can tell which one. But I think y'all will be able

to agree to that.

MR. BUCKNER: All right.

THE COURT: And I don't know and we talk about the characterization of the contract as illusory, to Mr. Buckner's point, I think probably that is a specific legal term that I'm not sure that we argued the first time. It was illusory. I think we argued not additional consideration, we argued independent consideration. So, I'm going to look at that. And I'm having a hard time finding in here specifically where it's characterized as illusory, although, I remember reading that. So, I'd like to take out that definition of the contract as well.

The, you know, when we're talking about the wrongful death issue, admission and readmission, you know, those are just unique factual wrinkles in this case. It may or may not have a bearing on it. There's still some really fundamental questions that need to be answered as a matter of policy by the Supreme Court in The State of South Carolina. Really, that, you know, that issue I think will be subsumed and taken care of by a policy decision by either the legislature or by The Supreme Court of the State of South Carolina. You know, those are the things that, you know, collectively, we are searching

for answers on, right?

So, y'all have a good time on appeal. I don't mean you appealing it because I want the answers to be sitting so when y'all come back before me the next time, I don't have to listen to you for two and a half hours talking. You both make good arguments and both make compelling arguments, you know, pick one. At this point, it's almost for the trial court, almost arbitrary. Until they tell us which way we're supposed to go.

MR. BUCKNER: Your Honor, one thing that Mr. Mullman mentioned in the end that might be helpful to and I was trying to reach some agreement to the extent that we can in the order is -- and I understand the wrongful death issue certainly being different arguments about it and the consideration argument. There's also sort of subsumed in that and in the courts order there was a finding that the Medicare and Medicaid regulations have statutes and we -- that was part of the motion to reconsider. Because I'm not aware of any case law that's endorsed that theory that it's violative of the Medicare regulations and also unenforceable.

And that maybe an issue where we will not be able to agree on something in terms of an order. And

I don't know -- as far as our motion to reconsider, I just didn't get to it.

THE COURT: Yeah, I'm with you. And I read that too and to it was curious to me because, you know, it seems fairly black and white on paper and in the argument. But, you know, if there's case law out there that says that right or that's wrong, I don't know. Again, is that a matter of first impression or is anybody opined on what the significance of that language --

MR. BUCKNER: Mr. Mullman and I had a case, I believe Mr. Mullman was plaintiff's, in a federal court South Carolina case, Benson, which we cited in our motion to reconsider that it cited about five or six admittedly out of state appellate opinions for the proposition that that is not preclude enforcement. I'm not aware of any authority to the contrary that says it doesn't preclude enforcement. But it is an argument that -- and if I was in his shoes I would certainly make it too --

THE COURT: Yeah.

MR. BUCKNER: -- the language--

MR. MULLMAN: I see it both ways, Your Honor.

THE COURT: Well, to me I can tell you that that was meaningful to me in my analysis. That specific

part was meaningful to me in my analysis. So, let's keep it in there, the Supreme Court will tell us whether we're right or wrong.

MR. MULLMAN: I just want to make sure you and I are -- a couple different CMS. There's a 1396 that says you can't do additional -- you can't ask for additional consideration if you're on Medicaid or Medicare. Then there's the one that we just talked about that if it's a readmission you can't make it to arbitration. Then there's the one that Trump got rid of that Obama tried to --

MR. BUCKNER: I'm just talking about the one in the order. Which I think was your --

MR. MULLMAN: I think all three are important but you only picked one in the order.

THE COURT: And I don't know that that was by design. I don't think I appreciated the distinction between the three.

MR. MULLMAN: There's actually three different ones. And the most recent one is still on the books but the Trump administration refuses to enforce it and they're trying to rewrite the regulation. So, we're in a gray area right now that that isn't the actual regulation and the CMS isn't enforcing it. And I don't know if that precludes you from using it,

I really just have never been in that situation, don't know.

THE COURT: Well, I can tell you that there was so much in the order and then so much to which Mr. Buckner took exception, I really thought about amending it just to say the motion to compel arbitration and stay is denied. An then y'all can go up and argue whatever you want to. I would prefer that.

MR. BUCKNER: I don't have a problem with that.

MR. MULLMAN: Because then we can argue everything.

THE COURT: Then you can argue everything. And really, I don't mind that either. If y'all want me to do it that way, I can do that too.

MR. BUCKNER: I think we probably -- that would be easier to prevent a fight. And, of course, you know, he's got the ability visa vie additional sustaining grounds to make those arguments. So, if we did a Form 4 it might work best. I mean, I guess the only part of that that I would have concerns with is there needs to be rulings on the stay and then the finding about related entities. I wouldn't want those to stick around, I guess.

THE COURT: No, what I would end up doing is

just vacating that order.

MR. BUCKNER: Okay--

MR. MULLMAN: -- stay because the appeal will automatically stay.

MR. BUCKNER: Yeah, I'm just talking more specifically about the language. In other words, if we just did a Form 4 denying the language about related entities and agencies--

THE COURT: If I did a Form 4, again, all it would say is that the defendants to compel arbitration and stay is respectfully denied.

MR. MULLMAN: That might be best.

THE COURT: Well, you know, I don't know that some of -- y'all had a lot of issues that were outstanding that I didn't -- I didn't either grant or deny. I just thought wasn't relative to my analysis. But if y'all want a broader analysis, I mean, I think if you went to The Court of Appeals or The Supreme Court, they'd give you a full hearing on all the issues that you brought up and that you briefed. But you can never be sure of that, you know.

MR. BUCKNER: Yeah.

THE COURT: So, to the extent that you think my order would limit you, then I'm willing to just make it barebones and then y'all can by agreement say we

agree that it's all free game.

MR. BUCKNER: I'll think about.

MR. MULLMAN: Yeah.

THE COURT: Y'all let me know by the end of the week and either we'll amend this one or I'll just do a very simple Form 4 and we'll vacate that one.

MR. BUCKNER: Thank you, Your Honor.

MR. MULLMAN: Thank you, Your Honor.

(WHEREUPON, the proceedings were concluded.)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 22nd day of April, 2019.

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

September 28, 2019

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APRIL P. HERRON, Court Reporter

ELECTRONICALLY FILED - 2018 Nov 12 6:45 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,	)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,	)	
vs.	)	**THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC D/B/A MAGNOLIA PLACE-GREENVILLE'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, COMPEL ARBITRATION AND STAY STATE COURT PROCEEDINGS**
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,	)	
DEFENDANTS.	)	

TO: GARY W. POLIAKOFF AND RAYMOND P. MULLMAN, JR., ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville (hereinafter referred to as "this Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

ELECTRONICALLY FILED - 2018 Nov 12 6:45 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Plaintiff has sued this Defendant for "Negligence/Recklessness", "Corporate Negligence", "Joint Venture", "Alter Ego/Piercing the Corporate Veil", "Amalgamation of Interests", "Neglect of a Vulnerable Adult", and "Wrongful Death" pursuant to the Plaintiff's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

[signature block on following page]

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YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant
THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville

Charleston, South Carolina

Dated: November 12, 2018

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Exhibit A

ELECTRONICALLY FILED - 2018 Nov 12 6:45 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between MAGNOLIA PLACE GREENVILLE ("Facility"); its agents, employees and servants, and MOZANA CLINKSCALES ("Resident") or CHARLIE CLINKSCALES ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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

I understand and agree that I am giving up and waiving my right to a jury trial

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

Resident/Representative Signature — Date — Printed Name of Resident/Representative

Authorized Agent of Facility — 8/30/13 Date — CLINT RICHEY, ADMISSIONS Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

ELECTRONICALLY FILED - 2018 Nov 12 6:33 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,	)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,	)	
vs.	)	
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,	)	**FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S MOTION TO STAY**
DEFENDANTS.	)	

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Clinical and Operational Services, LLC, hereinafter referred to as "this Defendant", by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant
Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: November 12, 2018

ELECTRONICALLY FILED - 2018 Nov 12 6:33 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

ELECTRONICALLY FILED - 2018 Nov 12 6:30 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,	)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,	)	
vs.	)	
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,	)	**FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S MOTION TO STAY**
DEFENDANTS.	)	

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC, hereinafter referred to as "this Defendant", by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying this action.

Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant
Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: November 12, 2018

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ELECTRONICALLY FILED - 2018 Dec 17 8:56 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville; and Rusty Flathmann, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23-05088 **MEMORANDUM IN OPPOSITION TO MOTION TO COMPEL ARBITRATION**

TO: JAY DAVIS, ATTORNEY FOR DEFENDANTS:

Plaintiffs, through their attorney, respectfully submit this Memorandum of Law in Opposition to Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings.

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II. Burden of Proof
III. Statement of Issues
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   c. *The Arbitration Agreement does not govern the wrongful death claim*
   d. *The nonmoving Corporate Defendants have not moved to compel arbitration because they are non-signatories. A stay is not necessary for those Defendants who are not bound by the alleged Arbitration Agreement.*
   e. *The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid agreement.*
   f. *Equitable estoppel is inapplicable to the facts of this case*

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g. *Defendant abandoned enforcement of the arbitration proceeding by failing to produce the Agreement when Plaintiffs requested Mozana's records from the facility.*

IV. Conclusion

I. FACTUAL BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of corporate negligence and nursing home neglect resulting in the wrongful death of Mozana Clinkscales ("Decedent"). (**Exhibit 1 – Complaint**).The Facility is owned and operated by the billion dollar national for-profit nursing home chain Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, Inc. The claims are brought against the nursing home facility THI of South Carolina at Magnolia Place at Greenville, LLC (d/b/a Magnolia Place – Greenville), as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two entities being hereinafter referred to as the "Corporate Defendants." Defendant Flathmann, who is employed by the Corporate Defendants, is included as a Defendant based upon his direct managerial control over the facility.

Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Decedent, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Decedent.

Charles Clinkscales ("Plaintiff') was Decedent's son and now serves as the personal representative of Decedent's estate. Mozana was admitted into Magnolia Place-Greenville ("Facility") on **January 15, 2011** according to the Admission Agreement. (**Exhibit 2 – Admission Agreement**). The Admission Agreement governed the type of care Mozana would receive at the Facility and Mozana's financial obligation to pay for those services. On the

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Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement"[1] provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mozana's admission to the Facility. The date on this document is **January 15, 2011**. However, Defendant asserts two contracts were signed as part of the admission.

A contract called "Arbitration Agreement" was allegedly signed on **August 30, 2013**. (**Exhibit 3 – Arbitration Agreement**). This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Mozana, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mozana's care at the Facility. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. The Arbitration Agreement was allegedly signed by Charlie Clinkscales on **August 30, 2013**—more than 30 months after the Admission paperwork was signed.

On **October 4, 2018**, the lawsuit was initiated by the personal representative for Mozana's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to monitor and supervise the safety and well-being of Mozana while at the Facility. (**Exhibit 1 - Complaint**).

On **November 12, 2018**, the Facility filed a Motion to Compel Arbitration and Petition to Stay State Court Proceedings. Accordingly, the Facility must show a valid and enforceable arbitration agreement between Mozana and the Facility to prevail on its motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

[1] "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties."

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II. BURDEN OF PROOF

The Facility seeks to compel arbitration. Defendant carries the burden to prove that a valid and enforceable arbitration agreement exists. The party seeking to establish contractual waiver of jury trial bears the burden of proof to establish that the waiver was signed in a "knowing, voluntary and intentional" capacity. Of those courts that have decided this question, most have held that it is the proponent of the waiver who bears the burden, reasoning that the jury trial right is fundamental, and should not be waived absent clear evidence.[2] In interpreting a jury trial waiver narrowly, some courts have also emphasized "the basic principle that ambiguities in a contract are construed against the drafting party."[3] Whether the parties agreed to arbitrate 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."). In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

> Although we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis. While actions taken in an arrangement such as the one entered into by these parties might have the potential to generate several legal claims and causes of action, we have no doubt that Chassereau did not intend to agree to arbitrate the claims she asserts in the instant case. Accordingly, we hold that these claims are not covered by the arbitration agreement at issue in the instant case.

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[2] See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4th Cir. 1986) ("Where waiver is claimed under a contract executed before litigation is contemplated, we agree with those courts that have held that the party seeking enforcement of the waiver must prove that consent was both voluntary and informed."); Nat'l Equip. Rental Ltd. v. Hendrix, 565 F.2d 255, 258 (2d Cir. 1977) (implying that party defending waiver bears burden of proof); Luis Acosta, Inc. v. Citibank, N.A., 920 F.Supp. 15, 18 (D.P.R. 1996) (rejecting a waiver, after concluding that "the burden of proving the waiver of such a fundamental right properly rests upon the party seeking to enforce such a waiver"); Phoenix Leasing Inc. v. Sure Broadcasting, Inc., 843 F.Supp. 1379, 1384 (D.Nev. 1994) ("An informal survey indicates the majority of courts having considered this question followed the approach in Leasing Service [and placed burden of proof on proponent of waiver]."); Smyly v. Hyundai Motor Am., 762 F.Supp. 428, 429 (D.Mass. 1991) (concluding that "since it is a waiver of a constitutional right," proponent of waiver bears burden of showing agreement was made knowingly and intentionally).

[3] Nat'l Acceptance Co., 381 F.Supp. at 271).

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While there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 s.E.2d 581 (2003). Plaintiff does not dispute the mandatory language in the Federal Arbitration Agreement ("FAA"). However, it is important to note that this mandatory language only applies in instances where a valid arbitration agreement has been established. This is evident from the FAA provisions: "The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue." 9 U.S.C. § 4. While it is true that the U.S. Supreme Court has held that the FAA "leaves no place for the exercise of discretion," the Court also cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.

However, not all arbitration clauses are enforceable. While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

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The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability. See *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d.302, 205 (4th Cir.2001). The party seeking to enforce an agreement to arbitrate 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). Pro-arbitration policy does not validate a contract that lacks the building blocks of a binding contract.

III. STATEMENT OF ISSUES

A. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.*

The alleged Arbitration Agreement provided by Defendants was allegedly signed on **August 30, 2013**. However, the Admission Agreement produced by Defendants was signed on **January 15, 2011**[4]. The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018) (**Exhibit 4**); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014)(Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

[4] No family member had Power of Attorney when Mozana was admitted on **January 15, 2011**.

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An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement *or* in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The "Admission Agreement" presented contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. To the extent there are any ambiguities in this contract language, they must be resolved against merger. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman). The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

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The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d161, 166 (S.C. 2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Plantation A.O., LLC v. Gerald Builders of Conway, Inc., 386 S.C. I 98, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the admission agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate **only if admission and arbitration are governed by the same contract.** In sum, Defendants cannot meet their burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

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An illegal contract is unenforceable. Berkebile v. Outen, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

It is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 321 S.E.2d 57, 60 (Ct.App.1984). In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care. Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission.

Counsel for Defendants has admitted that the arbitration agreement was not a condition of admission. Under similar circumstances, the Honorable Judge Perry Buckner held in Holmes v. Bayview that the arbitration agreement was not enforceable. See Judge Buckner's Order (**Exhibit 5**) which states:

> Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission

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and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

The Honorable Judge Diane Goodstein recently had a similar analysis in Rawl v. West Ashley (**Exhibit 6**):

> The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement.
>
> Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. **Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement**. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility. 42 U.S.C. § 1369r(c)5(A)(iii)l 42 CFR § 486.12(d)(3) expressly states that a:

> Nursing home facility *shall not change, solicit, or accept, or receive*, in addition to any amount otherwise required to be paid under the State's Medicaid plan any gift, money, donation, or *other consideration* as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay in the facility. [emphasis added]

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case. The fact is if a facility were to charge an additional five

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dollar fee to Medicaid beneficiaries as a condition for any reason, this would be strictly prohibited. Therefore, a facility should not be able to demand a waiver of a constitutional right as the price of admission.

There exists a lack of mutuality that makes the Arbitration Agreement unenforceable. A lack of mutuality also makes the agreement unconscionable. An agreement may lack mutuality where it permits one party to seek relief through the courts, but does not allow the same relief for the other party. The agreement provides that claims primarily brought by patients, such as those for medical malpractice, claims arising from the provision of services by defendant, and elder abuse claims are to be arbitrated. Defendants argue that the Agreement requires both sides to be bound by arbitration. That is exactly the problem: the only party that is going to bring a "dispute over care" is the patient. It is virtually inconceivable that Defendants would sue its patient regarding a dispute over care. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Mrs. Clinkscales received from the Arbitration Agreement alone. (See **Exhibit 7 - McKinnon Order**). Any such attempt to find a benefit would have been futile given the Court of Appeals' unambiguous ruling in Thompson. which held that "**any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial.**" 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

B. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms which would violate the Federal Arbitration Act and applicable case law.

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties ***with regard to all essential and material terms of the agreement***. Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards,

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265 S.C.529 (1975). The forum chosen for the arbitration to take place is just that, essential and material. An agreement which neglects material terms may be found unenforceable for indefiniteness. Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997). "Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced." Id. In this particular case, even if the contract was validly executed, there was no "meeting of the minds" as to the terms of arbitration, specifically the choice of arbitrator, rules of evidence or allowance of pre-hearing discovery. Defendants have previously taken the position that this very arbitration agreement does not allow for ANY discovery outside the limited powers of the arbitrators under FAA. See **Exhibit 8 - Campsen v. THI of SC Motion for Clarification and/or Protection from Discovery** and **Exhibit 9 - Campsen v. THI of SC Brief in Opposition to Plaintiff's Motion to Compel** for further argument outlining Defendants' believed position that the arbitration agreement precludes any pre-hearing discovery.

The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, to say otherwise undermines the purpose of the arbitration process. See the Honorable Judge Kristi Lee Harrington's Order in Powell v. Fundamental Long-Term Care Holdings, LLC. attached as **Exhibit 10**.

No rules for arbitration were included in the clause or attached to the contract or provided to the Plaintiff. There was no "meeting of the minds" as to choice of arbitrator or as to prohibition of discovery or rules of evidence at the arbitration hearing. For these reasons, there is growing resistance to the enforcement of pre-dispute arbitration clauses in printed "contracts" that disadvantage the weaker party in efforts to enforce contractual or statutory rights. For example,

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the Commission on Health Care Dispute Resolution[5] adopted recommended principles that would allow binding arbitration of disputes involving patients only where the parties agree to do so *after* the dispute has arisen.[6] The American Arbitration Association has recently announced that it will no longer accept the administration of cases involving individual patients without a *post-dispute* agreement to arbitrate.[7] (**Exhibit 11 – AAA Statement**). Three arbitration organizations (AHLA, NAF and AAA) refuse to participate in contracts similar to the one at bar. (**Exhibit 11 – AAA Statement, Exhibit 12 – NAF Statement, and Exhibit 13 – AHLA Statement**).

Contracts may be rescinded based upon **an omission of some material element affecting the subject matter** or terms and stipulations of the contract.[8] The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court.[9] However, "Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced." Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997). As a result, the promise that the dispute "shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules" is moot and ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals. None of this was negotiated or discussed by the

[5] This was a joint project of the American Arbitration Association, the American Bar Association, and the American Medical Association. See Health Care Due Process Protocol, Draft Final Report, July 27, 1998, available at http://www.adr.org/upload/LIVESITE/focusArea/Healthcare/healthcare.pdf.
[6] Id., Principle 3: Knowing and Voluntary Agreement to Use ADR.
[7] AAA Health Care Policy Statement, at https://www.adr.org/sites/default/files/document_repository/AAA_Healthcare_Policy_Statement.pdf (policy effective January 1, 2003).
[8] Truck South, Inc. v. Patel, 528 S.E.2d 424, 429 (S.C. 2000).
[9] See Defendants' Exhibit – Arbitration Agreement. "The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry." This language fails to show any type of specific agreement between the parties regarding the selection of an arbitrator and is therefore unenforceable.

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parties. No agreement or meeting of the minds to material terms exists.

Even if there is a valid agreement between Mozana and the Defendants, the Court should find that the arbitration clause contained in the Admission Contract at hand is unenforceable because a material part of the arbitration clause exists. There has been no meeting of the minds as to the choice of arbitrator which is the key material term to the whole agreement. The choice of the arbitral forum is one of the most important and material terms in an agreement to arbitrate. **(Exhibit 10 – Harrington Order - Powell v. FLTCH)**.

C. *The Arbitration Agreement does not govern the wrongful death claim*

If there is a valid and enforceable arbitration agreement, it should not include the wrongful death cause of action because no one with legal authority could enter into an agreement that waives the right to a jury trial on behalf of the statutory beneficiaries. No person other than the court-appointed personal representative can waive the rights of the statutory beneficiaries. The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages.
>
> South Carolina Code Annotated §15-51-10 (1977)
>
> The wrongful death beneficiaries are as follows:
>
> Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused

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As this Honorable Court decided in Young v. NHC (**Exhibit 14**) the wrongful death cause of action should not be included in the arbitration proceeding if a valid and enforceable arbitration agreement is found by the Court for the Survival cause of action:

> It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the decedent's statutory beneficiaries who were not a party to the contract. [cite omitted]
>
> This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).
>
> However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants."
>
> (Ping, 376 S.W.3d at 599-600).

A similar analysis and holding can be found in Wilson v. NHC by the Honorable Judge Michael Nettles (**Exhibit 15**) which held:

> [T]the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

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South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

D. *The nonmoving Corporate Defendants have not moved to compel arbitration because they are non-signatories. A stay is not necessary for those Defendants who are not bound by the alleged Arbitration Agreement.*

Either all Defendants should be ordered to arbitration or Plaintiffs should be able to go forward with the case against other Defendants and dismiss the Facility. All Defendants are all related entities[10] of the nursing home and have a significant relationship in the ownership, operation, and management of the nursing home, and derive significant economic benefits from

[10] Related entity is an industry term that means the entities are have common ownership, management, and control.

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its revenue. Judge Nettles's Order in Coleman (**Exhibit 16**) covers this issue as well:

> Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. **Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.**
>
> Instructive on this issue is the matter of Birl v. Heritage Care, *LLC,* 172 Cal.App.4th 1313, 91 Cal. Rptr.3d 777. In Birl a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility south to compel arbitration. Of relevance, the Court here noted that "(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement." In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that "the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not joined to the court action with the other defendants... Different triers of fact in different proceedings could come to different conclusions..." Id. at 1321.
>
> While the circumstances of the current actions differ slightly from those of Birl, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in Birl. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of the Corporate related entities stating that "The arbitration agreement contractually ***is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances*** and Pennsylvania law in any event. In addition, Defendants argued that decedent and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable

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by each of the defendants." See the Honorable Judge Cercone's Order in Hawthorne (**Exhibit 17**) which states:

> Each of the moving defendants are entitled to enforce the arbitration agreement. Plaintiff essentially alleges that each defendant may be held accountable under theories of ownership and control, agency, joint venture and integrated enterprise. Specifically, it is averred that defendants collectively managed the (1) operation, (2) planning and (3) quality control of the facility, which included control over the quality of care provided.
>
> THI of Pennsylvania is a parent corporation of the facility and THI of Baltimore is the parent corporation of THI of Pennsylvania. Fundamental Clinical and Operational Services, LLC, and Fundamental Clinical Consulting, LLC, were agents providing services to the facility. The arbitration agreement is expressly applicable to plaintiff's claims against the facility's parent entities, purposes underlying enactment of the [FAA].").

A parent company has been forced to arbitrate under a valid and enforceable contract even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement under a theory of equitable estoppel. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp. (S.C. App., 2012). See **Exhibit 18 - Pearson v. Hilton Head Hospital**.

As this Honorable Court decided in Young v. NHC the Corporate Defendants should be included in the arbitration proceedings if a valid and enforceable arbitration agreement is found by the Court:

> Further, the Court finds that the Corporate NHC Defendants were intended beneficiaries of the Arbitration Agreement; therefore, the order compelling arbitration of the Survival Action shall also apply to the Corporate NHC Defendants as the allegations against those Defendants are based on the same facts and are inherently inseparable from the claims made against NHC-Mauldin. *See* Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); *see also* Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012).

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Furthermore, plaintiff claims against all the moving parties are based on a theory of unified operation and control. Each is said to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory." Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993). Under all accounts advanced by plaintiff each of the moving parties is a parent entity, agent or employee of the facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against these defendants and in turn each can rely on the principles of agent law and the broad scope of the FAA to compel and participate in the arbitration agreement. Cf. Id. ("Where the parties to such a clause unmistakably intend to arbitrate all controversies, which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories."); Sharp Properties, 998 F.2d at 155 ("Applying Barrowclough [v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985)]' s logic here, because Bared's and ARI's interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared's interests. There is, therefore, no reason to conclude that the Federal Arbitration Act's overarching policy favoring the enforcement of arbitration awards does not apply to this case.").

In summary, there is no basis for any Stay of the claims against the Corporate Defendants or Flathmann. Plaintiffs will show that the arbitration clause is not valid as to any Defendant. However, should the Court determine that the arbitration clause is valid as to claims against the

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facility, then Plaintiffs' claims against the remaining Defendants should proceed, on one forum or another.

E. The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid agreement.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann.§ 36-2-302(1) (2003). In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," Id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination

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whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17 A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

The choice of a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.[11] The need to find a placement arises quickly[12] and nursing home admissions are often unplanned; there is little time to investigate options or to wait for an opening at a nursing home of choice.[13] Time pressure significantly impairs the ability to seek and carefully consider alternatives.[14] Mr. Clinkscales had no choice or time in making such a decision. Many facilities lack a coherent admissions process, adding to the chaos surrounding the admission of a resident.[15] Residents and their family members do not have time to read and deliberate on the terms of the agreement. An arbitration clause is not part of the core transaction involved in a contract for medical care or service.[16] It is not, therefore, likely to get much attention from the non-drafting party.[17] As is true in the present action, facilities

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[11] *See, e.g.,* Podolosky v. First Healthcare Corp., 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (*citing* Donna Ambrogi, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); *see also* Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

[12] In the 1980's, the government changed the way hospitals were paid for their Medicare patients; since the change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health and Aging 145, 150 (2000). See also Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 222 (1994).

[13] Denise Ashbugh Vlosky, et al., "*Say-so*" as a *Predictor of Nursing Home Readiness*, 93 J. of Family & Consumer Science 59 (2001).

[14] Potential residents and their family members can experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options. Whitton, *supra*, at 150.

[15] Donna Ambrogi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 The Gerontologist 82, 83-88 (1988).

[16] See Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice,* 58 VA. L. REV. 947, 987 (1972) ("The arbitration provision, viewed from the perspective of the patient, is indeed subsidiary to the primary exchange of medical services for an undertaking of payment.")

[17] The drafting party, on the other hand, has a great deal of information about these repetitive transactions and a great deal of incentive to prepare form contracts so that they are optimal from the drafter's perspective. Melvin Aaron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan.L.Rev. 211, 243 (1995).

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often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual can assess the rights affected by the contract.[18]

The Honorable Judge Diane Goodstein found an arbitration agreement unconscionable in a similar circumstance in Rawl v. West Ashley Rehab (**Exhibit 6**) based on the following facts that also apply to the circumstances in this case:

1. Resident lacked a meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms.
2. Upon admission the standard Arbitration Agreement form was presented on a take-it-or leave it basis.
3. Resident did not contribute to the drafting of the Arbitration Agreement
4. Resident did possess the bargaining power to negotiate the terms of the Arbitration Agreement.
5. An inherent disparity in bargaining power between the parties to the transaction.
6. The Arbitration Agreement was inconspicuous.
7. The injuries include wrongful death.
8. Resident did not have sufficient time to allow any meaningful explanation of the terms and significance of the alleged arbitration agreement, considering the number and complexity of admission documents other than that alleged arbitration agreement.[19]

The terms of the Arbitration Agreement are unfair and no person would voluntarily agree to them. The arbitration agreement at issue does not allow for any discovery. It does not provide the rules of the arbitration including evidence. The costs of the arbitration are not disclosed. The lack of discovery alone makes the agreement unconscionable *when Defendants possess all the material information about the operation of the nursing home and what happened to Mozana at their facility.*

[18] California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California's Residential Care Facilities for the Elderly* 1 (Mar. 2003).

[19] The Admission paperwork included 56 pages of documents for the resident to review and sign. These documents include the following: Admission Agreement (**Exhibit 2**), Admissions and Re-admissions, Arbitration Agreement, Assignment Agreement, Consent for Release of Medical Records, Consent to Treat, Pharmacy Consultant, Questionnaire, Room and Board Rates, Statement for Disclosures, and Therapy Services.

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The agreement states that the FAA applies. Because the arbitration agreement is silent as to pre-hearing discovery, the FAA applies and FAA§ 7 prohibits **any** pre-hearing discovery. Under the sole discovery provision of the FAA, arbitrators may summon, in writing, any person as a witness and, in a proper case, may require the witness to bring tangible things and documents to the hearing. 9 U.S.C. § 7. In pertinent part, § 7 reads:

> The arbitrators may summon in writing any person to *attend before them* or any of them as a witness and in a proper case to bring with them any book, record, document, or paper which may be deemed material as evidence in the case ... Said summons shall issue in the name of the arbitrator or arbitrators ... and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify *before the court.* If any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators ... are sitting *may compel the attendance of such persons before said arbitrator* .. .in the same manner provided by law for securing the attendance of witnesses ... for neglect or refusal to attend in the courts of the United States. (emphasis added).

No other FAA provision discusses any allowed compulsion of witnesses or discovery by the parties. *See* 9 U.S.C. § 1, *et seq.* In fact, parties to a private arbitration agreement "relinquish the right to certain procedural niceties which are normally associated with a formal trial...*one of these accoutrements is the right to pre-trial discovery.*" *See* Burton v. Bush, 614 F.2d 389, 390-91 (4th Cir. 1980) (emphasis added). A hallmark of arbitration is its limited discovery process. See Id. at 391. The "essence of arbitration is its freedom from the formality of ordinary judicial procedure." Harvey Aluminum, Inc. v. United Steelworkers of Am., AFL-CIO, 263 F. Supp. 488, 491 (C.D. Cal. 1967) (quoting Canuso v. City of Philadelphia, 326 Pa. 302, 307, 192 A. 133, 136).

Arbitration, by its very nature, does not lend itself to discovery outside the parameters set by§ 7: "The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one *and its superfluity and utter incompatibility in the other.*" Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co, 20 F.R.D. 359, 362 (S.D.N.Y. 1957) (emphasis added). As Judge Learned Hand

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eloquently stated, when [parties] have adopted [arbitration], they must be content with its informalities; *they may not hedge it with those procedural limitations which is precisely its purpose to avoid.* They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery. Am. Almond Products Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944) (emphasis added).

Arbitrators alone are afforded the power to call witnesses and subpoena tangible evidence and documents at the hearing. 9 U.S.C. § 7. This power is not extended to the parties to the arbitration. Burton, 614 F.2d at 390-91; *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, (7th Cir. 2002) ("[F]or the sake of economy and in contrast to the practice in adjudication, *"'parties to an arbitration do not conduct discovery, the arbitrators do".")* (emphasis added). Put simply, because an arbitrator controls discovery pursuant to the strictures of § 7, Plaintiff has no right to serve discovery requests upon Defendant. The power granted to the Arbitrator is simply to compel attendance at hearings of witnesses and documents at the hearing.

The Federal Arbitration Act, 9 U.S.C.A. §§ 1-307 does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship. See Comsat Corp. v. Nat'l Science Foundation, 190 F.3d 269 (4th Cir., 1999). The subpoena powers of an arbitrator are limited to those created by the express provisions of the FAA. The statute provides, in pertinent part: "arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material . . . ." 9 U.S.C.A. § 7. Nowhere does the FAA grant an arbitrator the authority to order non-parties to appear at depositions, or the authority to demand that non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of

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the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing. See id. The FAA provides that a federal court may "compel the attendance of [a subpoenaed person] before said arbitrator . . . ." 9 U.S.C.A. § 7. The enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal. Arbitrators do not have the authority to issue a deposition subpoena or a subpoena *duces tecum* prior to the arbitration hearing itself. In the litigation setting, the power to issue subpoenas derives from the applicable rule of civil procedure. See Rule 45, SCRCP; Fed. R. Civ. P. 45. The rules speak specifically of "courts" and do not confer similar power to cases in alternative dispute resolution. Power to issue pre-hearing subpoenas is also not provided by the other authorities governing arbitration proceedings.

Then-Judge Samuel Alito agreed with the Fourth Circuit's position when, writing for the Third Circuit, he concluded FAA Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); see also CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("we reject the proposition that section 7 [of the FAA] grants arbitrators implicit powers to order document discovery from third parties prior to a hearing"); Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (citing Hay Group and finding FAA "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding").

Further the cost of arbitration far outweighs the cost of proceeding in Court and therefore the agreement is unconscionable. (See **Exhibit 19 - Affidavit of Gary W. Poliakoff** and **Exhibit**

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20 – Affidavit of Charlie Clinkscales). Also, the cost of the arbitration must be paid by the parties including the Estate of Mozana Clinkscales which contains no money or assets. Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff.

> Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, since Green Tree the issue of the prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement. See Zephyr Haven, 122 So.3d at 921–22. "[W]here 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.' " Id. at 921 (quoting Green Tree, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case analysis is appropriate. Id. at 922. The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims. Id. In order to invalidate the arbitration agreement, the plaintiff, at an evidentiary hearing, must show the expected cost of arbitrating the specific claim is greater than litigating it and that the cost of arbitration would be prohibitively expensive. Id.
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> Fi-Tampa, LLC v. Kelly-Hall, 135 So.3d 563 (Fla. App., 2014)

> An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights." [Cite omitted] Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. [cites omitted] Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case. See Harrington, 119 P.3d at 1055 (explaining that "the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights") (citing Randolph, 531 U.S. at 92, 121 S.Ct. 513). In determining whether arbitration costs are prohibitively expensive, courts have considered several factors. First, the party seeking to invalidate the arbitration agreement must present evidence concerning the cost to arbitrate. [cite omitted]. This evidence cannot be speculative; it must be based on

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> specific facts showing with reasonable certainty the likely costs of arbitration. [cite omitted]see also Phillips v. Assocs. Home Equity Servs., Inc., 179 F.Supp.2d 840, 847 (N.D.Ill.2002) (party must make "a reasonable, good faith effort to estimate" arbitration costs). Second, a party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. This evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration. Third, a court must consider whether the arbitration agreement or the applicable arbitration rules referenced in the arbitration agreement permit a party to waive or reduce the costs of arbitration based on financial hardship. Id. (holding an arbitration agreement was not substantively unconscionable because, in part, the agreement provided that any claim or dispute would be resolved under the American Arbitration Rules ("AAA"); the applicable AAA rules provided for waiver or reduction in arbitration fees based on "extreme hardship"); Jones v. Gen. Motors Corp., 640 F.Supp.2d 1124, 1134 (D.Ariz.2009) (finding arbitration fee not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship). We conclude there is reasonable evidence to support the trial court's finding that "[i]n this particular case, Plaintiff has established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim."
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> Clark v. Renaissance W., LLC, 232 Ariz. 510, 307 P.3d 77, 666 Ariz. Adv. Rep. 29 (Ariz. App., 2013). (**Exhibit 21**).

F. Equitable estoppel is inapplicable to the facts of this case

The Facility argues Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on

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conduct of the party to be estopped. Id. Defendants have not met the burden of proof on equitable estoppel.

The Facility contends their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. This argument is as at odds with U.S. Supreme Court precedent. An arbitration contract concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of equitable estoppel. 9 U.S.C. § 2 (requiring enforcement of arbitration contract "save upon such grounds as exist at law or in equity for the revocation of any contract"). The FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to equitable estoppel arguments. Id. at 632 (noting question on remand was "whether the relevant state contract law recognizes equitable estoppel").

The Facility relies primarily on International Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a "direct benefit" from a contract containing an arbitration clause. The Facility then argues Mozana's admission to the Facility was the required "direct benefit." In doing so, the Facility tie their estoppel argument inextricably to their flawed merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission agreements and the [arbitration agreements] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same

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contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Mozana's admission does not support equitable estoppel.

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals recently held in Thompson that any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.[20] Since admission is unavailable as a "direct benefit" to support estoppel, the Facility would be required to point to some benefit Mozana received from the Arbitration Agreement alone. However, Mozana and her estate derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the Arbitration Agreement"). Even if they had, "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [Mozana] waive [her] right to access the courts and [her] right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

Plus, Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

G. Defendant abandoned enforcement of the arbitration proceeding by failing to produce the Agreement when Plaintiffs requested Mozana's records from the facility.

[20] Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 ("we find it difficult to find [resident] benefitted even from being admitted").

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Through their delay in production of the Arbitration Agreement and their participation in pre-suit discovery and mediation, Defendants waived their right to enforce the Agreement. After Mozana's injury and discharge from Defendants' facility, a request was sent for her entire nursing home file from Defendants. (**Exhibit 22 – Records Request**). The request specifically asked for a complete copy of Mrs. Clinkscales' file, including "administrative records, medical records, [and] **admission records**." (*emphasis added*). This request was sent at the beginning of this litigation, and Defendant has since had sufficient time to send any and all records pertaining to Mozanna Clinkscales. However, Defendants failed to produce the arbitration clause until much later. Defendants did not mention arbitration when Plaintiff filed the Notice of Intent on **January 9, 2018** which specifically requests if an arbitration agreement applies and warns that any delay would be treated as a waiver of arbitration. Defendants did not mention the arbitration clause when Plaintiff responded to pre-suit mediation. Defendants participated in pre-suit mediation without once mentioning the arbitration clause or attempting to enforce the agreement. This is prejudicial and contradicts the purpose of arbitration which includes a speedy and efficient resolution. It has now been more than 11 months since Plaintiffs filed the NOI.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, must be denied. The claims in this case are not subject to arbitration. In the alternative, should this Court find the arbitration clause to be valid, then this Court should determine that the Wrongful Death claim is not subject to arbitration, and should further rule that all claims against the Corporate Defendants and Flathmann are not subject to arbitration, and such claims should be allowed to proceed in Court at this time. Under no scenario would a stay be appropriate. All claims should proceed in some forum.

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POLIAKOFF & ASSOCIATES, PA

s/Raymond P. Mullman, Jr.
Gary Poliakoff, Esq., S.C. Bar # 4488
atty@gpoliakoff.com
Ray Mullman, Esq., S.C. Bar# 8662
rmullmanjr@gmail.com
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472

Matthew Christian, Esq.
S.C. Bar # 70516
mchristian@christiananddavis.com
Christian & Davis, LLC
1007 E. Washington St.
Greenville, SC 29601

Attorneys for Plaintiff

Date: December 17, 2018
Spartanburg, SC

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ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: Mozana Clinkscales

RESIDENT NUMBER: _____

DATE OF ADMISSION: 1.15.11

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Magnolia Place of Greenville ("Facility"), Mozana Clinkscales ("Resident") and/or Charlie Clinkscales ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

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II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

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

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

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

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

6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.

8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

9. Provide an activities program for Resident, components of which will be at the discretion of Facility.

10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

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B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold.*

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

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10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

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20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses; and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☑-semi-private) accommodations, for a basic fee of $ 170 00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.

b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.

c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

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state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

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

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
c. Resident's death
d. The safety or health of individuals in the Facility is endangered.
e. Resident and/or his/her legal representative has failed to pay for his/her stay.
f. Facility ceases to operate or is no longer able to provide services to Resident.
g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. **Eligibility**. Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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

3. **Non-Covered Services.**

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

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

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

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

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

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

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

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

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

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

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

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

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

5. Application/ Appeals. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. Routine Services. If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

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2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

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

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

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

35 Southpointe Dr.
Greenville SC 29607

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

REDACTED
Mauldin, SC 29662

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

Original: Business File Photocopy: Resident/Representative

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IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

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XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident	Date	Printed Name of Resident	
Resident Social Security Number			
Witness Signature	Date	Printed Name of Witness	

OR

X Charlie E. Gintescates	1-15-11	X Charlie E. Gintescates	
Signature of Representative, if any	Date	Printed Name of Representative	
Witness Signature	Date	Printed Name of Witness	

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official	Shayna Ferguson Dir. of Nsg.
	Printed Name of Facility Official & Title
1-15-11	
Date	

Original: Business File • Photocopy: Resident/Representative

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Camille Hodge, Jr., as personal representative of the estate of Mable Hodge, Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, M.D., P.A.; and Dr. Herbert A. Moskow; Defendants,

Of which UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. are the Appellants.

Camille Hodge, Sr., Respondent,

v.

UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp.; R. Dale Padgett, M.D., P.A.; and Dr. Herbert A. Moskow; Defendants,

Of which UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. are the Appellants.

Appellate Case No. 2015-001183

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Appeal From Bamberg County
Clifton Newman, Circuit Court Judge

Opinion No. 5541
Heard May 2, 2017 – Filed March 7, 2018

AFFIRMED

Monteith Powell Todd and John Michael Montgomery, both of Sowell Gray Robinson Stepp & Laffitte, LLC, and Robert E. Horner, of Speed, Seta, Martin, Trivett & Stubley, LLC, all of Columbia, for Appellants.

Joseph Preston Strom and Bakari T. Sellers, both of Strom Law Firm, LLC, of Columbia; and Wallace K. Lightsey and Meliah Bowers Jefferson, both of Wyche Law Firm, of Greenville; and John Carroll Moylan, III, of Wyche Law Firm, of Columbia, for Respondents.

KONDUROS, J.: In this medical malpractice case, UniHealth Post-Acute Care of Bamberg, LLC f/k/a Bamberg County Nursing Center; United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. a/k/a UHS-Pruitt Corp. (collectively, Appellants) appeal the circuit court's determination an arbitration agreement did not apply. Appellants argue the circuit court erred in denying their motion to compel arbitration on several bases. They also maintain the circuit court erred in denying their motion to compel the deposition of Camille Hodge, Sr., one of the Respondents, whose testimony they assert is relevant to whether the arbitration agreement is binding. We affirm.

FACTS/PROCEDURAL HISTORY

Mable Hodge entered a rehabilitation facility—UniHealth Post-Acute Care of Bamberg, LLC (the Facility)—on August 31, 2010, after being hospitalized for

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heart and kidney problems. The Facility is owned by United Health Services of South Carolina, Inc.; United Health Services, Inc.; and UHS-Pruitt Holdings, Inc. According to her doctor's records, Mable was "well developed" and "in no real distress" and had a full range of motion in her extremities when she entered the Facility. Her husband, Camille Hodge Sr., (Husband) executed various documents related to her admission, including an Arbitration Agreement and an Admission Agreement. The Facility had an Arbitration Checklist. The first item on the checklist was "Determine competency of patient/resident." The last item on the checklist was "Secure appropriate signatures," which provided:

> ***Competent, capable of signature–***
> Patient/resident must initial each page in the lower right hand corner and sign and date the final page in the presence of Admissions Coordinator and one witness.
>
> ***Competent, incapable of signature–***
> Have the patient/resident verbally confirm in the presence of two (2) healthcare center/agency witnesses that the patient/resident authorizes their family member or friend to sign on the patient/resident's behalf. Have the two (2) healthcare center/agency witnesses execute the contract.

Mable was not present at the time her husband signed these documents on the day before her admission as she was still in the hospital. Mable was competent at the time of her admission and signed additional documents on the day she arrived at the Facility. She had no health care power of attorney at that time.

In both agreements, the top of every page was labeled either "ADMISSION AGREEMENT" or "ARBITRATION AGREEMENT," respectively. The Admission Agreement was individually paginated with pages numbered 1 through 12. The Arbitration Agreement was also individually paginated with pages numbered 1 through 5. Each of these documents contained its own signature page as the last page of each agreement.

The Arbitration Agreement provided:

> Any and all claims or controversies arising out of or in any way relating to this Agreement or the

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> Patient/Resident's Admission Agreement, including the interpretation of either, or the Patient/Resident's stay at, or the care or services provided by, the Healthcare Center, or any acts or omissions in connection with such care or services, including care or services provided prior to the date that this Agreement was signed, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages, and whether sounding in breach of contract, tort, or breach of statutory or regulatory duties (including, without limitation, any claim based on an alleged violation of the state bill of rights for Patients/Residents of long-term care facilities or federal Patient/Resident's rights, any claim based on negligence, any claim for damages resulting from death or injury to any person arising out of care or service rendered by the Healthcare Center or by any officer, agent, or partner thereof acting within the scope of his or her employment, any claim based on any other departure from accepted standards of health care or safety, or any claim for unpaid nursing home charges), irrespective of the basis for the duty or of the legal theories upon which the claim is asserted, shall be submitted for arbitration.

The Arbitration Agreement specified "signing of this Agreement is not a precondition to admission." The Arbitration Agreement also stated it could be revoked with notice to the Facility within thirty days. The Arbitration Agreement also noted "[i]n signing this Agreement, Patient/Resident Representative binds both Patient/Resident and Patient/Resident Representative individually." Husband signed but left blank a line on the Arbitration Agreement where he was to indicate his capacity of representation.

The Arbitration Agreement also provided:

> [T]his Agreement shall be governed by and enforced under federal law, specifically, the Federal Arbitration Act (9 U.S.C. §§ 1-16), as opposed to state arbitration law, notwithstanding any provision of state law or any other understanding or agreement between the parties.

The parties specifically exclude the application of South Carolina's Uniform Arbitration Act.

The Admission Agreement stated in pertinent part:

> I. This Agreement shall be construed, governed and enforced under the laws of the State of South Carolina. This Agreement together with all exhibits is the exclusive statement of the terms and conditions between the parties with respect to the matters set forth herein, and supersedes all prior agreements, negotiations, representations, tender documents, and proposals, written and oral with respect to the subject matter hereof. Variance from, or additions to, the terms and conditions of this Agreement in any written notification from Patient/Resident shall be of no effect.
>
> J. This Agreement shall not be modified or amended in any respect by Patient/Resident except by written agreement executed by Healthcare Center and Patient/Resident in the same manner as this Agreement is executed. These provisions are subject to federal and state law and may be changed periodically to comply with these laws. This Agreement may be modified or amended by Healthcare Center if Healthcare Center sends a notice of the amendment to Patient/Resident thirty (30) days prior to the implementation of the amendment. If Patient/Resident does not reject such amendment in writing within thirty (30) days of receipt of the amendment, such amendment shall be deemed accepted and incorporated into this Agreement. This Agreement shall not be assigned, directly or indirectly, by Patient/Resident without the prior written consent of Healthcare Center. Any attempted assignment by Patient/Resident not in full compliance herewith shall be void and of no force or effect. This Agreement is freely assignable by Healthcare Center.

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Around three weeks after her admission, after complaining of increasingly severe back pain, Mable was not able to feel her legs or arms, was unable to stand, and was ultimately transported to Richland Memorial Hospital, where hospital staff confirmed she was paralyzed from the waist down. Mable never walked again and died one year later as a result of her paralysis.

Camille Hodge, Jr. (Son)—Mable and Husband's son—was appointed personal representative of Mable's estate. Husband and Son, in his capacity as personal representative, filed a notice of intent to sue and later filed separate summons and complaints[1] against Appellants.[2] In addition to filing answers, Appellants filed a motion to dismiss and compel arbitration or alternatively, to compel arbitration and stay proceedings in both actions. Appellants also requested they be allowed to depose Husband on topics solely related to the arbitration issue.

The circuit court held a hearing on the motions and subsequently issued orders denying both the motion to dismiss or compel arbitration and the motion to compel the deposition of Husband. Specifically, the circuit court found the following facts were uncontested: (1) The Arbitration Agreement was signed only by the Facility and Husband; (2) Mable and Son did not sign the Arbitration Agreement; (3) Mable was competent at the time she was admitted to the Facility and when Husband signed Arbitration Agreement; (4) Mable had not executed a general power of attorney or health care power of attorney (or any other document giving Husband or other family members the authority to make contractual commitments or waivers on her behalf) at the time she was admitted to the Facility or when Husband signed the Arbitration Agreement; (5) Mable was a patient at Providence Hospital when Husband signed the Arbitration Agreement; and (6) the Facility presented Mable with other documents to sign at the time of her admission to it and Mable signed those but not the Arbitration Agreement. Appellants filed a motion for reconsideration, which the trial court denied. This appeal followed.

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[1] Husband's suit was for loss of consortium and Son's was for negligence and gross negligence.

[2] They also named R. Dale Padgett, M.D., P.A. and Dr. Herbert A. Moscow as defendants, but because those defendants did not seek to compel arbitration, they are not involved in this appeal.

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STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not reverse those findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

LAW/ANALYSIS

I. Reliance on Unpublished Opinion

Appellants maintain the circuit court erred by denying their motion to compel arbitration for several reasons. First, they contend the circuit court erred by relying on this court's unpublished opinion in *Scott v. Heritage Healthcare of Estill, LLC*.[3] They assert the circuit court utilized a "three-factor test" constructed from this court's statements in *Scott*. We disagree.

Scott involved another nursing home facility with one of the same parent entities as the defendants here. Op. No. 2014-UP-317 at 2. In that case, the personal representative of the estate of a patient who died at the facility brought suit and the defendants sought to compel arbitration. *Id.* The patient's sister had signed an arbitration agreement on behalf of the patient when admitting her to the facility. *Id.* The patient was competent when admitted to the facility, and the sister did not possess a health care power of attorney to sign either contract on her behalf. *Id.* In an unpublished opinion, this court affirmed the circuit court's decision the arbitration agreement was not enforceable against the personal representative of the estate, finding:

> [T]he evidence reasonably supports the [circuit] court's findings that [the sister] lacked authority to enter into the [a]rbitration [a]greement on [the patient's] behalf because [the patient] was competent at the time of her admission, and . . . the admissions director [for the facility] . . . agreed it would have been more appropriate for [the patient] to sign the contract herself because she was

[3] Op. No. 2014-UP-317 (S.C. Ct. App. filed Aug. 6, 2014).

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> competent, and [the admissions director] did not know if [the sister] had a power of attorney.

Id. This court noted this determination disposed of the remaining issues on appeal. *Id.* at 3.

"Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR. However, "[a]n error is not reversible unless it is material and prejudicial to the substantial rights of the appellant." *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 489, 429 S.E.2d 839, 841 (Ct. App. 1993); *see also McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

In the present case, the circuit court's order contained a summary of the facts from *Scott* and quoted a paragraph containing the *Scott* court's findings. The circuit court stated it found "the reasoning" of this court in *Scott* "persuasive." The circuit court indicated in a footnote:

> The *Scott* case involves the same defendant, represented by the same lawyer, making the same argument that they are making before this [c]ourt today, and thus falls close to the rule's[4] exception. Moreover, the [c]ourt does not treat *Scott* as controlling precedent, but instead views it as persuasive reasoning on the precise issue presented here.

The circuit court did examine the *Scott* decision. But as the circuit court noted, this was an unusual situation in that some of the same parties were making the same arguments in a case with similar facts. Additionally, the circuit court did not rely solely on the *Scott* opinion to make its decision. It also relied on the published opinions of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), and *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014)—both of which we discuss below—as well as other cases

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[4] The circuit court was referencing Rule 268(d)(2), SCACR, which states: "Memorandum opinions . . . have no precedential value and should not be cited except in proceedings in which they are directly involved."

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involving agency or arbitration. Further, this court in *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016—a published opinion filed after the circuit court's ruling—also reached the same decision as in *Scott*, relying on the same principles.[5] Accordingly, even if the circuit court did err in referencing the *Scott* opinion, any error would not be reversible because it was not prejudicial. *See Visual Graphics Leasing Corp.*, 311 S.C. at 489, 429 S.E.2d at 841 ("An error is not reversible unless it is material and prejudicial to the substantial rights of the appellant.").

II. Equitable Estoppel

Appellants also contend the circuit court erred by denying their motion to compel arbitration because equitable estoppel bars Respondents from denying a relationship between Mable and Husband. They maintain equitable estoppel is a different concept than the estoppel discussed in *Coleman*. Appellants also argue the circuit court erred in finding the Arbitration Agreement was separate from the Admissions Agreement because they assert the two documents were merged. They also allege that because Husband is a beneficiary of the Estate, the claims are intertwined. We disagree.

In *Thompson*,[6] the appellants asserted the circuit court should have concluded the "estate was equitably estopped from refusing to comply with the [arbitration

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[5] The *Thompson* case is similar to the present case but the opinion was not released until after the filing of the briefs in the present case, and thus, it is not discussed therein.

[6] Appellants' argument in the present case is similar to the appellants' argument in *Thompson*, in which they asserted

> [Son] represented in the contract itself that he was authorized to sign it . . . . [Daughter] was present while the agreements were signed and made no effort to repudiate [Son's] representations that he was authorized to sign the agreements on [Mother's] behalf . . . . Now, however, [Daughter] seeks to repudiate these agreements on the basis that [Son] was not authorized to sign them on [Mother's] behalf. [Daughter] should be estopped from taking this contrary position. Additionally, . . . the very last sentence of the [arbitration agreement] notes

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agreement]. [The] [a]ppellants argue[d] Mother benefited from the [arbitration agreement] because she was admitted to [the facility], received medical care, and became capable of enforcing the [arbitration agreement]." 416 S.C. at 58, 784 S.E.2d at 687. The court recognized a

> recent conflict between the United States Supreme Court and our state courts concerning the application of state law in determining whether a non-signatory is bound by an arbitration agreement. *Compare Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630, 632 (2009) (holding that a nonparty to an agreement is entitled to invoke the Federal Arbitration Act (FAA) "if the relevant state contract law allows him to enforce the agreement"), *and id.* at 631 ("Because 'traditional principles' of state law allow a contract to be enforced by or against nonparties to the contract through 'assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver and estoppel,' the Sixth Circuit's holding that nonparties to a contract are categorically barred from [FAA] relief was error." (citation omitted)), *with Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288-89, 733 S.E.2d 597, 601 (Ct. App. 2012) (decided in 2012 and holding "[b]ecause the determination of whether a non[-]signatory is bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question").

Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88 (alterations by court).

> that in signing the [arbitration agreement], the Patient/Resident Representative binds both the Patient/Resident and the Patient/Resident Representative. [Son], [Daughter], and the Estate should be estopped from denying that [Son] had the authority to sign the [arbitration agreement], or that they are bound by it . . . .

416 S.C. at 60-61, 784 S.E.2d at 689 (all alterations by court other than references to arbitration agreement).

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The *Thompson* court determined the conflict was irrelevant in that case because "the doctrine of equitable estoppel d[id] not apply to [the] estate under either South Carolina law or federal substantive law concerning arbitrability." *Id.* at 59, 784 S.E.2d at 688. The court noted that under federal substantive law, the equitable estoppel doctrine in an arbitration setting allows a party to "be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him." *Id.* (emphasis omitted) (quoting *Pearson*, 400 S.C. at 290, 733 S.E.2d at 601). Restated, when a signatory seeks to enforce an arbitration agreement against a nonsignatory, the doctrine prevents the nonsignatory from averring he or she is not bound to the arbitration agreement when he or she receives a direct benefit from a contract that contains an arbitration clause. *Id.*

> Notably, in those opinions addressing equitable estoppel in the arbitration context, the nonsignatory's contractual benefit is not typically an alleged benefit of arbitration such as "avoiding the expense and delay of extended court proceedings" or being "capable of enforcing the [arbitration agreement]," as touted by [the] [a]ppellants in the present case—rather, the contractual benefit typically arises from another provision of the same contract that includes the arbitration provision.

Id. at 59-60, 784 S.E.2d at 688.

The court in *Thompson* determined the arbitration agreement in that case was

> not incorporated into the [a]dmission [a]greement; therefore, [the] [a]ppellants' assertion that Mother received benefits under the [a]dmission [a]greement, i.e., being admitted to the facility and receiving medical care, is of no moment. The two agreements are independent of one another, as reflected in the language of the [arbitration agreement] indicating its execution is not a condition for being admitted to the nursing home. Further, any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration

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> agreement]'s requirement that Mother waive her right to access to the courts and her right to a jury trial. Therefore, equitable estoppel under federal substantive law has no application to the present case.

Id. at 60, 784 S.E.2d at 688.

The *Thompson* court next examined the doctrine of equitable estoppel under South Carolina law and noted the elements as to the party to be estopped are as follows:

> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is *calculated* to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) *intention*, or at least expectation, that such conduct shall be acted upon by the other party; and (3) *knowledge*, actual or constructive, of the real facts.

Id. (emphases added by court) (quoting *Boyd v. Bellsouth Tel. Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). The court also provided the elements in regards to the party asserting estoppel: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Id.* at 60, 784 S.E.2d at 688-89 (quoting *Boyd*, 369 S.C. at 422, 633 S.E.2d at 142).

In *Thompson*, this court recognized "Mother had dementia prior to being admitted to [the facility]. Therefore, her incapacity prevented her from forming the intent or having the requisite knowledge to mislead [the] [a]ppellants or to assent to the [arbitration agreement's] terms." *Id.* at 60, 784 S.E.2d at 689. The court noted the appellants attempted to bypass this "fact by substituting both Daughter, in her individual capacity, and Son for Mother in the estoppel analysis." *Id.*

The court found the appellants' "argument necessarily implies that Daughter, in her individual capacity, or Son may serve as the legal equivalent of Mother's estate." *Id.* at 61, 784 S.E.2d at 689. The court noted "at least one jurisdiction has rejected this type of premise." *Id.* The court quoted a Maryland Court of Appeals case, which examined an argument identical to the appellants' estoppel argument:

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> Respondent is attempting to use equitable estoppel against [the patient's] [e]state based on actions that [patient's companion] took *in her individual capacity*. The fact that [the patient's companion] is *now the personal representative for [the patient's] [e]state* is of no moment; we will not hold this circumstance against [the patient's] [e]state. Simply put, [the patient's] [e]state is the plaintiff in this case, and Respondent has alleged no conduct on the part of [the patient's] [e]state, or by [the patient's companion] in *her capacity as Personal Representative* of [the patient's] [e]state, that has affected Respondent's position. This, too, is a necessary element of an equitable estoppel defense.

Id. (alterations and emphases added by court) (quoting *Dickerson v. Longoria*, 995 A.2d 721, 743 (Md. 2010)). This court recognized the *Dickerson* "court also noted the absence of evidence that the owner of the nursing home facility had changed its position for the worse based on the assertion of the patient's companion that she was acting on the patient's behalf when she signed the arbitration agreement." *Id.* (citing *Dickerson*, 995 A.2d at 743). The court found that "[l]ike the facility owner in *Dickerson*, [the] [a]ppellants have failed to show how they have changed their position for the worse based on Son's representation that he was acting on Mother's behalf when he signed the [arbitration agreement]." *Id.* at 61-62, 784 S.E.2d at 689. The court stated "the [arbitration agreement] was separate from the [a]dmission [a]greement, and [the] [a]ppellants represented the [arbitration agreement] to be a voluntary agreement that was not a condition to Mother's admission to the facility and was unconditionally revocable within thirty days of execution." *Id.* at 62, 784 S.E.2d at 689.

The *Thompson* court also found relevant to the equitable estoppel argument the *Dickerson* court's analysis as to "the facility owner's argument that the doctrine of unclean hands should apply to the patient's estate because the patient's companion was an heir to the estate." *Id.* at 62, 784 S.E.2d at 689. The *Dickerson* court explained:

> Respondent notes that [the patient's companion] is "the heir of [the patient's] [e]state," suggesting that we should apply the doctrine of unclean hands because [the patient's

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> companion] may benefit if the [e]state's claims against Respondent are successful. We decline to do so. First, as we have explained, we will not hold against the [e]state acts that [the patient's companion] may have performed *in her individual capacity.* Second, the [e]state may well have other beneficiaries or creditors. We will not hold [the patient's companion's] *individual acts* against these other entities for the same reasons.

Id. at 62, 784 S.E.2d at 689-90 (alterations and emphases added by court) (quoting *Dickerson*, 995 A.2d at 744 n.23). The *Thompson* court determined in that case the appellants could "not hold Mother's estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities. Therefore, the circuit court properly rejected [the] [a]ppellants' equitable estoppel theory." *Id.* at 62, 784 S.E.2d at 690.

In *Coleman*, 407 S.C. at 350, 755 S.E.2d at 452, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. Coleman brought suit after her sister's death, and the facility and its parent entities sought to compel arbitration. *Id.* The circuit court denied the motion to compel. *Id.* On appeal, the supreme court noted the "equitable estoppel argument is premised on [the appellants'] contention that, under state law, the admission agreements and the [arbitration agreements] merged." *Id.* at 355, 755 S.E.2d at 455. The court stated that in South Carolina,

> The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

Id. (quoting *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)).

The *Coleman* court found "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, [the] appellants are correct that there was a

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merger." *Id.* The court noted "[t]he admission agreements contain this language in a section titled 'Entirety of Agreement':"

> This [a]greement, including all Exhibits hereto, and the [a]rbitration [a]greement between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this [a]greement acknowledges that no representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in this [a]greement or in the [a]rbitration [a]greement. This [a]greement may be amended only by a written agreement signed on behalf of the Facility and the Resident.

Id.

The supreme court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.* The court also noted "[e]ven if the 'Entirety' clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the drafter, in this case, [the] appellants." *Id.* at 355-56, 755 S.E.2d at 455. The court determined the circuit court properly denied the appellants' equitable estoppel argument because no merger occurred. *Id.* at 356, 755 S.E.2d at 455.

In the present case, the Admissions Agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. Like in *Coleman*, the Arbitration Agreement recognized a separatedness as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way *relating to this Agreement or the Patient/Resident's Admission Agreement.*" Also, the Arbitration Agreement stated it could be revoked within thirty days, whereas the Admission Agreement contained no such indication and instead provided the Admissions Agreement

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could only be amended by the patient with written agreement executed by the Facility and the patient in the same manner as the Admissions Agreement was executed or if the Facility sent a notice of the amendment to the patient and the patient did not reject the amendment within thirty days. Further, each document was separately paginated and had its own signature page. Additionally, the Arbitration Agreement stated signing it was not a precondition to admission. Based on all of this, we find the Admissions Agreement and Arbitration Agreement did not merge.

Moreover, we disagree with Appellants' assertion that *Coleman* does not address the concept of equitable estoppel. In *Coleman*, the appellants argued "even if Sister lacked capacity to execute the [arbitration agreement] under the [Adult Health Care Consent] Act, she is nevertheless *equitably estopped* to deny the [arbitration agreement]'s enforceability." *Id.* at 354, 755 S.E.2d at 455 (emphasis added). The supreme court noted the "[a]ppellants' *equitable estoppel argument* is premised on their contention that, under state law, the admission agreements and the [arbitration agreements] merged." *Id.* at 355, 755 S.E.2d at 455 (emphasis added). This court also applied the same reasoning in *Thompson* to the equitable estoppel arguments. 416 S.C. at 60, 784 S.E.2d at 688. Likewise, the same reasoning applies in the present case. Because Mable, Husband, and the Estate received no benefit from the Arbitration Agreement, equitable estoppel would only apply if documents were merged. The only agreement from which Respondents even arguably received a benefit was the Admission Agreement because Mable was admitted to the Facility as a result of it. However, because the Facility allegedly caused Mable's injuries that later led to her death, we find it difficult to find she benefited even from being admitted. Respondents are not seeking to enforce the Arbitration Agreement nor have they previously tried to do so. Further, even if the Admission Agreement and Arbitration Agreement merged, because Respondents are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement. Therefore, the circuit court did not err in finding equitable estoppel did not bar Respondents' claims.[7]

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[7] Appellants also maintain that because Husband signed the Arbitration Agreement, his claims are subject to the Arbitration Agreement and as his claims are intertwined, the Estate should be compelled to arbitrate its claims as well. We agree with Respondents this argument is unpreserved.

"[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *S.C.*

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III. Common Law Agency

Additionally, Appellants contend the circuit court erred in denying their motion to compel arbitration by finding there was no common law agency between Mable and Husband. They argue that because Husband had taken over many of Mable's medical affairs, he had become her agent. They also maintain the circuit court erred in failing to find the evidence established an apparent agency relationship. We disagree.

"Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the

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Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (quoting *Wilder Corp. v. Wilke*, 330 S.C.71, 76, 497 S.E.2d 731, 733 (1998)). "There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." *Id.* at 301-02, 641 S.E.2d at 907 (quoting Jean Hoefer Toal *et al*, *Appellate Practice in South Carolina* (2d. ed. 2002)).

Appellants' specific argument was never made to the circuit court. Appellants contend in their reply brief this argument is preserved because they assert they filed two separate motions to dismiss and compel. However, their motion to dismiss and compel as to Husband's cause of action references the affidavit and materials in Son's cause of action—which makes no mention of this argument—and makes no separate arguments. The Memorandum in Support of their motion in the record references only Son as the plaintiff in the caption; that memo does not include any argument as to why Husband could be forced to arbitrate as the signor, as opposed to Son. At the hearing before the circuit court, Appellants stated "a memo was filed in the case involving the Estate but it basically covers both cases. The issue is the same in both cases." Later at the hearing, Appellants stated "the one memo [they had already argued] would be for both cases." Additionally, Appellants did not make any argument on this basis at the hearing before the circuit court. Further, the circuit court made no ruling on any such issue, and Appellants' motion for reconsideration makes no mention of this argument. Accordingly, because they never raised this specific argument as to why the Agreement could be enforced against Husband on this basis or obtained a ruling on it, this argument is not preserved.

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principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)); *see also Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) ("Agency . . . results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf."). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n*, 310 S.C. at 145-46, 425 S.E.2d at 773. "In an actual agency case, the question is not whether the purported principal could have exercised control over its agent, but whether it did so." *Jamison v. Morris*, 385 S.C. 215, 222, 684 S.E.2d 168, 171 (2009); *see also Cowburn v. Leventis*, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005) ("The test to determine agency is whether or not the purported principal has the *right to control* the conduct of the alleged agent." (quoting *Fernander v. Thigpen*, 278 S.C. 140, 144, 293 S.E.2d 424, 426 (1982))).

> "The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship." *Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984). Under such rules, "the relationship of agency need not depend upon express appointment and acceptance thereof. Rather, the agency relationship may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case." *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 242, 597 S.E.2d 165, 168 (Ct. App. 2004).

Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 189, 717 S.E.2d 74, 77 (Ct. App. 2011) (alterations by court).

"A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts." *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987). "The existence of an agency relationship is . . . determined by the relation, the situation, the conduct, and the

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declarations of the party sought to be charged as principal." *Langdale v. Carpets*, 395 S.C. 194, 201, 717 S.E.2d 80, 83 (Ct. App. 2011). "[I]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority." *McCall*, 294 S.C. at 6, 362 S.E.2d at 29 (alteration by court) (quoting *Justus v. Universal Credit Co.*, 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939)). "A true agency relationship may be established by evidence of actual or apparent authority." *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Cowburn*, 366 S.C. at 39-40, 619 S.E.2d at 448 (Ct. App. 2005) (alteration by court) (quoting *Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)). However, "such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962).

In *Klippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 128-31, 399 S.E.2d 163, 164-65 (Ct. App. 1990), the circuit court granted summary judgment to respondents, who had denied in their affidavits a purported agent was actually their agent, as did the purported agent. This court determined that even though the purported agent stated in a deposition he was respondents' agent, because no other affidavits or depositions corroborated that claim, there was no question of fact as to agency and it affirmed the grant of summary judgment to respondents. *Id.* at 130, 399 S.E.2d at 165. This court noted, "The law is clear in this state that statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." *Id.* In *Snell v. Parlette*, 273 S.C. 317, 322-23, 256 S.E.2d 410, 413 (1979), our supreme court found "[t]he testimony of [a purported agent who signed an agreement on behalf of ten relatives] that she was acting as the agent of her ten nonresident relatives is entitled to some weight, but is insufficient without more to establish an agency relationship."

In the *Dickerson* case discussed above, the Court of Appeals of Maryland analyzed whether an estate was required to arbitrate its claims against a nursing home facility when the personal representative of the estate represented herself as the decedent's agent when she signed the arbitration agreement on his behalf when he was admitted to the nursing home. 995 A.2d at 725-26. In that case, the court noted:

> [T]he decision to enter into an arbitration agreement primarily concerns the signatory's decision to waive his

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> or her right of access to the courts and right to a trial by jury. *See Walther v. Sovereign Bank*, 872 A.2d 735, 754 (Md. 2005) (explaining that "the 'loss of the right to a jury trial *is a necessary and fairly obvious consequence* of an agreement to arbitrate'" (quoting *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d 302, 307 (4th Cir. 2001))).

Dickerson, 995 A.2d at 736-37.

The *Dickerson* court found the facts in that case suggested the decedent "conferred on the [personal representative—]directly or through acquiescence[—]actual authority to make some decisions on his behalf" concerning medical treatments, admission into medical facilities, or his finances. *Id.* at 736. The court found, "This limited range of acts performed on the [decedent]'s behalf suggest that, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that." *Id.*

The *Dickerson* court provided:

> Courts in other jurisdictions have recently concluded that the decision to sign an arbitration agreement was not a health care decision, and they based that decision on the fact that signing the arbitration agreement was not a prerequisite to admission to a health care facility. In *Koricic v. Beverly Enterprises - Nebraska, Inc*, . . . , the Supreme Court of Nebraska concluded that a son who had authority to sign health care documents on behalf of his mother did not have authority to sign an arbitration agreement on her behalf. 773 N.W.2d 145, 149-52 (Neb. 2009). In reaching that decision, the court explained that the decision to sign the arbitration agreement was not within the son's authority because the agreement "was optional and was not required for [the mother] to remain at the [nursing home] facility." *Id.* at 151. Similarly, the Supreme Court of Mississippi concluded in *Hinyub* that the decision to sign an arbitration agreement is not a "health care decision" where the patient or his agent "was not required to sign the arbitration provision to admit [the

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> patient] to the [health care facility]." *Miss. Care Ctr. of Greenville, LLC v. Hinyub*, 975 So. 2d 211, 218 (Miss. 2008). The Mississippi court drew a distinction between Hinyub's case and previous cases in which "the arbitration provision was an essential part of the consideration for the receipt of 'health care.'" *Id.*

Dickerson, 995 A.2d at 738 (alterations by court except ellipsis).

The *Dickerson* court agreed with the reasoning of those courts, holding:

> The decision to sign a free-standing arbitration agreement is not a health care decision if the patient may receive health care without signing the arbitration agreement. In such a case, the decision primarily concerns the legal rights of the patient with respect to resolving legal claims. If signing the arbitration agreement is necessary to receive health care, then the decision to sign the agreement is a health care decision because the receipt of health care depends on whether the patient agrees to arbitrate his or her claims. In that case, the decision to sign the arbitration agreement is effectively a decision about where and whether to receive health care, either from a facility that requires the patient to sign an arbitration agreement, from a facility that does not impose such a requirement, or from no facility at all.

Dickerson, 995 A.2d at 739.

When analyzing whether the decision to sign the arbitration agreement was a health care decision within the scope of the personal representative's authority to act on the decedent's behalf, the court noted the arbitration agreement was a free-standing contract, separate from the admission agreement, and explicitly stated it was not a precondition for admission. *Id.* The court accordingly determined "the decision to enter into the arbitration agreement was not a health care decision; instead, it primarily concerned [a] waiver of [a] right of access to the courts and [a] right to a trial by jury." *Id.* The court found no evidence was presented the decedent conferred on the personal representative the authority to waive those

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rights. *Id.* The court therefore concluded the personal representative "did not have actual authority to sign the arbitration agreement." *Id.* at 739-40.

In *Curto v. Illini Manors, Inc.*, 940 N.E.2d 229, 231 (Ill. App. Ct. 2010), a wife filed a complaint against a nursing home as administrator of her deceased husband's estate, and the nursing home sought to compel arbitration. The wife had signed an admission contract on the preprinted signature line that designated her as the "Legal Representative," and her husband did not sign the contract. *Id.* The wife had also signed a separate arbitration agreement above a line that stated "Signature of Resident Representative," while the husband did not sign the arbitration agreement. *Id.* The Appellate Court of Illinois found wife's signature on the nursing home documents did not confer express or implied authority to her. *Id.* at 233. The court noted it was joining the majority of states reviewing this issue, which

> followed *Dickerson*'s reasoning and have concluded that a spouse or other family member did not have actual authority to sign an arbitration agreement on the resident's behalf. *Koricic*, 773 N.W.2d 145 (decedent's son did not possess authority necessary to sign arbitration agreement); *Hinyub*, 975 So. 2d 211 (daughter did not have authority to enter arbitration agreement whe[n] there was no declaration of resident's inability to manage his affairs and no power of attorney in the record); *Mt. Holly Nursing Ctr. v. Crowdus*, 281 S.W.3d 809 (Ky. Ct. App. 2008) (spouse lacked authority to bind resident to arbitration agreement); *Goliger v. AMS Props., Inc.*, 19 Cal. Rptr. 3d 819 (Cal. Ct. App. 2004) (daughter was not acting as mother's agent when she signed arbitration agreement without some evidence of authority beyond merely signing admission contracts). *See also Compere's Nursing Home, Inc. v. Estate of Farish*, 982 So. 2d 382 (Miss. 2008); *Sennett v. Nat'l Healthcare Corp.*, 272 S.W.3d 237 (Mo. Ct. App. 2008); *Ashburn Health Care Ctr., Inc. v. Poole*, 648 S.E.2d 430 (Ga. Ct. App. 2007); *Flores v. Evergreen at San Diego, LLC*, 55 Cal. Rptr. 3d 823 (Cal. Ct. App. 2007); *Landers v. Integrated Health Servs. of Shreveport*, 903 So. 2d 609 (La. Ct.

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App. 2005); *Pagarigan v. Libby Care Ctr., Inc.*, 120 Cal. Rptr. 2d 892 (Cal. Ct. App. 2002).

Curto, 940 N.E.2d at 234-35.

The court noted, "Even whe[n] a health care power of attorney was present, courts have concluded that the spouse lacked authority to sign the arbitration agreement . . . because a health care power of attorney granted for medical decisions does not confer authority to sign an arbitration agreement waiving legal rights." *Id.* at 234. The court distinguished cases cited by the facility from "a minority of courts that have enforced nursing home arbitration agreements signed by a family member." *Id.* at 235. The court determined:

> Those cases follow the reasoning of *Sovereign Healthcare of Tampa, LLC v. Estate of Huerta*, 14 So. 3d 1033 (Fla. Dist. Ct. App. 2009). In *Sovereign Healthcare*, the Florida appellate court held that a daughter-in-law had the authority to sign a contract for admission on the resident's behalf, including the arbitration agreement, in reliance on a durable power of attorney. The durable power of attorney in that case included a catch-all provision giving the attorney-in-fact the authority "to sign any and all releases or consent required." *Sovereign Healthcare*, 14 So. 3d at 1035; *see also Triad Health Mgmt. of Ga., III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. Ct. App. 2009) (signature of patient's son on arbitration agreement was enforceable whe[n] son had general power of attorney executed by father); *Five Points Health Care, Ltd. v. Mallory*, 998 So. 2d 1180 (Fla. Dist. Ct. App. 2008) (daughter had durable power of attorney to prosecute, defend and settle all actions or other legal proceedings and to "do anything" regarding resident's estate). These cases, however, are distinguishable. In each case, there is at least some evidence of actual authority granting general powers of attorney to the spouse or family representative. Here, [the facility] has produced neither a general or property power of attorney, nor an order of guardianship authorizing [the wife] to administer her husband's legal

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> affairs. Thus, [the wife] lacked actual authority to sign the arbitration agreement on [her husband's] behalf.

Curto, 940 N.E.2d at 235.

In *United Health Services of Georgia, Inc. v. Alexander*, 802 S.E.2d 314, 317 (Ga. Ct. App. 2017), *cert. denied*, the Court of Appeals of Georgia disagreed that the daughter's previous signing of certain medical documents for her mother who had not objected amounted to an express grant of general authority to act as her agent without limitation. In *Hogsett v. Parkwood Nursing & Rehabilitation Center, Inc.*, 997 F. Supp. 2d 1318, 1325 (N.D. Ga. 2014), the court determined that even if it could be assumed a patient must have deduced her daughter had signed the documents a facility required for her admission because she had signed nothing, one cannot assume the mother "would have had the sophistication to understand that, included among the standard medical forms, would be a separate agreement to give up her right to a jury trial should the rehabilitation center be guilty of negligence," especially considering the mother's "consent to the arbitration agreement was not a prerequisite to her admission."

In *Poole*, 648 S.E.2d at 432, when admitting his wife to a nursing home, a husband signed the admission documents. The son, who had power of attorney, was present during the signing but testified "he did not review the documents or discuss them with his father." *Id.* The Court of Appeals of Georgia found:

> These circumstances do not reveal an agency relationship between [the husband and wife]. [The wife] was not present when her husband executed the arbitration agreement, and the mere fact that he signed on the "authorized representative" line cannot establish agency. Moreover, although [the son] was present when his father signed the document, [the facility] asserts that they did not then know that [the son] held a durable power of attorney for his mother. [The son]'s failure to object to the arbitration agreement, therefore, could not have led [the facility] to believe that [the son] had given his father apparent authority to execute the document.

Id. at 433 (citation omitted).

"[A] power of attorney should be evidenced by an instrument in writing." *Matter of Celsor*, 330 S.C. 497, 501, 499 S.E.2d 809, 811 (1998).

"The relationship of agency need not depend upon express appointment and acceptance thereof. Generally, agency may be, and frequently is, implied or inferred from the words and conduct of the parties and the circumstances of the particular case." *Bruce*, 283 S.C. at 423, 323 S.E.2d at 532 (citation omitted). "To establish apparent authority, the proponent must show (1) 'the purported principal consciously or impliedly represented another to be his agent;' (2) the proponent relied on the representation; and (3) 'there was a change of position to the [proponent's] detriment.'" *Thompson*, 416 S.C. at 54, 784 S.E.2d at 685 (alteration by court) (quoting *Froneberger v. Smith*, 406 S.C. 37, 47, 748 S.E.2d 625, 630 (Ct. App. 2013)).

> Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the *principal* which, reasonably interpreted, causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him.

Id. (emphasis added by court) (quoting *Froneberger*, 406 S.C. at 47, 748 S.E.2d at 630). "Either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief." *Id.* at 54-55, 784 S.E.2d at 686 (quoting *Froneberger*, 406 S.C. at 47, 748 S.E.2d at 630). "Moreover, an agency may not be established solely by the declarations and conduct of an alleged agent." *Id.* at 55, 784 S.E.2d at 686 (quoting *Froneberger*, 406 S.C. at 47, 748 S.E.2d at 630).

In *Thompson*, this court determined "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Id.* at 55, 784 S.E.2d at 686. Like *Scott*, *Thompson* also involved a nursing home facility seeking to compel arbitration with the same parent entities as those in the present case. *Id.* at 48, 784 S.E.2d at 682. In *Thompson*, a woman's daughter and son had their mother transferred from a hospital to a nursing home facility. *Id.* The son signed an admission agreement, an arbitration agreement, and several other documents on behalf of his mother, who suffered from dementia. *Id.* The mother was not present

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at the time as she was in the process of being transported to the facility. *Id.* After the mother's death, the daughter brought suit, individually and as personal representative, and the facility and its owners filed a motion to compel arbitration. *Id.* The circuit court denied the motion to compel, finding the son did not have authority to execute the arbitration agreement on his mother's behalf under either common law agency principles or the Adult Health Care Consent Act.[8] *Id.* at 48-49, 784 S.E.2d at 682. This court determined "the evidence does not show that Son had either actual or apparent authority to execute the [arbitration agreement] on Mother's behalf. Therefore, the circuit court properly concluded Son did not have the authority to bind Mother to the [arbitration agreement]." *Id.* at 56, 784 S.E.2d at 686.

In the present case, at the hearing before the circuit court, the parties argued over the interpretation of the supreme court's opinion in *Dean*, which involved a different facility with one of the same parent entities as here. 408 S.C. at 376, 759 S.E.2d at 729-30. In that case, the circuit court denied the motion to compel arbitration for reasons not implicated in the instant case. *Id.* at 378, 759 S.E.2d at 731. The supreme court reversed and remanded to the circuit court for consideration of other arguments but in a footnote addressed the issue in our present case. *Id.* at 387, 759 S.E.2d at 736. The supreme court stated:

> We are concerned that, according to the Record, the patient did not sign either the residency agreement or the [a]greement on her own behalf, despite being competent at the time, nor did Respondent possess a health care power of attorney to sign either contract on the patient's behalf. The parties did not address this issue on appeal, and Respondent's only argument that this issue should serve as an additional sustaining ground was located in a cursory footnote in her brief. Accordingly, we merely note that, on remand, the circuit court must engage in a full inquiry into this matter prior to any attempt to enforce the [a]greement.

Id. at 388-89 n.13, 759 S.E.2d at 736 n.13.

[8] S.C. Code Ann. §§ 44-66-10 to -80 (2018).

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Here, the circuit court did not err in finding Husband was not Mable's agent. At the hearing, Appellants argued the evidence showed Mable authorized Husband to sign on her behalf and they had an actual or apparent agency relationship. The circuit court noted "[i]n the absence of any evidence that Mable . . . gave . . . [H]usband any express authority to act for her, UPAC argues that Mable . . . 'represented' that . . . [H]usband was authorized to act on her behalf by 'allowing' him to procure her admission to the . . . [F]acility." Husband's signing of the Arbitration Agreement, Admissions Agreement, and other forms does not make him Mable's agent. Mable did not have a health care power of attorney. Additionally, the Facility knew she was competent at the time of admission as indicated by the doctor's examination and allowed her to sign other forms. The record contains no evidence from the Facility that *Mable*, as the principal, represented Husband was her agent. Further, because Mable was competent, unlike the patient in *Thompson* for whom the family members were allowed to sign medical forms under the Adult Health Care Consent Act, no argument can be made the Adult Health Care Consent Act gave Husband the right to sign medical forms. Similarly, Husband did not have Mable's health care power of attorney. Moreover, even if Husband had authority to handle finances or make health care decisions, as Appellants contend is evidenced by Husband signing past healthcare documents, this court has held "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686. Accordingly, the circuit court did not err in finding Husband was not Mable's agent.

IV. Third-Party Beneficiary

Appellants also assert the circuit court erred by denying their motion to compel arbitration because it incorrectly found Mable was not a third-party beneficiary of the Arbitration Agreement. At oral argument, Appellants conceded the *Thompson* opinion extinguished their third-party beneficiary argument. *See Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (holding "[a]s to the [arbitration agreement] between [the] [a]ppellants and Son in his individual capacity, 'a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.'" (quoting *Dickerson v. Longoria*, 995 A.2d 721, 742 (Md. 2010))); *id.* (finding the daughter was "not attempting to enforce the [arbitration agreement] on behalf of Mother's estate. Rather, she has asserted tort claims against [the] [a]ppellants

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arising out of the patient-provider relationship created by the separate [a]dmission [a]greement"). Therefore, we will not address Appellants' third-party beneficiary argument.

V. Deposition

Appellants contend the circuit court erred by denying their motion to compel the deposition of Husband, whose testimony they assert is relevant to whether the arbitration agreement is binding. Appellants contend because Husband signed medical documents for her on other occasions, they presented evidence Mable authorized him to make medical decisions on her behalf and they should be allowed to inquire into the scope of that authority.[9] We disagree.

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admissions. The frequency or intent of use of discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the

[9] "[D]iscovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008). However, courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review but not when the issues appealed lack a sufficient nexus. *Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005). Appellants raise their motion to compel the deposition as part of their reasoning as to why the circuit court erred in denying the motion to compel arbitration. Accordingly, because it has a sufficient nexus to the appeal of the denial motion to compel arbitration, it is appropriately before this court and we will address it.

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> action to obtain the information sought; or (iii) the discovery is unreasonably burdensome or expensive taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Rule 26(a), SCRCP.

"A trial court's rulings in matters related to discovery generally will not be disturbed on appeal in the absence of a clear abuse of discretion." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). "An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Id.*

Appellants argued before the circuit court "the evidence will show . . . [Mable] authorized her husband to sign this agreement on her behalf and that there's an actual or an apparent agency there." They maintained "essentially the issue is . . . was [Husband] her agent for the purposes of admitting her to the nursing home and executing this arbitration agreement. . . . [W]hen we take his deposition[,] the deposition will support that." They further asserted that "when [Mable] was admitted to other hospitals before, [Husband] . . . executed consents and admissions agreements." They indicated they would ask Husband about these instances if they were allowed to depose him. They provided to the court documents Husband executed on Mable's "behalf for healthcare and for responsibility for paying bills and that kind of thing in other situations." Appellants asserted the documents showed Husband "was [Mable's] agent for executing *these kinds of documents*." (emphasis added). Respondents contended the law in South Carolina does not allow a relative to waive a party's right to a jury trial.

The circuit court denied Appellants' motion to compel the deposition of Husband, determining:

> Because the facts material to the [c]ourt's decision are not contested and because the parties submitted, without objection, all documents that they wished the [c]ourt to consider, the [c]ourt concludes that the deposition of [Husband] would not provide any additional material

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> facts that would be helpful to the [c]ourt in reaching its decision.

Apparent authority occurs when the *principal* by written or spoken words or any other conduct, when reasonably interpreted, causes a third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him. *Thompson*, 416 S.C. at 54, 784 S.E.2d at 685. "Apparent authority must be established based upon manifestations by the principal, not the agent. The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but on that between the principal and the third party." *Town of Kingstree v. Chapman*, 405 S.C. 282, 314, 747 S.E.2d 494, 510 (Ct. App. 2013) (quoting *R & G Constr.*, 343 S.C. at 432-33, 540 S.E.2d at 118). "Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." *Id.* (quoting *WDI Meredith & Co. v. Am. Telesis, Inc.*, 359 S.C. 474, 478-79, 597 S.E.2d 885, 887 (Ct. App. 2004)). "To establish apparent agency, a party must prove the purported principal has represented another to be his agent by either affirmative conduct or conscious and voluntary inaction." *Id.* "The crux of apparent agency is that the principal holds out to a third party the agent is acting on his or her behalf." *Id.* at 316, 747 S.E.2d at 511.

"[A]n agency may not be established solely by the declarations and conduct of an alleged agent." *Frasier*, 323 S.C. at 245, 473 S.E.2d at 868. However, "such declarations and conduct are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller*, 240 S.C. at 83, 124 S.E.2d at 606. "[A] power of attorney should be evidenced by an instrument in writing." *Matter of Celsor*, 330 S.C. at 501, 499 S.E.2d at 811. "The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship." *Stiltner*, 395 S.C. at 189, 717 S.E.2d at 77 (alterations by court) (quoting *Bruce*, 283 S.C. at 423, 323 S.E.2d at 532). "[T]he authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686.

In *Klippel*, 303 S.C. at 130-31, 399 S.E.2d at 165, the circuit court granted summary judgment to respondents who, along with the alleged agent, had denied in their affidavits an alleged agent was actually their agent. This court held that

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even though the purported agent stated in a deposition he was respondents' agent, because no other affidavits or depositions corroborated that claim, no question of fact was presented as to agency, and the court affirmed the grant of summary judgment to respondents. *Id.* at 130, 399 S.E.2d at 165. This court observed "statements made by an agent concerning the existence or extent of his authority are insufficient standing alone to establish agency." *Id.* In *Snell*, 273 S.C. at 322-23, 256 S.E.2d at 413, our supreme court determined "[t]he testimony of [a purported agent who signed an agreement on behalf of ten relatives] that she was acting as the agent of her ten nonresident relatives is entitled to some weight, but is insufficient without more to establish an agency relationship."

As described above, the Arbitration Agreement was not a prerequisite to admission and the Arbitration Agreement and the Admission Agreement in this case did not merge. Accordingly, signing the Arbitration Agreement was not a healthcare decision. Further, like in *Dickerson*, nothing indicates Mable realized Husband would sign an arbitration agreement in admitting her to the Facility.

Because apparent agency involves Mable's representations to the Facility, Husband's deposition would not add anything to that determination. Appellants argued Husband's deposition would show he was Mable's agent for the purposes of admitting her to the Facility. Appellants' argument Husband was Mable's agent revolved around his representations to the Facility and that Husband did not rebut the presumption he had the authority to execute contracts on Mable's behalf.

Appellants only evidence Husband was Mable's actual agent was based on the fact he previously had signed contracts on her behalf. Much like *Dickerson*, those contracts cited by Appellants were all healthcare contracts or financial responsibility for bills arising out of healthcare procedures. Husband noted on many of those contracts as authority that he was the patient's husband. However, simply being married does not amount to agency. *See Stiltner*, 395 S.C. at 189, 717 S.E.2d at 77 ("The relationship of agency between a husband and wife is governed by the same rules which apply to other agencies[,] . . . [and] no presumption arises from the mere fact of the marital relationship." (alterations by court) (quoting *Bruce*, 283 S.C. at 423, 323 S.E.2d at 532)). Further, a power of attorney must be in writing. *See Matter of Celsor*, 330 S.C. at 501, 499 S.E.2d at 811. Even if Husband had some authority as Appellants contend is evidenced by Husband signing these documents, this court has held "the authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby

waiving the principal's right of access to the courts and to a jury trial." *Thompson*, 416 S.C. at 55, 784 S.E.2d at 686. Moreover, like in *Kippel*, even if Husband provided in a deposition he was Mable's agent, this alone would not be enough to prove agency. *See* 303 S.C. at 130, 399 S.E.2d at 165. Therefore, the circuit court did not abuse its discretion in denying the motion to compel Husband's deposition.

CONCLUSION

Accordingly, the circuit court's denial of the motion to compel Husband's deposition and the motion to compel arbitration is

AFFIRMED.

WILLIAMS, J., and LEE, A.J., concur.

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ELECTRONICALLY FILED - 2018 May 15 12:01 PM - BEAUFORT - COMMON PLEAS - CASE#2017CP0702636
ELECTRONICALLY FILED - 2018 Dec 17 8:56 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

FORM 4

STATE OF SOUTH CAROLINA **COUNTY OF BEAUFORT** **IN THE COURT OF COMMON PLEAS**	**JUDGMENT IN A CIVIL CASE** **CASE NO. 2017-CP-07-02636**
JOSEPH HOLMES, as Personal Representative of the ESTATE OF DAVID HOLMES PLAINTIFF(S)	BAYVIEW MANOR, LLC, d/b/a BAYVIEW MANOR; EPIC GROUP, LP; and EPIC GENERAL, LLC DEFENDANT(S)
Submitted by: Eric M. Poulin	**Attorney for :** ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

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

☐ **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: Defendants' Motion for Non-Jury Trial is DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

Eric M. Poulin / Stefan B. Feidler
32 Ann Street
Charleston, SC 29403
ATTORNEY(S) FOR THE PLAINTIFF(S)

W. McElhaney White
101 West St. John Street, Suite 200
Spartanburg, SC 29306
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

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STATE OF SOUTH CAROLINA) COUNTY OF BEAUFORT)	IN THE COURT OF COMMON PLEAS FOR THE 14TH JUDICIAL CIRCUIT
	CASE NO: 2017-CP-07-02636
JOSEPH HOLMES, as Personal Representative of the ESTATE OF DAVID HOLMES, Plaintiff(s), v. BAYVIEW MANOR, LLC, d/b/a BAYVIEW MANOR; EPIC GROUP, LP; and EPIC GENERAL, LLC, Defendant(s).	ORDER DENYING DEFENDANTS' MOTION FOR NON JURY TRIAL

THIS MATTER is before the Court on Defendants' Motion for Non-Jury Trial. Arguments were held on April 25, 2018 in the Beaufort County Courthouse. Present at the call of the case was attorney Eric M. Poulin, representing the Plaintiff, and attorney W. McElhaney White, representing the Defendants. For the following reasons, Defendants' Motion is respectfully **DENIED.**

BACKGROUND

The Decedent, David Holmes, was a resident of Defendants' long term care facility. Decedent was first admitted on December 2, 2014, and re-admitted on February 17, 2015. Decedent was incompetent during both admissions. At each admission, Decedent's family signed an Admission Agreement.[1] The Admission Agreements contained the following provision:

[1] Plaintiff argues that the family members lacked authority to sign these Admission Agreements to the extent they contain jury waiver clauses. However, because the Court finds this waiver was invalid and unenforceable in the first instance, it is not necessary to discuss the issues of authority or agency.

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Waiver of Jury Trial: (Please read carefully)
Resident hereby knowingly, voluntarily, and intentionally waives the right to trial by jury with respect to any litigation, including any counterclaim which Resident may assert, arising from or relating to this Agreement or any other document connected with this Agreement, or arising out of or relating to any of the said documents or any relationship between the Facility and Resident, including the Resident's admission itself, or any other course of conduct, course of dealing statements (whether verbal or written) or actions of the facility or Resident.

Resident represents and warrants that the waiver contained in this Paragraph has been freely and voluntarily made after reviewing the same, or having had an opportunity to review the same, with counsel of Resident's choice.

The Admission Agreements also contained an Arbitration Clause which states that arbitration is "Optional" and allows the person signing to decline by marking an "X." At each admission, the family declined arbitration by marking an "X." Upon Decedent's death, his Estate brought this medical negligence action against the Defendants and requested a jury trial. Defendants now seek to invoke the jury waiver clause of the Admission Agreements, and seek an order setting this case for non-jury disposition.

LAW

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under

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the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility." 42 U.S.C. § 1396r(c)(5)(A)(iii).

Finally, it is well settled that to be valid and enforceable, a contract must be supported by valuable consideration. Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984)("[a] contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act."). Consideration may consist of "some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).

ANALYSIS

In the instant case, it is undisputed that Decedent was a Medicare and Medicaid beneficiary while residing at Defendants' facility and that the facility was billing and accepting payment from Medicare and Medicaid for Decedent's care.[2] Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. During arguments, counsel for Defendants was unable or unwilling to take a position on this issue. However, in light of the following analysis, the Court finds that this provision is unenforceable in either case.

If the jury waiver provision was a required pre-condition to admission, then this requirement was a clear violation of Federal Law. 42 U.S.C. § 1396r(c)(5)(A)(iii) prohibits a

[2] During the hearing, counsel for Defendants stated his belief that Decedent was Medicare eligible but only "Medicaid pending" during his stay. However, Mr. White has since confirmed that Decedent was, in fact, Medicaid eligible during his stay.

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facility such as Defendants' from soliciting or accepting "any other consideration" as a condition to admission outside of the Medicaid payments when admitting a patient in Decedent's position. By requiring Decedent's family to waive his right to a jury trial as a condition of admission, Defendants' were requiring and accepting consideration in addition to Medicaid payments. Therefore, the jury waiver clause would be unenforceable due to its illegality.

Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration. As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

CONCLUSION

Therefore, we are left with a clause that, if a pre-condition to admission, is unenforceable under the doctrines of illegality; if not a precondition to admission, void for lack of consideration. For these reasons, Defendants' Motion for Non-Jury trial is respectfully **DENIED.**

IT IS SO ORDERED!

Dated this ____ day of May, 2018
Walterboro, S.C.

The Honorable Perry M. Buckner, III
Presiding Judge, 14th Judicial Circuit

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Beaufort Common Pleas

Case Caption: David Holmes Estate Of , plaintiff, et al VS Bayview Manor Llc , defendant, et al

Case Number: 2017CP0702636

Type: Order/Jury Trial

It is so Ordered

s/ Perry M Buckner III 2122

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IN THE STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO: 2017-CP-10-5984
VICTOR RAWL as Personal Representative of the ESTATE OF VERA BROWN, Plaintiff, v. WEST ASHLEY REHABILITATION AND NURSING CENTER-CHARLESTON, SC, LLC d/b/a HEARTLAND OF WEST ASHLEY REHAB AND NURSING CENTER, Defendant.	ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND COMPEL ARBITRATION

This matter came before the court on March 21, 2018 on Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth below, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

BACKGROUND FACTS

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days after her admission into Defendant's facility, while under Defendant's care.

LEGAL ANALYSIS

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v.

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Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'"). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.

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

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Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confides of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc, 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C at 14, 644 S.E.2d at 663. Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party,

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when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due to the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants relative sophistication over Plaintiff's decedent.

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36–2–302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General

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Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms. Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there

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is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

Therefore, this Court denies Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and was unconscionable.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss and Compel Arbitration is **DENIED.**

IT IS SO ORDERED!

Dated this 27 day of April 2018

Dianne L Goodstein

The Honorable Dianne Goodstein
Presiding Judge, Ninth Judicial Circuit

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF YORK)	SIXTEENTH JUDICIAL CIRCUIT
Teresa Murphy, as Personal Representative for the Estate of Isaac Strong,)	Civil Action No.: 2018-CP-46-01459
Plaintiff,)	
v.)	
Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Consulting, LLC; Fundamental Administrative Services, LLC; THI of Baltimore, Inc.; THI of South Carolina, LLC; THI of South Carolina at Rock Hill, LLC d/b/a Magnolia Manor of Rock Hill; and Amisub of S.C., Inc. d/b/a Piedmont Medical Center,)	**ORDER**
Defendants.)	

This matter came before the Court on Defendant THI of South Carolina, LLC d/b/a Magnolia Manor Rock Hill's ("THI") Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings. A hearing was held on August 30, 2018. After considering the parties' written submissions and oral arguments and for the reasons stated below, THI's motion is **DENIED**.[1]

FACTS

Plaintiff's Complaint alleges Isaac Strong was admitted to Magnolia Manor of Rock Hill ("Facility") on December 22, 2014, following a multi-week hospitalization in Piedmont Medical

[1] Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC also filed motions to stay Plaintiff's claims against them pending resolution of THI's motion to compel arbitration. In light of the Court's ruling denying to compel arbitration, the motions to stay are dismissed as moot.

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Center related to a stroke that caused persistent weakness along his right side. (Compl. ¶¶ 25, 28). Four days before Mr. Strong was transferred to the Facility, his daughter Teresa Murphy was presented with two contracts. The first was an "Admission Agreement" that governed the type of care Mr. Strong would receive at the Facility and Mr. Strong's financial obligation to pay for those services. On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Mr. Strong's admission to the Facility. Ms. Murphy signed the Admission Agreement on the "Signature of Representative" line. Ms. Murphy was not Mr. Strong's conservator, guardian, or attorney-in-fact.

On the same day, Ms. Murphy signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Mr. Strong, provides for alternative dispute resolution for any claim a party may bring against another arising out of Mr. Strong's admission in the Facility. Ms. Murphy signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." THI informed the Court that Mr. Strong agreeing to arbitrate was not a prerequisite to his admission at the Facility.

When Mr. Strong arrived in the Facility on December 22, 2014, he had a pressure ulcer and was at an elevated risk of developing new ulcers. (Compl. ¶ 28). Orders were entered requiring that Mr. Strong be turned or repositioned ever two hours. (Compl. ¶ 26). However, over the next couple weeks, Mr. Strong's pressure ulcer worsened, becoming infected and then septic. (Compl. ¶¶ 31-33). Mr. Strong's condition grew increasingly severe over the following months requiring hospitalizations and procedures before his passing away on September 5, 2015. (Compl. ¶¶ 34-

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46). On May 14, 2018, Ms. Murphy initiated this action as the personal representative for Mr. Strong's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to properly treat Mr. Strong's skin condition while at PMC and the Facility. On July 17, 2018, THI filed a Motion to Compel Arbitration and Petition to Stay State Court Proceedings. Relying on the Arbitration Agreement that Mr. Strong did not sign, THI argues Plaintiff must arbitrate rather than litigate her claims.

LEGAL REASONING

I. There is no valid agreement to arbitrate claims stated in Plaintiff's Complaint.

Plaintiff's Complaint alleges causes of action for negligence (wrongful death and survivor actions). The survival claim relates to duties established and breached during Isaac Strong's life and damages sustained during his life. This claim belongs to Mr. Strong. Plaintiff Teresa Murphy (Mr. Strong's personal representative) presents this claim on Mr. Strong's behalf. See S.C. Code Ann. § 15-5-90 (stating that claims "survive both to and against the personal or real representative...of a deceased person"). Accordingly, THI must show a valid and enforceable arbitration agreement between Mr. Strong and THI to prevail on its motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

Basic contract law holds that a contract binds only those parties who show an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). Mr. Strong did not sign the Arbitration Agreement or personally give any other objective manifestations of assent to this contract. THI contends Mr. Strong is bound to the agreement through the signature of Teresa Murphy, whom THI asserts was acting as Mr. Strong's agent. Defs.' Mem. at 6-9. For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto

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Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, THI must show that all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

A. The Admission Agreement and Arbitration Agreement are Separate Contracts that do not Merge.

As discussed below, THI argues the Arbitration Agreement signed by Teresa Murphy is valid because, even though she had no actual authority to sign it on Mr. Strong's behalf, she was Mr. Strong's apparent agent or, in the alternative, Mr. Strong's estate is estopped from contesting her alleged authority. These arguments have a common premise. Defendants stake both arguments to the notion that the Arbitration Agreement and Admission Agreement merge into a single contract that must be construed as a unit. For example, THI argues Mr. Strong created an agency relationship to support arbitration because he "accepted" admission. (Defs.' Mem. at 8). THI then argues Plaintiff is estopped from denying authority to bind Mr. Strong to arbitration because she does not deny authority to admit him to the Facility. (Defs.' Mem. at 12). Accepting merger is a prerequisite to accepting Defendants' arguments. However, recent case law governing nursing home arbitration contracts reject THI's argument. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014).

South Carolina law states that contracts signed at the same time by the same parties and for the same purpose will be construed together "in the absence of anything indicating a contrary intention." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts Resort Realty, Inc. v.

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Down'round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement *or* in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicat[e] the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Many of these same factors are present here. The "Admission Agreement" presented to Ms. Murphy contains an "Entire Agreement" provision stating that "this Agreement represents the entire agreement" related to Mr. Strong's admission to the Facility. Thus, "Agreement" is a defined term in this contract and, as stated in the contract's opening paragraph, is limited to the "Admission Agreement," not the separate Arbitration Agreement. Like in Hodge, the separate contracts have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement states its independence with its "Arbitration Agreement" title. Moreover, THI's counsel

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argued at the hearing that agreeing to arbitrate was not required for Mr. Strong to be admitted to Defendants' facility. To the extent there are any ambiguities in this contract language, they must be resolved against merger. Coleman, 407 S.C. at 355-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685 (citing Coleman). THI was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired.

In sum, THI cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

B. Teresa Murphy was not Mr. Strong's Actual or Apparent Agent.

Agency is a "fiduciary relationship that results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." Peoples Fed. Savs. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992) (citing Restatement (Second) of Agency § 1 (1958)). An agency relationship may be established with clear evidence of actual or apparent authority conferred by the purported principal on the purported agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Actual authority is "expressly conferred upon the agent by the principal." Richardson v. PV, Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations." Young v. S.C. Dep't of Disabilities & Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). To prove apparent authority, a party must show (1) purported principal consciously or impliedly represented another to be his agent; (2) reliance on the representation by a third party; and (3) change in position by third party in reliance on the representation. Cowburn, 366 S.C. at 39-40, 619 S.E.2d at 448.

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South Carolina law provides that an agency relationship cannot be established solely by the words and actions of the purported agent. Id. For apparent authority to exist, "[e]ither the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such belief." R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000). THI has not identified any conduct by Mr. Strong showing he intended to cause THI to believe Teresa Murphy was authorized to act for him. In fact, THI argued at the hearing Mr. Strong suffered from serious health issues that may have affected his ability to understand events occurring during his admission.

THI then argues Mr. Strong represented Teresa Murphy had authority to waive his jury trial right simply by his continued residency in the Facility. Defs.' Mem. at 8. The Court rejects this argument for several reasons. First, Defendants conclude Mr. Strong's presence alone can constitute an affirmative representation. Defs.' Mem. at 7-8 (citing Carraway v. Beverly Enters. Ala., Inc., 978 So.2d 27, 30-31 (Ala. 2007)). Carraway is not binding precedent in this Court and its expansive view of apparent agency was rejected in Hodge, where the court rejected the notion that a nursing home resident represents his/her family member has authority to enter an arbitration agreement on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent"). THI makes a similar argument to the one Hodge rejected. Defs.' Mem. at 8 (suggesting Mr. Strong created apparent agency relationship "by allowing Ms. Murphy to procure Mr. Strong's admission to the Facility").

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Second, even accepting THI's recently rejected premise, any representation Mr. Strong's presence conveyed could only cover admission and not arbitration. As THI argued during the hearing, Mr. Strong's admission was in no way contingent on agreeing to arbitrate disputes. Third, THI's argument conflates the Admission Agreement and Arbitration Agreement in another important way. THI argues Mr. Strong "accept[ed] the benefits of the contracts." Def's. Mem. at 8. However, the only "benefit" THI cites is admission itself, a benefit THI has admitted to be separate from arbitration. THI never attempts to explain what supposed "benefit" of the independent Arbitration Agreement Mr. Strong derived during his time as a resident in Defendants' facility. Any such attempt would have been futile given the Court of Appeals' unambiguous ruling in Thompson which held that "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. Since Mr. Strong made no affirmative representations that Ms. Murphy had authority to sign the Arbitration Agreement on his behalf, the Court rejects THI's actual and apparent agency arguments.

C. Plaintiff is not Estopped from Challenging the Arbitration Agreement's Validity.

THI argues Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the

party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

THI briefly mentions some of these elements but make no effort to apply them. Def's. Mem. at 10 (citing Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). Instead, THI suggests an alternative equitable estoppel standard and rely on federal cases. Defs.' Mem. at 17-18. THI contend their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. The Court rejects this argument as at odds with U.S. Supreme Court precedent. An arbitration contract concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of equitable estoppel. 9 U.S.C. § 2 (requiring enforcement of arbitration contract "save upon such grounds as exist at law or in equity for the revocation of any contract"). The FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to equitable estoppel arguments. Id. at 632 (noting question on remand was "whether the relevant state contract law recognizes equitable estoppel"). At least eight

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federal circuits[2] along with multiple district[3] and state courts[4] have cited Arthur Andersen with multiple courts modifying or overruling precedent to comply with the Supreme Court's ruling.

Moreover, the Court finds THI could not prevail even if its equitable estoppel argument was governed by federal law. THI relies primarily on International Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a "direct benefit" from a contract containing an arbitration clause. THI then argues Mr. Strong's admission to the Facility was the required "direct benefit." In doing so, THI tie their estoppel argument inextricably to their flawed merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the

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[2] Richmond Health Facilities v. Nichols, 811 F.3d 192, 195 (6th Cir. 2016) (citing Arthur Anderson) ("in determining the enforceability of an arbitration agreement, we apply state law of contract formation"); Crawford Prof'l Drugs, Inc. v. CVS Caremark Corp., 748 F.3d 249, 255 (5th Cir. 2014) (holding "state contract law" applied to equitable estoppel issue and noting prior decisions "based on federal common law, rather than state contract law . . . have be modified to conform with Arthur Andersen"); Kramer v. Toyota Motor Corp., 705 F.3d 1122, 1128 (9th Cir. 2013) (citing Arthur Andersen and applying California law to the equitable estoppel analysis); Awuah v. Coverall N. Am., Inc., 703 F.3d 36, 41-42 (1st Cir. 2012) (same for Massachusetts law); The Republic of Iraq v. BNP Paribas USA, 472 Fed. Appx. 11, 13-14 (2d Cir. 2012) (same for New York law); Lenox MacLaren Surgical Corp. v. Medtronic, Inc. 449 Fed. Appx. 704, 708 n. 2 (10th Cir. 2011) (finding Arthur Andersen "made it clear that state law governs who may be bound to an arbitration clause"); Lawson v. Life of the S. Ins. Co., 648 F.3d 1166, 1172 (11th Cir. 2011) (holding that "to the extent any of our earlier decisions indicate to the contrary, those indications are overruled or at least undermined to the point of abrogation by [Arthur Andersen]"); Donaldson Co. v. Burroughs Diesel, Inc., 581 F.3d 726, 732 (8th Cir. 2009) ("The Supreme Court has ruled that state contract law governs the ability of nonsignatories to enforce arbitration provisions").

[3] MacDonald v. Unisys Corp., 951 F. Supp. 2d 729, 736-38 (E.D. Pa. 2013) ("Post-Arthur Anderson, it is incontrovertible that state law governs the equitable estoppel and third-party beneficiary determinations"); Hospira, Inc. v. Therabel Pharma N.V., Case No. 12-C-8544, 2013 WL 3811488 *11-14 (N.D. Ill. July 19, 2013) (citing Arthur Andersen and applying state law to equitable estoppel analysis); FR 8 Singapore Pte. Ltd. v. Albacore Maritime Inc., 794 F. Supp. 2d 449, 455 (S.D.N.Y. 2011) ("the question of who was bound by [arbitration] agreement was treated as a question of state law").

[4] See e.g., Carter v. TD Ameritrade Holding Corp., 721 S.E.2d 256, 261-62 (N.C. Ct. App. 2012) (citing Arthur Andersen and considering ratification argument under state law).

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admission agreements and the [arbitration agreements] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Mr. Strong's admission does not support equitable estoppel.

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals recently held in Thompson that any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.[5] Since admission is unavailable as a "direct benefit" to support estoppel, THI would be required to point to some benefit Mr. Strong received from the Arbitration Agreement alone. However, Mr. Strong and his estate derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the Arbitration Agreement"). Even if they had, "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [Mr. Strong] waive [his] right to access the courts and [his] right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688.

THI then makes a broader argument that it would be "manifestly inequitable" for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Ms. Murphy's authority to sign the Arbitration Agreement. Defs.' Mem. at 18. Defendants misunderstand the legal distinction between health care and dispute resolution decisions. It is not unusual for a family

[5] Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death. 422 S.C. at 563, 813 S.E.2d at 303 ("we find it difficult to find [resident] benefitted even from being admitted").

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member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is what the Adult Health Care Consent Act permits. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, THI's equitable estoppel argument is rejected under South Carolina and federal law as interpreted in Thompson and Hodge.[6]

D. Ms. Murphy did not have Inherent Agency Power to Bind Mr. Strong or his Estate to Arbitration.

THI next ask the Court to find a binding agency relationship even if Ms. Murphy lacked actual or apparent authority to admit Mr. Strong to the Facility. Def's. Mem. at 12-13. THI cites

[6] THI assert "agency by estoppel" as a separate basis for compelling arbitration (Def's. Mem. at 10-12) but the arguments in that section are subsumed by THI's other arguments. THI cites a sentence from R & G Construction holding that a principal is estopped from denying the existence of an agency relationship. However, that same sentence makes clear that estoppel only applies if the principal has acted in a way to create an agency relationship. For the reasons stated in Section 2(B), there is no agency relationship here. THI then cite Boyd v. BellSouth Tele. Tele. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006), but the elements cited there are for equitable estoppel. Finally, THI relies heavily on McCutcheon v. THI of S.C. at Charleston, LLC, an unreported federal district court. No. 2:11-cv-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). Any value McCutcheon may have held is significantly undercut by the facts that the McCutcheon reviewed merged contracts and that this (at best) persuasive authority preceded the binding rulings in Coleman, Thompson, and Hodge.

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just one South Carolina case in support of this proposition. Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975). Smith was later overruled but, even on its own, Smith does not support THI's theory because the only reference to agency in the whole opinion was the court rejecting the inherent agency theory. Id. at 134, 212 S.E.2d at 927 ("appellant has offered no authority, and we have found none, that [individual] would have inherent agency power . . ."). There is no basis for inherent agency in South Carolina law for nursing home arbitration contracts.

E. The South Carolina Bill of Rights for Residents of Long-Term Care Facilities did not Authorize Ms. Murphy to Bind Mr. Strong to Arbitration.

Finally, the Court rejects Defendants' argument that a statute designed to protect nursing home residents' dignity and personal integrity actually paves the way for a resident to lose his right to litigate claims for nursing home neglect. (Defs.' Mem. at 13-14). The "Bill of Rights" for nursing home residents is intended to help residents "retain their individuality and personal freedom" and to support residents' "need for self-determination." S.C. Code Ann. § 44-81-20. To make these rights meaningful, the statute requires nursing homes to provide a written explanation of each right to the resident or his representative and provides a grievance procedure to address alleged violations. S.C. Code Ann. §§ 41-81-40, -60. Defendants cite this statute to suggest that, because Ms. Murphy may have been the "representative" who received a copy of Mr. Strong's explanation of the Bill of Rights, she then gained legal authority to bind him to arbitration. However, the Bill of Rights makes no mention of arbitration, and the Court finds neither the statute's language nor its legislative purpose support arbitration in this case.

F. THI is not Entitled to Depose Ms. Murphy or to Conduct Other Discovery before the Court Rules on its Motion.

Finally, THI argued at the hearing that it should be allowed to depose Ms. Murphy or conduct additional discovery to support its agency and estoppel arguments before the Court rules on arbitration. Hodge recently rejected a similar argument. 422 S.C. at 575, 813 S.E.2d at 309. As

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discussed above, agency depends on the representations of the purported principal (i.e. Mr. Strong) and cannot be formed based on the representations of the purported agent (i.e. Ms. Murphy). Accordingly, Ms. Murphy's deposition "would not add anything to [the agency] determination." Id. at 578, 813 S.E.2d at 310. Moreover, while THI argues on reply that it needs additional discovery on Mr. Strong's mental capabilities when the arbitration contract was signed, records documenting Mr. Strong's mental faculties at admission lie within THI's own medical records. The Court finds no need for additional discovery to rule on the issues raised in THI's motion.

CONCLUSION

For all these reasons, THI's motion to dismiss/compel arbitration is **DENIED**. In light of this ruling, the motions to stay filed by Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC are **DISMISSED AS MOOT**.

IT IS SO ORDERED

_____
William A. McKinnon
Circuit Court Judge, 16th Judicial Circuit

October ___, 2018

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York Common Pleas

Case Caption: Teresa Murphy , plaintiff, et al VS Hunt Valley Holdings, Llc , defendant, et al

Case Number: 2018CP4601459

Type: Order/Dismissal

So Ordered

/s William A. McKinnon, #2761, Circuit Judge

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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF SPARTANBURG	)	IN THE ARBITRATION MATTER
	)	
	)	
Frank A. Campsen By and Through His Attorney-In-Fact Larry F. Campsen,	)	MOTION FOR CLARIFICATION AND/OR PROTECTION FROM DISCOVERY
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Patricia Harris, Robert Crooks, Margaret Keller	)	
	)	
Defendants.	)	
	)	
	)	
	)	

In light of the Arbitrator's Preliminary Order stating that discovery will proceed according to the South Carolina Rules of Civil Procedure just as in Circuit Court, the Defendants in Arbitration hereby seek clarification from the Arbitrator as to the allowable scope of discovery, if any, since pre-hearing discovery is not authorized under the FAA. It is undisputed that Judge Couch has ruled that the Federal Arbitration Act ("FAA") applies in this matter. Further, given that the FAA has its own enumerated, limited discovery provisions, the Defendants ask the Arbitrator to rule that the Plaintiff's First Requests for Production and Interrogatories need not be answered because neither the parties' arbitration agreement nor the FAA allows for pre-hearing discovery. However, under the FAA the parties can agree to limited discovery consistent with the objectives of the FAA. No agreements have been reached in this matter. Accordingly, Defendants ask the Arbitrator to order, in absence of an agreement

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between the parties, that the Arbitrator lacks the authority to order pre-hearing discovery. Defendants have offered and remain willing to meet with Plaintiff's Counsel to determine if an agreement regarding scope of pre-hearing discovery can be agreed upon.

DISCUSSION

I. PARTIES TO AN ARBITRATION AGREEMENT MUST CONTRACT TO PROVIDE FOR ANY PRE-HEARING DISCOVERY

Recognizing that arbitration agreements, like any valid contract, are enforceable in accordance with their terms, Judge Couch expressly ruled in his June 22, 2012 Order (the "Order") that the FAA applies to this matter.[1] This Order, of course, controls this arbitration. It therefore is necessary, as a threshold matter, to understand and appreciate that arbitration agreements are private contracts. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (Scalia, J) (2013); 9 U.S.C.A. § 2. The text of the FAA reflects the overarching principle that arbitration is a matter of contract and, consistent with that text, courts must rigorously enforce arbitration agreements according to their terms. *Id.* Consequently, parties may contract to provide for as expansive or limited discovery as they desire. *See Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("The point of affording parties discretion in designing arbitration process is to allow for efficient, streamlined procedures tailored to the type of dispute."). Absent coercion, or duress, the courts must respect what the parties' contract for in terms of discovery. *See Concepcion*, 131 S. Ct. at 1748-49; *Continental Airlines, Inc. v. Mason*, 87 F.3d 1318 (9th Cir. 1996). Indeed, the FAA does not prevent enforcement of agreements to arbitrate under different rules than those set forth in the Act itself, so long as the rules do not undermine the goals and policies of the FAA to

[1] The reasons for the FAA's application are legion and discussed in length by Judge Couch. (Order Compelling Arb, 4-7).

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ensure the enforceability, according to their terms, of private agreements to arbitrate. *Osteen v.* 315 S.C. at 422.

II. FAA § 7 CONTROLS IF THE PARTIES CANNOT AGREE ON A DISCOVERY PLAN

Under the **sole discovery provision of the FAA**, arbitrators may summon, in writing, any person as a witness and, in a proper case, may require the witness to bring tangible things and documents to the hearing. 9 U.S.C. § 7. In pertinent part, § 7 reads:

> The arbitrators may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with them any book, record, document, or paper which may be deemed material as evidence in the case...Said summons shall issue in the name of the arbitrator or arbitrators...and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court.
>
> ...
>
> If any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators...are sitting may compel the attendance of such persons before said arbitrator...in the same manner provided by law for securing the attendance of witnesses...for neglect or refusal to attend in the courts of the United States.

No other FAA provision provides the parties the ability to serve or conduct discovery themselves. *See* 9 U.S.C. § 1, *et seq.* In fact, parties to a private arbitration agreement "relinquish the right to certain procedural niceties which are normally associated with a formal trial...one of these accoutrements is the right to pre-trial discovery." *See Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980). A hallmark of arbitration is its limited discovery process. *Id.* at 391. The "essence of arbitration is its freedom from the formality of ordinary judicial procedure." *Harvey Aluminum, Inc. v. United Steelworkers of Am., AFL-CIO*, 263 F. Supp. 488, 491 (C.D. Cal. 1967) (quoting *Canuso v. City of Philadelphia*, 326 Pa. 302, 307, 192 A. 133, 136). Rules of civil procedure serve merely as instructive guidelines on how to conduct

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arbitration; so long as the arbitration hearing is fairly conducted, "rules of judicial procedure need not be observed." *See Harvey*, 263 F.Supp. at 491.

A party in arbitration may not simultaneously invoke the normal discovery procedures used in courts, unless the arbitration agreement provides otherwise. Discussing the issue of whether depositions may be taken and interrogatories going to the merits of the case can be propounded in matters referable to arbitration, the federal court for the Southern District of New York ruled that:

> By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. "A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial." *Penn Tanker Co. of Del. v. C. H. Z. Rolimpex, Warszawa*, 199 F. Supp. 716, 718 (S.D.N.Y. 1961) (quoting 1 Wigmore, Evidence § 4(e) (3d ed. 1940)).

Arbitration, by its very nature, does not lend itself to discovery outside the parameters set by § 7: "The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one **and its superfluity and utter incompatibility in the other**." *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957) (emphasis added). As Judge Learned Hand eloquently stated,

> when [parties] have adopted [arbitration], they must be content with its informalities; **they may not hedge it with those procedural limitations which is precisely its purpose to avoid.** They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery. *Am. Almond Products Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (emphasis added).

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Plaintiff likely will argue that the Federal Rules of Civil Procedure and its attendant discovery provisions are applicable to proceedings under the FAA to the extent that the FAA does not provide for matters of procedure and, as a corollary, presumably the South Carolina Rules of Civil Procedure can thus apply. Plaintiff's argument is devoid of merit and full discovery should not be allowed, because the rules of procedure are applicable only where the FAA is silent as to a procedural issue. *Cf. Concepcion*, 131 S. Ct. at 1747 (explaining that the FAA would preempt a state law rule "finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery."); *Application of Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, (4th Cir. 1999). As stated, *supra*, the FAA **contains its own discovery procedure.** *See* 9 U.S.C. § 7. Discovery therefore is controlled solely by § 7.

Finally, arbitrators alone are afforded the power to conduct discovery by calling witnesses and subpoenaing tangible evidence and documents at the hearing. 9 U.S.C. § 7. **This power is not extended to the parties to the arbitration.** *Burton*, 614 F.2d at 390-91; *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, (7th Cir. 2002) ("[F]or the sake of economy and in contrast to the practice in adjudication, parties to an arbitration do not conduct discovery; the arbitrators do."). Put simply, because an arbitrator controls discovery pursuant to the strictures of § 7, Plaintiff has no right to serve discovery requests upon Defendants. The power granted is simply to compel attendance at hearings.

CONCLUSION

Because Judge Couch has ruled that the FAA applies to this matter and the FAA contains its own discovery provision, Defendants are not required to respond to Plaintiff's discovery. Further, 9 U.S.C. § 7 controls discovery unless the parties reach an agreement otherwise.

Defendants ask the Arbitrator to order the parties to reach an agreement regarding discovery. In the alternative, the Defendants ask that the Arbitrator enforce Judge Couch's Order and allow the parties to conduct discovery under 9 U.S.C. § 7, which is the FAA's sole discovery provision.

Respectfully submitted,

By: _____

D. Jay Davis, Jr.
William L. Howard
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com

and

Lori D. Proctor
919 Milam Street, Suite 1700
Houston, TX 77002
(713) 222-2323; ldproctor@proctor-law.com
Attorneys for the Defendants in Arbitration

Charleston, South Carolina

Dated: 12/19/13

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 19 day of December, 2013

_____

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STATE OF SOUTH CAROLINA	)	
	)	**MATTER IN ARBITRATION**
COUNTY OF SPARTANBURG	)	
	)	
Larry Campsen, Individually and as Personal Representative of the Estate of Frank A. Campsen	)	
	)	**DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**
Plaintiff,	)	
v.	)	
	)	
THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Patricia Harris, Robert Crooks, Margaret Keller	)	
Defendants.	)	

Defendant THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg Patricia Harris, Robert Crooks, and Margaret Keller ("Defendants" or "the Facility" where appropriate) submit this Brief in Opposition to Plaintiff's Motion to Compel. As explained below, Plaintiff's motion should be DENIED because: (1) Circuit Court Judge Couch's June 22, 2012 order (the "Order") specifically ruled that the parties' arbitration agreement is governed by the Federal Arbitration Act ("FAA"), and the FAA does not authorize pre-hearing discovery in the absence of an agreement between the parties; (2) even if authorized, the scope and size of Plaintiff's discovery requests violates and conflicts with the FAA's mandate that the arbitration process be efficient, streamlined, and unburdened by ordinary judicial procedure; (3) South Carolina Alternative Dispute Resolution ("SCADR") Rule 13(a) does not allow the Arbitrator to control pre-hearing discovery; and (4) the arbitrator alone—not the parties—controls hearing discovery.

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PROCEDURAL HISTORY

This matter's path to arbitration was tortured and continues to this very point. Plaintiff has attempted to skirt the Arbitrator's authority and seek relief from the Court, despite the issues already being completely referred to the Arbitrator. A brief recap of this matter's procedural history is necessary to resolving this motion.

Defendant's initial Motion to Compel Arbitration was denied by Judge Couch on August 25, 2011. On September 15, 2011, Defendant moved the Court to alter, amend, or reconsider its judgment. The motion was granted and the matter was ordered to arbitration on June 22, 2012, with Judge Couch expressly ruling that the arbitration agreement is governed by the FAA. Despite Judge Couch already reconsidering one order regarding arbitration, Plaintiff subsequently filed his own Motion to Reconsider Judge Couch's Order Compelling Arbitration. After a THIRD hearing before Judge Couch, he denied Plaintiff's motion on October 22, 2013 and appointed Kenneth C. Anthony, Jr. as Arbitrator. Since then, Plaintiff again has returned to the Court and requested a FOURTH reconsideration, seeking to declare the arbitration agreement unconscionable.[1] That matter is pending and set to be heard March 18, 2014.

On November 14, 2013, Plaintiff issued his First Interrogatories and Requests for Production to the Facility. These discovery documents are attached and seek information not only from the Facility (a party to the arbitration), but also information from entities that are not parties to the arbitration and that actually have a stay order in place. Plaintiff's first Set of Interrogatories seeks expansive information and directly conflicts with the purpose of the FAA.[2] While styled as eleven questions, the subparts expand the request to 31 separate interrogatories.

[1] Attached as **Exhibit 1**
[2] Attached as **Exhibit 2**

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The requests for production are even more illuminating. Here, the Plaintiff has issued 61 requests for production of documents.[3] Including subparts, the requests actually include 186 categories of documents. Based on past experience with identical requests in multiple cases, the requests will conservatively seek thousands of pages of documents. Simply crafting responses and securing reasonable limits (voluntarily or by Arbitrator relief) will cost the defendants an exorbitant amount of attorneys' fees and interfere with the operations of not only the Facility, but also the consulting companies that are not parties to the arbitration. Again, these requests conflict with the avowed purpose of arbitration as articulated by Congress, the FAA, and case law extensively promulgated thereunder.

The Arbitrator issued a Preliminary Order on November 20, 2013, stating that discovery would proceed according to the *South Carolina Rules of Civil Procedure*, just as in Circuit Court.[4] On December 19, 2013, the Defendant filed a motion before the Arbitrator seeking clarification as to the allowable scope of discovery, if any, in light of the FAA's own enumerated discovery mandates and the case law interpreting the same.[5] Though filed long before Plaintiff's Motion to Compel, Defendant's Motion for Clarification fully addressed many, if not all, of the issues raised by Plaintiff's motion and will not be repeated here except as needed. While we believe the FAA is supportive of our position, we are willing to agree to a reasonable scope of discovery and again offer to enter into an agreement regarding the same to alleviate the constraints of the FAA. In fact, a proposed reasonable discovery schedule and agreement has been sent to Plaintiff's counsel for consideration.[6]

[3] Attached as **Exhibit 3**
[4] Attached as **Exhibit 4**
[5] Attached as **Exhibit 5**
[6] Attached as **Exhibit 6**

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Instead of waiting for the Arbitrator to clarify the scope of discovery, Plaintiff filed the instant Motion to Compel on February 6, 2014 asking the Arbitrator to compel the Defendant to fully respond to his "limited, reasonable, and necessary" discovery requests.[7] However, in an attempt to divest the Arbitrator of his authority, and presumably fearing that the Arbitrator would deny his motion to compel, Defendant filed ***on the same day and in state court*** his Second Motion to Reconsider, Alter, or Amend Judge Couch's Order Compelling Arbitration.[8] That state court Motion to Reconsider makes precisely the same argument as the Motion to Compel presently before the Arbitrator.[9] This is absolutely improper and is an obvious attempt to seek "two bites at the apple" in case the Arbitrator issues a ruling the Plaintiff does not like. This is the second time this has happened. (*See* state court Motion to Join Parties filed after your motion denying Plaintiff's request)(attached as **Exhibit 8**).

In short, Plaintiff has asked for the same relief in different forums, all in hopes of placing the Arbitrator in conflict with Judge Couch and the state court. This tactic was first used in Plaintiff's Motion to Join and has now been done on the discovery issue. This must stop. The costs being incurred by the defendants are astronomical in fighting the plaintiff in multiple forums. Further, the time delays associated with the actions are in direct contravention of the goals of arbitration. The simple course should have been to brief the issues and receive the ruling from the arbitrator. Instead, the defendants are being forced to litigate in two separate forums at extreme expense.

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[7] Pl. Mtn. to Comp., 1.
[8] Attached as **Exhibit 7**
[9] Indeed, Plaintiff's Motion to Compel argues that the FAA applies only to the enforcement of the arbitration clause while the SCADR Rules apply to the arbitration itself. (Pl. Mtn. to Comp., 2). It continues by arguing that *Henderson v. Summerville Ford-Mercury* and *Toler's Cove v. Trident* are controlling on the issue. *Id.* at 2, 3. Finally, it cites to the Code of Ethics for Arbitrators, Canon 1.F in support of its argument. *Id.* at 2. Plaintiff's state court motion to reconsider quotes precisely the same provisions and even lifts entire passages from its Motion to Compel and places them in the motion verbatim. *See* Pl. Mtn. to Reconsider.

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ARGUMENT AND CITATION TO AUTHORITY

I. PARTIES TO AN ARBITRATION AGREEMENT MUST CONTRACT TO PROVIDE FOR ANY PRE-HEARING DISCOVERY

Recognizing that arbitration agreements are enforceable in accordance with their terms, Judge Couch expressly ruled in his Order Compelling Arbitration that the FAA applies to this matter.[10] Accordingly, Plaintiff should recognize that the arbitrator has the power to make a decision on this discovery dispute subject to the strictures of the FAA. It is undisputed that arbitration agreements are private contracts. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (Scalia, J) (2013); 9 U.S.C.A. § 2. The text of the FAA reflects the overarching principle that arbitration is a matter of contract and, consistent with that text, courts must rigorously enforce arbitration agreements according to their terms. *Id.* Consequently, parties may contract to provide for as expansive or limited discovery as they desire. *See Osteen v. T.E. Cuttino Constr. Co.*, 315 S.C. 422, 434 S.E.2d 281 (1993); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) ("The point of affording parties discretion in designing arbitration process is to allow for efficient, streamlined procedures tailored to the type of dispute."). Because the arbitration agreement is silent as to pre-hearing discovery, the FAA applies and as explained below, FAA § 7 controls discovery.

Despite this legal principal, Defendant remains open to a discussion to see if the parties simply can agree to conduct some limited discovery that is consistent with the goals of the arbitration process and efficient dispute resolution. Defendant has proposed such an agreement.[11] However, to date the parties have not entered into a consent discovery plan or discovery agreement. Hopefully, an agreement can be reached and alleviate the need for a hearing on this matter.

[10] The reasons for the FAA's application are discussed at length by Judge Couch. (Order Compelling Arb, 4-7).
[11] *See* **Exhibit 6**

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II. FAA § 7 CONTROLS WHEN THE PARTIES CANNOT AGREE ON A DISCOVERY PLAN

Under the sole discovery provision of the FAA, arbitrators may summon, in writing, any person as a witness and, in a proper case, may require the witness to bring tangible things and documents to the hearing. 9 U.S.C. § 7. In pertinent part, § 7 reads:

> The arbitrators may summon in writing any person to ***attend before them*** or any of them as a witness and in a proper case to bring with them any book, record, document, or paper which may be deemed material as evidence in the case...Said summons shall issue in the name of the arbitrator or arbitrators...and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify ***before the court.***
>
> ...
>
> If any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators...are sitting ***may compel the attendance of such persons before said arbitrator***...in the same manner provided by law for securing the attendance of witnesses...for neglect or refusal to attend in the courts of the United States. (emphasis added).

No other FAA provision discusses any allowed compulsion of witnesses or discovery by the parties. *See* 9 U.S.C. § 1, *et seq.* In fact, parties to a private arbitration agreement "relinquish the right to certain procedural niceties which are normally associated with a formal trial...***one of these accoutrements is the right to pre-trial discovery***." *See Burton v. Bush*, 614 F.2d 389, 390-91 (4th Cir. 1980) (emphasis added). A hallmark of arbitration is its limited discovery process. *See Id.* at 391. The "essence of arbitration is its freedom from the formality of ordinary judicial procedure." *Harvey Aluminum, Inc. v. United Steelworkers of Am., AFL-CIO*, 263 F. Supp. 488, 491 (C.D. Cal. 1967) (quoting *Canuso v. City of Philadelphia*, 326 Pa. 302, 307, 192 A. 133, 136).

A party in arbitration may not simultaneously invoke the normal discovery procedures used in courts, unless the arbitration agreement provides otherwise. Discussing the issue of

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whether depositions may be taken and interrogatories going to the merits of the case can be propounded in matters referable to arbitration, the federal court for the Southern District of New York ruled that:

> By voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. "A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial." *Penn Tanker Co. of Del. v. C. H. Z. Rolimpex, Warszawa*, 199 F. Supp. 716, 718 (S.D.N.Y. 1961) (quoting 1 Wigmore, Evidence § 4(e) (3d ed. 1940)).

Arbitration, by its very nature, does not lend itself to discovery outside the parameters set by § 7: "The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one ***and its superfluity and utter incompatibility in the other***." *Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co*, 20 F.R.D. 359, 362 (S.D.N.Y. 1957) (emphasis added). As Judge Learned Hand eloquently stated,

> when [parties] have adopted [arbitration], they must be content with its informalities; ***they may not hedge it with those procedural limitations which is precisely its purpose to avoid***. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery. *Am. Almond Products Co. v. Consol. Pecan Sales Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (emphasis added).

In the face of the the FAA and applicable case law, Plaintiff argues that because the FAA only preempts conflicting procedural law, the *South Carolina Rules of Civil Procedure* apply as if we are in state court.[12] Plaintiff's argument is devoid of merit and full discovery should not be allowed, as the rules of procedure could only be applied ***if*** the FAA is silent as to a procedural

[12] Pl. Mtn. to Comp., 2-3.

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issue and they are consistent with the goals of arbitration per the FAA . *Cf. Concepcion*, 131 S. Ct. at 1747 (explaining that the FAA would preempt a state law rule "finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery."); *see also Application of Deiulemar Compagnia di Navigazione S.P.A. v. M/V Allegra*, 198 F.3d 473, (4th Cir. 1999). As stated, *supra*, the FAA ***expressly addresses who may conduct discovery and where and how documents may be compelled.*** *See* 9 U.S.C. § 7. Discovery therefore is controlled solely by § 7.

III. PLAINTIFF'S DISCOVERY REQUESTS FRUSTRATE THE EXPRESS PURPOSE OF THE FAA

Even if it was allowed by the FAA—which it is not—the discovery Plaintiff has propounded stands in utter and direct contravention of the essential purpose of arbitration. As repeatedly emphasized above, arbitration was created to provide a streamlined and efficient method of dispute resolution that is unburdened by the strictures of traditional litigation. Plaintiff improvidently cites *Toler's Cove* and *Henderson* in an attempt to support his contention that the South Carolina Uniform Arbitration Act's ("SCUAA") procedural rules must apply.[13] Plaintiff misinterprets these cases, which, if anything, support Defendant's position that the SCUAA conflicts with the express purpose of the FAA. As Plaintiff notes, *Toler's Cove* and *Henderson* state that the procedural rules of the SCUAA should not be preempted by the FAA unless they stand as an obstacle to the purpose and goals of arbitration as articulated by Congress.[14] Arbitration, by its very nature, truncates the discovery process in order to create an efficient forum to resolve disputes. Allowing full discovery would eviscerate that purpose and render FAA § 7 effectively meaningless.

[13] Pl. Mtn. to Comp. at 2-3.
[14] *Id.*

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At this point the Arbitrator's ruling is that the rules of civil procedure control. Under those rules, there would be ***unlimited depositions, unlimited requests for production, requests for admission, and all the other possible forms of discovery.*** In short, the discovery would be no different than if the matter were in court. Giving the Plaintiff the ability to conduct unlimited discovery would expressly frustrate the purpose of the FAA and the case law thereunder. Forcing Defendant to respond to the broad discovery initially sought by Plaintiff, additional discovery requests, and be exposed to unlimited depositions and unlimited naming of experts and expert depositions simply is contrary to the mandates of the FAA.

IV. ONLY THE ARBITRATOR CAN COMPEL WITNESSES AND PRODUCTION OF DOCUMENTS AT THE HEARING IN THE ABSENCE OF AN AGREEMENT TO THE CONTRARY BY THE PARTIES

Arbitrators alone are afforded the power to call witnesses and subpoena tangible evidence and documents at the hearing. 9 U.S.C. § 7. This power is not extended to the parties to the arbitration. *Burton*, 614 F.2d at 390-91; *CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, (7th Cir. 2002) ("[F]or the sake of economy and in contrast to the practice in adjudication, "*parties to an arbitration do not conduct discovery; the arbitrators do.*") (emphasis added). Put simply, because an arbitrator controls discovery pursuant to the strictures of § 7, Plaintiff has no right to serve discovery requests upon Defendants. The power granted to the Arbitrator is simply to compel attendance at hearings of witnesses and documents at the hearing.

Further, Plaintiff's insistence on pointing the Arbitrator to the applicable Code of Ethics is inappropriate and misplaced.[15] *This is not an ethical issue.* Plaintiff's Motion to Compel does not raise "ethical concerns" for the Arbitrator and citation of such is irrelevant to the legal issue.

[15] *Id.* at 2-3.

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Even if it somehow bore relevance to the issue, the Cannons cited by Plaintiff also mandate the Arbitrator not to exceed the authority derived from the agreement of the parties.[16]

V. PLAINTIFF MISINTERPRETS THE SCADR RULES

Plaintiff quotes Rule 13(a), SCADR to support his position that the *South Carolina Rules of Civil Procedure* apply to pre-hearing discovery.[17] This is a patent misinterpretation of Rule 13(a)'s plain language. The Rule states that "[t]he Arbitrator shall at all times be authorized to control ***the hearing*** and the procedures to be followed." (emphasis added). Rule 13(a) does not provide the Arbitrator with the authority to control pre-hearing discovery but instead discusses the hearing itself. As stated ad nauseum, even if it did the FAA would preempt any conflicting state law that frustrates the FAA's purpose. Unlimited discovery pursuant to the rules of civil procedure would be in direct conflict with the FAA and thus preempted regardless. The FAA and case law cited herein make it abundantly clear that allowing full, protracted discovery directly contradicts the purpose of arbitration. Indeed, the FAA's lone discovery provision speaks solely to the actual hearing itself—not to any pre-hearing procedure. *See* 9 U.S.C. § 7.

Further, and as repeatedly emphasized by courts all over the country, the parties have no right to pre-trial discovery absent an agreement to the contrary.[18] The Facility agrees that the arbitration agreement calls for the application of the SCADR. However, Plaintiff's argument that the arbitration agreement requires the SCADR's application to pre-trial discovery is misguided. The SCADR rules do not contemplate pre-hearing discovery. The arbitration agreement does not even mention discovery. It does, however, explicitly require that the arbitration agreement "shall be governed by the Federal Arbitration Act." The plain,

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[16] Cannon 1.F states:
"When an arbitrator's authority is derived from an agreement of the parties, the arbitrator **should neither exceed that authority** nor do less than is required to exercise that authority completely."
[17] Pl. Mtn. to Comp., 2.
[18] *See supra*, at 5-7.

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unequivocal language of the SCADR grants the Arbitrator the power to control the hearing and its attendant procedures. Recognizing that the courts and the FAA consider pre-trial discovery in arbitration proceedings to be superfluous and incompatible with the very nature and goals of arbitration, the SCADR simply recognizes the Arbitrator's power to control the hearing. It does not anywhere address pre-trial procedure. *See, e.g.*, *Commercial Solvents Corp.*, 20 F.R.D. at 362; 9 U.S.C. § 7. Accordingly, pre-trial discovery should be controlled by the FAA and the Facility should not be required to answer Plaintiff's expansive, unallowable discovery requests.

CONCLUSION

For the reasons cited herein, Defendant respectfully requests an Order DENYING Plaintiff's Motion to Compel and allowing the parties to conduct discovery under 9 U.S.C. § 7, which is the FAA's sole discovery provision.

YOUNG CLEMENT RIVERS, LLP

By: _____

D. Jay Davis, Jr.
William L. Howard
P.O. Box 993, Charleston, SC 29402(843) 720-5406; jdavis@ycrlaw.com *Attorneys for the Defendants in Arbitration*

Charleston, South Carolina

Dated: 3/10/14

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 10th day of March, 2014.

Kathleen Bowers

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF BERKELEY)	
	08
Willie Powell, individually and as Personal Representative of the Estate of Rebecca Powell,)	C/A No. 07-CP-08-695
)	
Plaintiff,)	**ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION**
Versus)	
Fundamental Long-Term Care Holdings, LLC, THI of Baltimore, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC,THI of Baltimore Management, LLC, Magnolia Manor-Moncks Corner, Inc., THI of South Carolina at Moncks Corner, LLC, THI Immediate Healthcare Staffing, LLC,)	
Defendants.)	

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This matter was before the Court on the Defendants Fundamental Long-Term Care Holdings, LLC, THI of Baltimore, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, THI of Baltimore Management, LLC, Magnolia Manor-Moncks Corner, Inc., THI of South Carolina at Moncks Corner, LLC, THI Immediate Healthcare Staffing, LLC's Motion to Dismiss this matter and to Compel Arbitration. For the following reasons, the Court denies the Defendants' motion and orders that the parties proceed with discovery.

FACTUAL BACKGROUND

Rebecca Powell ("Ms. Powell"), now deceased, was admitted to a skilled nursing facility located at 505 S. Live Oak Drive, Moncks Corner, South Carolina, 29461 on August 25, 2003, and placed under the care, supervision and control of the Defendants. At the time of her admission Rebecca Powell did not sign her own Admission Contract. The Defendants allege that Ms. Powell's daughter, Pamela Powell, executed the agreement with the Defendants as the "fiduciary party." The Admission Contract contained an arbitration clause in paragraph VI on the last page. It is undisputed that (1) Ms. Powell did not sign the document; (2) Ms. Powell's daughter was not Ms. Powell's power of attorney and had no

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power to bind Ms. Powell; (3) Ms. Powell's daughter is not the Personal Representative of Ms. Powell's estate; (4) none of the Defendants named in this case are mentioned anywhere in the agreement and (4) the document was signed prior to the alleged injuries in this case.

Mrs. Powell was a resident at the Defendants' facility from August 25, 2003 until shortly before her death on March 30, 2008, with the exception of outings and hospital admissions. The Plaintiff alleges that Ms. Powell suffered injuries and death due to the Defendants' negligence. The Defendants deny the claims.

LEGAL CONCLUSIONS

The Court finds that the arbitration clause in the Admission Contract is not binding on the Plaintiff, as it was not signed and executed by her, nor is the clause still valid as the body chosen to arbitrate any dispute under the contract can no longer do so.

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (S.C. App., 1999). However, case law is clear that in determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Id.* (citing *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)). Furthermore, Arbitration is available only when the parties involved contractually agree to arbitrate. *Id.* In determining whether a particular dispute can be compelled to arbitration, a Court conducts an inquiry into whether "a valid agreement to arbitrate exists between the parties." *Hooters of America v. Phillips*, 173 F.3d. 933, 938 (4th Cir. 1999).

In this case, the Parties have not agreed to arbitrate as the contract was not executed by the Plaintiff or her valid representative. In addition, the clause is moot and ineffective because there is no proper forum, as the NHLA will no longer arbitrate this type of case.

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I. **The Court finds there is not a valid binding contract between the parties.**

Under the FAA, the party seeking arbitration must first show a written agreement between the parties to arbitrate. There is nothing in the record to show that Pamela Powell had authority to act as agent the Plaintiff, Rebecca Powell, and/or of her estate, and bind the Plaintiff or waive the Plaintiff's right to a jury trial.

The Admission Contract containing the arbitration clause which Defendants seek to enforce was signed by Pamela Powell, the daughter of Rebecca Powell, and the box was not checked to specify Pamela Powell's relationship to Rebecca Powell and/or her authority to enter into the contract. It is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority. *Frasier v. Palmetto Homes of Florence*, 473 S.E.2d 865 (S.C. App. 1996). There is no evidence that Pamela Powell possessed any other relationship with Rebecca Powell, such as Power of Attorney or Guardian, that would be capable of binding Rebecca Powell to this agreement.

Magnolia Manor's social progress notes document that Mrs. Powell was an "involved resident" who was very aware of her surroundings, as early as the time of admission. Magnolia Manor documented in its Activities Progress Notes that Mrs. Powell "like[d] any and all activities" including "Church Worship" and that she "love[d] to play Bingo." The March 2, 2006, quarterly social notes indicate that Mrs. Powell "continue[d] to be part of facility life by participating in activities and interacting with staff and residents." Magnolia Manor further documented Mrs. Powell to be a "good candidate for worship, small group activities, puzzles and memory games." As of September 21, 2006, only six months before Mrs. Powell's death, it is clear that she was very active and aware of her surroundings. Magnolia Manor's activity progress notes of that date noted that Mrs. Powell was "able to self select activities" and that Mrs. Powell still "enjoy[ed] church, music, bingo & team games." Even at the onset of the sacral pressure ulcer which would lead to Mrs. Powell's death, as of December 13, 2006, it was noted that Ms. Powell was able to self "select group activities" and that Mrs. Powell still

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enjoyed "church, music & bingo." *Additionally, the Defendants noted, as of January 22, 2004, Rebecca Powell was awake and oriented to her name, age, year of birth, town, country and birth.*

Because the Defendants own records indicate the patient was apparently competent when she was admitted to the facility, arrangements should have been made to have the resident execute the contract. The Defendants have presented no evidence to show that an authorized party signed the agreement, nor that they at any time attempted to ensure the agreement was properly executed and valid between the parties.

Furthermore, the document which the Defendants allege constitutes an agreement to arbitrate is only as to "Magnolia Manor" (a non-existent corporation) and does not mention *any* of the named Defendants in this lawsuit: Fundamental Long-Term Care Holdings, LLC, THI of Baltimore, LLC, THI of Baltimore, Inc., THI of South Carolina, LLC, THI of Baltimore Management, LLC, Magnolia Manor-Moncks Corner, Inc., THI of South Carolina at Moncks Corner, LLC, or THI Immediate Healthcare Staffing, LLC.[1] Accordingly, the Court finds no valid agreement to arbitrate.

II. <u>The Court finds that the Arbitration Clause is Unenforceable Due to an Omitted Material Term – the lack of a definitive forum.</u>

Even if there were a valid agreement between Ms. Powell and the Defendants, the Court finds that the arbitration clause contained in the Admission Contract at hand is unenforceable because a material part of the arbitration clause no longer exists.

The arbitration clause states that arbitration "... shall be resolved by binding arbitration administered by the National Health Lawyers Associations (the "NHLA"). The NHLA, now known as the American Health Lawyers Association (hereinafter "AHLA"), amended its rules for cases filed with the service after January 1, 2004. The Service will only administer consumer health care liability claims if an agreement to arbitrate was entered into by the parties in writing ***after*** **the alleged injury** occurred. This rule change applies to a very limited type of claim, namely medical malpractice, medical negligence or products liability cases brought by a patient, former patient or their representative. This change not

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only rests with the AHLA (f/k/a the NHLA), but also with the world's leading provider of conflict management and dispute resolution services known as the American Arbitration Association (hereinafter "AAA"). As of January 1, 2003, the AAA announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate. The Senior Vice President of the AAA, Robert Meade, stated that the AAA thought it was appropriate to change their policy in these types of cases since, "medical problems can be life or death situations and require special consideration."

While strong federal policy in favor of arbitration is well-established, the FAA makes clear that arbitration agreements must "be valid, irrevocable and enforceable... " to be enforced. *Smith Barney, Inc. v. Critical Health Systems of NC*, 212 F.3d 858, 861 (4th Cir. 2000) (citing 9 U.S.C. § 2). As set forth in Part I, *supra*, in determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles v. United Healthcare Corp.* 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (S.C. App., 1999)(citing *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)). The choice of the arbitral forum is one of the most important and material terms in an agreement to arbitrate. Consideration of objections by the Court to the arbitral forum are warranted. See *Penn v. Ryan's Family Steakhouses, Inc.*, 95 F. Supp.2d 940, 947 (2000). The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability. See *Sydnor v. Conseco Fin. Servicing Corp.*, 252 F.3d.302, 205 (4th Cir.2001).

South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 1989 (citing *Hughes v. Edwards*, 265 S.C. 529 (1975). The forum chosen for the arbitration to take place is just that, essential and material.

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In *Smith Barney,* the arbitration agreement provided that arbitration would proceed in accordance with the rules of three self-regulatory organizations, the NASD, the NYSE and the AMEX. "Notably, the agreement makes no mention whatsoever of the AAA." *Smith Barney* at 862. "Where the parties have agreed explicitly to settle their disputes before particular arbitration fora, that agreement must control. To hold otherwise would require us to impose a strained construction on a straightforward agreement." *Id.* at 862 (internal citations omitted). Similarly, in the case before this Court, the clause specifically states that the NHLA shall administer the arbitration, and the NHLA, now known as the AHLA, no longer will arbitrate this dispute without an arbitration clause signed post injury; therefore, the forum fails and the arbitration clause is unenforceable.

In these types of cases similarly situated Defendants have asserted that §5 of the FAA can be invoked so as not to destroy the enforceability and effectiveness of the arbitration clause. While this argument is enticing, the plain language of §5 prevents its use in this instance. In this particular cased, there has not been a lapse in naming an arbitrator as contemplated by §5 of the FAA, rather, the parties' agreement as to the administration and forum for the arbitration has lapsed. Had the parties not agreed specifically on NHLA to administer this arbitration, this Court could apply §5 to appoint an arbitrator if the parties could not agree upon the same.

An agreement which neglects material terms may be found unenforceable for indefiniteness. *Lindsay v. Lindsay*, 491 S.E.2d 583 (S.C. App. 1997). "Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced." *Id.* In this particular case, even if the contract was validly executed, there was not "meeting of the minds" as to the terms of arbitration, specifically the choice of arbitrator. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, to say otherwise undermines the purpose of the arbitration process. Through no fault of either party, the parties cannot now arbitrate this dispute through the NHLA. As a result, the promise that the dispute "shall be resolved by binding arbitration administered by the National Health Lawyers Associations" is moot and

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ineffective. The Plaintiff cannot be bound to act on a promise that is no longer possible; therefore, the Court finds that arbitration should not be compelled in this case.

CONCLUSION

For the above reasons, the Court denies the Defendants' motion to compel arbitration and finds that and Orders that the case is properly before the Court and discovery shall proceed.

August 26, 2008
Moncks Corner, South Carolina

Hon. Kristi Lea Harrington
Ninth Judicial Circuit

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AAA® Healthcare Policy Statement

In 2003, the American Arbitration Association® ("AAA") announced that it would not administer healthcare arbitrations between individual patients and healthcare service providers that relate to medical services, such as negligence and medical malpractice disputes, unless all parties agreed to submit the matter to arbitration after the dispute arose. This policy is consistent with the *American Arbitration Association/American Bar Association/American Medical Association Due Process Protocol for the Mediation and Arbitration of Health Care Disputes.*

However, the AAA will administer disputes between patients and healthcare providers to the extent a court order directs such a dispute to arbitration where the parties' agreement provides for the AAA's rules or AAA administration. In addition, the AAA will continue to administer arbitrations that involve solely billing or collections matters between an individual and a doctor or healthcare provider, although such billing or collections disputes may be governed by the *AAA's Consumer Rules and Consumer Due Process Protocol.*

The AAA notes that this policy does not relate to or impact the administration of all other types of disputes in the healthcare field, such as disputes among providers, healthcare companies, insurance carriers and related entities. For more information on the AAA's administration of these types of cases and the *AAA's Healthcare Payor Provider Arbitration Rules*, please visit **www.adr.org.**

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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155
TELEPHONE: (651) 296-6196

For Immediate Release
July 19, 2009

Contact: Ben Wogsland at: (651) 296-2069
(612) 818-0965 (pager)

NATIONAL ARBITRATION FORUM BARRED FROM CREDIT CARD AND CONSUMER ARBITRATIONS UNDER AGREEMENT WITH ATTORNEY GENERAL SWANSON

Swanson Also Wants Congress to Ban "Fine Print" Forced Arbitration Clauses

Minnesota Attorney General Lori Swanson and the National Arbitration Forum—the country's largest administrator of credit card and consumer collections arbitrations—have reached an agreement that the company would get out of the business of arbitrating credit card and other consumer collection disputes.

"I am very pleased with the settlement. To consumers, the company said it was impartial, but behind the scenes, it worked alongside credit card companies to get them to put unfair arbitration clauses in the fine print of their contracts and to appoint the Forum as the arbitrator. Now the company is out of this business," said Swanson.

Swanson sued the National Arbitration Forum on Tuesday, alleging that the company--which is named as the arbitrator of consumer disputes in tens of millions of credit card agreements--hid from the public its extensive ties to the collection industry. The lawsuit alleged that the Forum told consumers and the public that it is independent and neutral, operates like an impartial court system, and is not affiliated with and does not take sides between the parties. The lawsuit alleged that the Forum worked behind the scenes, however, to convince credit card companies and other creditors to insert arbitration provisions in their customer agreements and then appoint the Forum to decide the disputes. The suit also alleged that the Forum has financial ties to the collection industry. The suit alleged that the company arbitrated 214,000 consumer arbitration claims in 2006, nearly 60 percent of which were filed by laws firms with which the Forum is linked through ties to a New York hedge fund.

Under the settlement, the National Arbitration Forum will, by the end of the week, stop accepting any new consumer arbitrations or in any manner participate in the processing or administering of new consumer arbitrations. The company will permanently stop administering arbitrations involving consumer debt, including credit cards, consumer loans, telecommunications, utilities, health care, and consumer leases.

Credit card companies, banks, retail lenders, and cell phone companies increasingly place—in the fine print of their consumer agreements—what are known as "mandatory predispute arbitration clauses." Through these clauses, the consumers waive, in advance, their

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right to have their day in court if a dispute arises. Instead, the consumer agrees—usually without knowing it—that any dispute will be resolved by an arbitrator selected by the credit card company or other creditor. Credit card companies are among the most prolific users of mandatory arbitration clauses. Just by keeping a credit card, the consumer agrees to the terms and conditions of the card, even if the arbitration provision was sent to the consumer after the card was issued. As a result of mandatory arbitration clauses, which appear in tens of millions of consumer agreements, hundreds of thousands of consumer disputes are resolved each year not by a judge or jury, but by a private arbitration system.

Swanson said that late this week she accepted an invitation from Congressman Dennis Kucinich, Chairman of the Congressional Committee on Oversight and Government Reform, to testify before the Committee this coming Wednesday in Washington, D.C. She said she will ask Congress to prohibit the use of mandatory pre-dispute arbitration clauses in consumer contracts.

"The playing field is tilted against the ordinary consumer when credit card companies bury unfair terms like forced arbitration clauses in fine print contacts. Congress should change that," said Swanson.

Swanson also announced that she sent a letter to the American Arbitration Association asking it to play a leadership role by ceasing to accept arbitration filings on consumer credit and collection matters arising out of mandatory pre-dispute arbitration clauses.

Swanson noted that the City of San Francisco is in litigation with the Forum and that other state Attorneys General have contacted her about these issues since the announcement of the lawsuit. "I am very pleased with the results of our lawsuit. It is good for consumers that this company will no longer be able to administer credit card and consumer debt collection arbitrations. I hope other jurisdictions will use whatever authority they have to look at other possible remedial relief in this area," said Swanson.

The settlement allows the Company to continue to arbitrate internet domain name disputes (which the company handles under an appointment from the Internet Corporation for Assigned Names and Numbers (ICANN)), personal injury protection claims (which the company performs under appointment and supervision under the New Jersey state government), and cargo disputes (which the company performs under rules established by the U.S. Department of Transportation). These areas were not part of the lawsuit, and the company performs the work under the supervision of government or non-government organizations (NGOs). Accordingly, the settlement does not affect this very limited activity.

The Consent Decree and amendatory letter are attached.

--30--

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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: Other Civil
(Consumer Protection)

State of Minnesota by its Attorney General, Lori Swanson,

Plaintiff,

vs.

National Arbitration Forum, Inc., National Arbitration Forum, LLC, and Dispute Management Services, LLC, d/b/a Forthright,

Defendants.

Court File No. 27-CV-09-18550
Judge John L. Holahan

CONSENT JUDGMENT

WHEREAS, Plaintiff State of Minnesota, by and through its Attorney General, Lori Swanson ("State"), filed a Complaint in this matter on July 14, 2009 ("Complaint") against National Arbitration Forum, Inc., National Arbitration Forum, LLC, and Dispute Management Services, LLC, d/b/a Forthright (hereinafter, collectively, the "NAF Entities") (the State, and the NAF entities are hereinafter collectively referred to as the "Parties");

WHEREAS, this Consent Judgment shall not be construed as an admission of wrongdoing or liability by the NAF Entities;

NOW, THEREFORE, in the interest of resolving this action, the State and the NAF Entities hereby stipulate and consent to entry of this Consent Judgment, as set forth below:

1. The purpose of this Consent Judgment is to require the complete divestiture by the NAF Entities of any business related to the arbitration of consumer disputes.

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2. The term "Consumer Arbitration" means any arbitration involving a dispute between a business entity and a private individual which relates to goods, services, or property of any kind allegedly provided by any business entity to the individual, or payment for such goods, services, or property. The term includes any claim by a third party debt buyer against a private individual. It does not include, however, the arbitration of internet domain name disputes on behalf of the Internet Corporation for Assigned Names and Numbers (ICANN), the processing of personal injury protection (PIP) disputes, the processing of shipping or storage disputes under 49 CFR § 375.211, or arbitrations where a NAF Entity is appointed and supervised by a government entity.

3. On or after July 24, 2009, no NAF Entity shall:

a. Accept any fee for processing any new Consumer Arbitration.

b. Administer or process any new Consumer Arbitration.

c. In any manner participate in any new Consumer Arbitration.

d. Attempt to influence the outcome of any arbitration proceeding currently pending before it.

4. The NAF Entities shall not engage in any deceptive practices, or make any false or misleading statements, in violation of Minn. Stat. §§ 325F.69, subd. 1; 325D.44, subd. 1; and 325F.67.

5. The NAF Entities shall pay investigative costs to the State of Minnesota within ten days of the date this Consent Judgment is signed. Notwithstanding this payment, the NAF Entities shall also pay the State of Minnesota an amount equal to any amount paid to the City of San Francisco over the next six months, in excess of the City's actual investigative expenses and attorneys' fees.

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6. The Parties have read this Consent Judgment and voluntarily agree to its entry.

7. In consideration of the stipulated relief, the sufficiency of which is acknowledged, the Office of the Attorney General, by execution of this Consent Judgment, hereby fully and completely releases the NAF Entities, including all of their past and present agents, employees, officers, directors, subsidiaries, shareholders, and affiliates, of any and all claims of the Attorney General connected with or arising out of the allegations in the State's Complaint in the above-captioned action, up to and including the date of this Consent Judgment.

8. Promptly after receiving notice that the Court executes this Consent Judgment, the State shall voluntarily dismiss the above-captioned action pursuant to Minnesota Rule of Civil Procedure 41.01(a).

9. The Parties shall cooperate to implement and facilitate this Consent Judgment, including the exchange of information reasonably necessary for that purpose or to confirm the NAF Entities' compliance with this Consent Judgment.

10. Any failure by any Party to this Consent Judgment to insist on performance by any other Party of any provision of this Consent Judgment shall not be deemed a waiver of any of the provisions included herein.

11. The Parties agree to bear their own costs and fees in this matter.

12. Each Party participated in the drafting of this Consent Judgment, and each agrees that the Consent Judgment's terms may not be construed against or in favor of any Party by virtue of draftsmanship. Each signatory further agrees they have authority to enter into this Consent Judgment.

13. This Consent Judgment, including any issues relating to interpretation or enforcement, shall be governed by the laws of Minnesota. The Court shall retain jurisdiction over this matter to enforce the terms of this Consent Judgment.

Dated: 7/17/09

National Arbitration Forum, Inc.

By: _____

Its _____

Dated: 7/17/09

National Arbitration Forum, LLC

By: _____

Its _____

Dated: 7/17/09

Dispute Management Services, LLC, d/b/a Forthright

By: _____

Its CEO

Dated: 7/17/09

LORI SWANSON
ATTORNEY GENERAL
STATE OF MINNESOTA

_____
Lori Swanson

IT IS SO ORDERED.

Dated: _____

BY THE COURT:

_____
John L. Holahan
Hennepin County District Court Judge

LET JUDGMENT BE ENTERED ACCORDINGLY.

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OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

July 19, 2009

President
American Arbitration Association
Corporate Headquarters
1633 Broadway
10th Floor
New York, New York 10019

Dear President:

This office recently concluded a year long investigation of National Arbitration Forum ("NAF"). The investigation concluded with an agreement by NAF that it would no longer arbitrate consumer debt disputes. I enclose a copy of the Consent Order and the amendatory letter. While the lawsuit focused on conflict of interest issues, our investigators and attorneys also interviewed over one hundred consumers who complained about the arbitration process. Based on our investigation, it is my conclusion that pre-dispute mandatory arbitration provisions are fundamentally unfair to the consumer. This is particularly the case with credit card contracts and other consumer contracts—such as cell phone, utility, loan, and hospital agreements—where the mandatory arbitration provisions are hidden in the fine print. Our findings include the following:

First, pre-dispute mandatory arbitration agreements are nearly always the product of unequal bargaining power between the consumer and the business. In almost every interview we found that the consumer was not aware of the arbitration provision. In many cases the consumer never saw the provision, because it was simply mailed with a monthly statement. The consumer is given virtually no opportunity to reject the provision. Yet, through these provisions, the consumer gives up their important right to have his or her day in court.

Second, because the consumer is unaware of the mandatory arbitration provision, in many cases the consumer ignored the notice of arbitration served on them. Since they did not know that they agreed to arbitration, and were unfamiliar with the arbitration process, they didn't believe they were obligated to respond to an arbitration notice from an office in Minnesota. It is part of our democracy that we have a right to redress in a court of law, and that includes the notion that the court should be easily accessible to the consumer. Through pre-dispute mandatory arbitration clauses, consumers forfeit this important right without even knowing it.

Third, it is apparent, based on many interviews with consumers, arbitrators and employees of NAF, that arbitrators have a powerful incentive to favor the dominant party in an arbitration; namely, the corporation. Indeed, there is a term commonly used in the arbitration industry called "repeat player bias," describing a phenomena describing where an arbitrator is more likely to favor the party that is likely to send future cases. This bias does not exist in a court, where the judge is not reliant on a dominant player for his or her future income. In the case of NAF, arbitrators and employees claimed that arbitrators who issued an award against the corporation, or who failed to award attorney's fees against the consumer, were simply "deselected" and not appointed to future proceedings.

Fourth, consumers are not aware they can submit exhibits, and many are not aware that there will only be a "document hearing" with no opportunity to be heard. For instance, victims of identity theft were not told to submit a copy of a police report, even though arbitrators were advised that, absent such documentation, the claim of identity theft should be ignored.

Fifth, the arbitration process is fundamentally unfair for holding corporations responsible for any wrongdoing. In some cases, consumers forfeited important rights in the fine print of contracts they had never seen. Consumers who we interviewed in the NAF investigation were told that, when they initiated a claim against the corporation, the claim could be delayed for up to one year before there was any review of the matter.

There are many other defects in the process. The fundamental problem with consumer arbitrations under "fine print" contracts is that the arbitration company draws its income from the dominant participant--namely the credit card company, telecommunications company, the hospital, etc.--and personnel have a financial incentive to make sure that the corporation is pleased with the outcome. Otherwise, the corporation will undoubtedly look to other arbitration administrators. As noted above, this "repeat player" bias does not occur in court, since judges rely on taxpayers—not litigants—for their income.

In short, for the above reasons and many others, I ask that your organization take the initiative to announce that it will not accept the arbitration of credit card and other consumer debt claims based on pre-dispute mandatory arbitration clauses. Because the AAA and NAF are the largest arbitration companies, I believe such a proclamation by AAA would be a powerful signal to Congress that reform is desperately needed in this area.

Sincerely

LORI SWANSON
Attorney General

Enclosure

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Alternative Dispute Resolution (ADR)

Mediation and Arbitration Services

Important Announcement Related to Health Lawyers' ADR Service

The American Health Lawyers Association's Alternative Dispute Resolution Service [the Service] has amended its rules for cases filed with the Service after January 1, 2004. The Service will only administer consumer health care liability claims if an agreement to arbitrate was entered into by the parties in writing after the alleged injury occurred.

The term "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

Health Lawyers' ADR Service will continue to administer all other kinds of claims whether the agreement to arbitrate or mediate was entered into pre or post alleged injury. The ADR Service is an important service offered by the Association, and we encourage attorneys to use this Service to resolve conflicts that may arise in interpreting agreements entered into by healthcare providers, professionals, plans, vendors, and service providers. The Service's rules contain sample arbitration and mediation provisions to use in agreements in case of a dispute.

The Service distinguishes itself by having a diverse list of 205 resolvers. Use the links on this page to learn more about Health Lawyers' ADR Service.

<- Back to Mediation and Arbitration Services page

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Suite 600, 1025 Connecticut Avenue NW
Washington, DC 20036-5405
Phone: (202) 833-1100
Fax: (202) 833-1105

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2014CP2300878

Patricia Young	Donald Estate Of Young
PLAINTIFF(S)	

National Healthcare Corporation	NHC/OP LP
National Health Corporation	NHC Mauldin LLC
NHC Healthcare Mauldin	Carolina Medical Rehabilitation LLC
Byung Hung Choe	Keith Schentzel
Gary Barcinas PA	
DEFENDANT(S)	

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.

☐ **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: _____

☐ **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.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL C. WICKENSIMER
2018 JUL 24 PM 4:25

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

7/24/2014

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 3/2013)

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Circuit Court Judge | Judge Code | Date

For Clerk of Court Office Use Only

This judgment was entered on **24rd day of July, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **24rd day of July, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Matthew W. Christian Christian & Davis P.O. Box 332 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Floyd Matlock Elliott Haynsworth Sinkler Boyd, P.A. P.O. Box 2048 Greenville, SC 29602
John Edward Cuttino Turner Padget Graham & Laney, PA P.O. Box 1473 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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ELECTRONICALLY FILED - 2018 Dec 17 8:56 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	THIRTEENTH JUDICIAL CIRCUIT IN THE COURT OF COMMON PLEAS
PATRICIA YOUNG, Individually and as Personal Representative of the Estate of Donald Young, Plaintiff, vs. NATIONAL HEALTHCARE COPRORATION, NHC/OP, L.P., NATIONAL HEALTH CORPORATION, NHC-MAULDIN, LLC d/b/a NCH HEALTHCARE MAULDIN, CAROLINA MEDICAL REHABILITATION, LLC, BYUNG HUNG CHOE, M.D., KEITH SCHENTZEL, M.D., and GARY BARCINAS, P.A., Defendants.	C. A. No. 2014-CP-23-00877 C.A. No. 2014-CP-23-00878 **ORDER**

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL D. WICKENSIMER
2019 JUL 24 PM 4 27

This matter came before the Court on Defendants National Healthcare Corporation, NHC/OP, L.P., and National Health Corporation's (collectively hereinafter as "Corporate NHC Defendants") Motion to Dismiss and to Compel Arbitration and Defendant NHC-Mauldin, LLC d/b/a NCH Healthcare Mauldin's (hereinafter "NHC-Mauldin") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memorandums, for the reasons more fully set forth below, the Court hereby grants the Motion to Compel Arbitration as to Civil Action number 2014-CP-23-00877 ("Survival Action"), but denies the Motion to Dismiss the Corporate NHC Defendants and to Compel Arbitration as to Civil Action number 2014-CP-23-00878 ("Wrongful Death Action").

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BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of nursing home negligence resulting in the death of Donald Young ("Decedent"). Patricia Young ("Plaintiff") was Decedent's spouse and serves as the personal representative of Decedent's estate.

On November 5, 2012, Decedent was admitted to NHC-Mauldin, a skilled nursing facility. National Healthcare Corporation is the parent corporation of NHC-Mauldin, and NHC/OP, L.P., and National Health Corporation are affiliate corporations. Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over NHC-Mauldin directly affected the quality of care received by Decedent.

At the time of admission, Decedent entered into an Admission and Financial Contract (the "Agreement") for the provision of health care services. As part of the Agreement, Decedent also executed an Agreement to Arbitrate ("Arbitration Agreement"). The Arbitration Agreement was also executed by Plaintiff, as an "other person signing on behalf of patient."

The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedure set forth in the Arbitration Agreement. This Procedure can be 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 Mr. Young;
2. Where the amount in controversy sits within the limits for submission to South Carolina Small Claims Court, then the controversy will be submitted to

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that Court;

3. Any disputes with an amount in controversy exceeding the limits for submission to small claims court shall be resolved by binding arbitration. There are no limits on the award of actual or punitive damages in the Agreement.

Plaintiff filed the instant actions on February 18, 2014. Plaintiff has not complied with the Grievance Procedure as described in the Patient Rights Booklet for claims or disputes arising out of or in connection with Decedent's care, nor, despite the fact that the amount in controversy exceeds the limits for submission to small claims court, has Plaintiff made an attempt to arbitrate this matter as Defendants contend is required under the Arbitration Agreement.

LEGAL ANALYSIS AND CONCLUSIONS

Whether the parties agreed to arbitrate 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."). The courts, not arbitrators, are charged with deciding certain "gateway matters" including whether the parties have a valid arbitration agreement or whether the arbitration clause applies to a certain type of controversy. New Hope Missionary Baptist Church v. Paragon Builders, 379 S.C. 620, 629, 667 S.E. 2d 1, 5 (Ct. App. 2008). The Court finds that the parties had a valid arbitration agreement; however, the agreement applies only to the Survival Action.

I. Survival Action Subject to Arbitration

The Survival Action is clearly within the scope of the Arbitration Agreement. The pertinent language of the Arbitration Agreement states,

> "The parties shall submit to binding arbitration all disputes... arising out of or in any way related or connected to the Patient's

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> 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 Arbitration Agreement implicitly recognizes that injuries may occur to Decedent while he was a resident of NHC-Mauldin and that personal injuries and tort claims arising therefrom are to be governed by the Arbitration Agreement. It is clear that the intent of the Arbitration Agreement is to resolve allegations of negligence and personal injury through arbitration.

It is undisputed that Decedent and Plaintiff both signed the Arbitration Agreement and that there is nothing improper about the Arbitration Agreement on its face. In opposition to the Motion to Compel Arbitration, Plaintiff argues that the Arbitration Agreement should be deemed unconscionable due to the circumstances upon which it was executed. Specifically, Plaintiff contends that the Arbitration Agreement was just one of many documents that Decedent executed in a short period of time during the admission process, so Decedent may not have had time to fully read it. However, whether the Decedent did or did not read the Arbitration Agreement is irrelevant since it is well established that a person who signs a contract cannot avoid the effect of the document by claiming he did not read it. Regions Bank v. Schmauch, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) ("Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.") In addition, Plaintiff contends that Decedent had taken narcotic medications prior to admission that may have affected his mental status and his ability to understand the document. But, mere speculation that Decedent may have been incompetent at the time is insufficient. Plaintiff had the burden of proving Decedent's incompetence, and she failed to put forth any

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evidence in support of her allegation. *See* Schmauch, 354 S.C. at 665, 582 S.E.2d at 441.

Therefore, this Court finds that Decedent knowingly entered into an agreement to arbitrate any claims that arose from his being a patient of NHC-Mauldin. As a result, this Court grants NHC-Mauldin's Motion to Dismiss the Survival Action and to Compel Arbitration pursuant to the terms of the Arbitration Agreement on all claims that were made or could have been made in the Survival Action. Further, the Court finds that the Corporate NHC Defendants were intended beneficiaries of the Arbitration Agreement; therefore, the order compelling arbitration of the Survival Action shall also apply to the Corporate NHC Defendants as the allegations against those Defendants are based on the same facts and are inherently inseparable from the claims made against NHC-Mauldin. *See* Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); *see also* Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012).

II. Wrongful Death Action Not Subject to Arbitration

While Decedent and NHC-Mauldin clearly intended to arbitrate any claims between them, it is less clear whether the Arbitration Agreement mandates arbitration for all claims related to Decedent's injuries and death. It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the decedent's statutory beneficiaries who were not a party to the contract. *Compare* Carter v. SSC Odin Operating Company, *LLC*, 2012 IL 113204, 976 N.E.2d 344, 360, 364 Ill. Dec. 66 (Ill. 2012); Lawrence v. Manor, 273 S.W.3d 525, 530 (Mo. 2009); Bybee v. Abdulla, 2008 UT 35, 189 P.3d 40,47, 50 (Utah 2008); Peters v. Columbus Steel Castings Co., 115 Ohio St. 3d 134, 2007 Ohio 4787, 873

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N.E.2d 1258, 1262 (Ohio 2007); McFarren v. Emeritus at Canton, 2013 Ohio 3900, 997 N.E.2d 1254, 2013 WL 4822908 (Ohio App. 2013); Pisano v. Extendicare Homes, Inc., 2013 PA Super 232, 77 A.3d 651, 2013 WL 4046673 (Pa. Super. 2013); Woodall v. Avalon Care Center-Federal Way, *LLC*, 155 Wn. App. 919, 231 P.3d 1252, 1257-59 (Wash. App. 2010) *with* Graves v. B.P., 568 F.3d 221, 223 (5th Cir. 2009); Peltz ex rel. Estate of Peltz v. Sears, Roebuck & Co., 367 F.Supp.2d 711, 718-19 (E.D. Pa. 2005); Laizure v. Avante at Leesburg, Inc., 109 So. 3d 752, 762 (Fla. 2013); Ruiz v. Podolsky, 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584, 591 n. 2 (Cal. 2010); In re Labatt Food Service, L.P., 279 S.W.3d 640, 647 (Tex. 2009); Briarcliff Nursing Home, Inc. v. Turcotte, 894 So.2d 661, 665 (Ala. 2004); Allen v. Pacheco, 71 P.3d 375, 379 (Colo. 2003); Estate of Richard Heiney v. Life Care Centers of America, Inc., 2013 Ariz. App. Unpub. LEXIS 496, 2013 WL 1846599 (Ariz. App. 2013).

This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a decedent cannot bind the decedent's statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914). The Arbitration Agreement, by its own terms, "is an agreement to arbitrate any dispute that might arise between Donald W. Young ("Patient") and NHC Healthcare Mauldin, LLC ("Center")." Decedent had the authority to bind himself and his claims to arbitration, but this Court finds he did not have the legal authority to bind his statutory beneficiaries who were not a party to the Arbitration Agreement.

NHC-Mauldin contends that the Arbitration Agreement expressly covers the statutory beneficiaries' claims, and that by signing the agreement, Decedent knowingly bound those

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claims to arbitration. However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, Inc.,

> "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract—individuals or entities with no substantive rights under the contract and no direct benefits—may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants."

376 S.W.3d at 599-600.

NHC-Mauldin contends that the fact that Plaintiff signed the Arbitration Agreement distinguishes this case from Ping and the other cases cited above. While it is true that Plaintiff signed the Arbitration Agreement, by its own terms, she did so on behalf of Decedent, not on her own behalf. As a result, the Court finds Plaintiff did not knowingly agree to arbitrate her claims against NHC-Mauldin. Regardless, even if the Court were inclined to agree that Plaintiff signed the Arbitration Agreement on her own behalf, Plaintiff has represented to the Court that she is not the only statutory beneficiary seeking to recover damages via the Wrongful Death action; therefore, even if her individual claims should be subject to arbitration, she did not have the authority to bind the other statutory beneficiaries' claims. As a result, they have a right to have their claims decided by a jury of their peers should the evidence so warrant.

III. Corporate NHC Defendants

The Court finds there are pending questions of fact as to whether the Corporate NHC Defendants had sufficient control over NHC-Mauldin and the care that was provided to Decedent so as to subject them to the jurisdiction of this Court. Questions regarding the Corporate NHC Defendants' level of involvement in the management of daily affairs including, employee scheduling and patient care, as well as the corporate involvement in the overall management of NHC-Mauldin must still be resolved through further discovery. Therefore, the Corporate NHC Defendants' Motion to Dismiss in the Wrongful Death action is denied at this time without prejudice. The Corporate NHC Defendants may raise the issue again at summary judgment as discovery warrants.

WHEREFORE, for the reasons stated herein, the Court grants the Motion to Dismiss the Survival Action and orders the parties to arbitrate the matter pursuant to the terms of the Arbitration Agreement. But, the Court denies the Motion to Compel Arbitration in the Wrongful Death action and also denies, without prejudice, the Motion to Dismiss the Corporate NHC Defendants.

IT IS SO ORDERED.

Robin B. Stilwell
Presiding Judge

June 26, 2014
Greenville, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2018-CP-23-00119 & 2018-CP-23-00120
	)	
Marlene Wilson, Individually and as Personal Representative of the Estate of Kenneth Wilson,	)	
	)	
Plaintiff,	)	**ORDER**
	)	
v.	)	
	)	
NHC Healthcare/Mauldin, LLC, National Healthcare Corporation, NHC/OP, LP, Bon Secours St. Francis Health System, Inc., Bon Secours Health System, Inc.,	)	
	)	
Defendant(s).	)	

This matter came before the Court on Defendants National Healthcare Corporation' and NHC/OP, LP's (hereinafter "Nursing Home Defendants") Motion to Dismiss and to Compel Arbitration. Having listened to oral arguments from counsel and having reviewed the parties' legal memoranda for the reasons more fully set forth below, the Court hereby denies the Defendants' Motion to Dismiss and to Compel Arbitration.

BACKGROUND

This matter arises out of two civil actions – a survival action and a wrongful death action. Both actions involve allegations of nursing home negligence and corporate negligence resulting in the death of Kenneth Wilson (hereinafter "Decedent"). Marlene Wilson (hereinafter "Daughter") was Decedent's daughter and serves as Personal Representative of Decedent's estate. On April 6, 2015, Decedent was admitted to NHC Mauldin for short-term rehabilitation after undergoing a hip arthroplasty at St. Francis

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Hospital. Plaintiff alleges that as a result of Nursing Home Defendants' negligence, Decedent developed necrotic and infected bedsores, became dehydrated, suffered from nutritional compromise, and developed multiple infections which went untreated, all of which Plaintiff alleges caused Decedent's injuries and death.

At the time of admission, Daughter signed an Agreement to Arbitrate and Waive Jury Trial ("Arbitration Agreement"). The Arbitration Agreement was signed by Jennifer Balon for "The Center" and by Daughter for "The Patient". The Arbitration Agreement provides that the parties agree to follow the dispute resolution procedures set forth in the Arbitration Agreement which include the waiver of a jury trial and the requirement that the parties submit to binding arbitration all disputes against each other which exceed an amount in controversy over $7,500.00.

Plaintiff filed the Notice of Intent to File Suit on September 14, 2017. The parties engaged in the mandatory pre-suit mediation on December 28, 2017. Plaintiff then filed the Summons and Complaint on January 5, 2018 and served same. Nursing Home Defendants filed this Motion to Dismiss and to Compel Arbitration on February 28, 2018. Nursing Home Defendants contend that this Arbitration Agreement requires that this Court order that this case be dismissed and that the claims be submitted to binding arbitration in accordance with the Arbitration Agreement. Plaintiff contends that the Arbitration Agreement is unenforceable under state contract law and this Court agrees for the various reasons set forth hereinbelow.

LEGAL ANALYSIS AND CONCLUSIONS

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. See Aiken v. World Finance

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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). 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 for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67,78,749 S.E.2d 139, 144 (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.").

I. Daughter had No Authority to Sign the Arbitration Agreement for Decedent

Because Decedent did not sign the Arbitration Agreement, Daughter was required to have authority to execute the Arbitration Agreement for the Arbitration Agreement to be enforceable. Daughter had no such authority. The legal consequences of an agent's actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 598 S.E.2d 717, 359 S.C. 635, 642 (Ct. App. 2004). In the present case, neither actual or apparent authority exists for Daughter.

A. No Actual Agency/Authority

While it is true that Daughter held a "Power of Attorney" on behalf of Decedent, this Power of Attorney did not confer the necessary authority to execute an arbitration agreement on Decedent's behalf. This document is titled "Power of Attorney" and is not

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identified a "General Durable Power of Attorney." More importantly, the document does not confer sufficient authority to enter into contracts generally, to enter into releases on behalf of Decedent, to waive the constitutional right to a jury trial, nor does it include the "catch all provision giving the attorney-in-fact the authority 'to sign any and all releases or consent required.'" Sovereign Healthcare of Tampa v. Schmitt, 195 So. 3d, 1175 (Fla. Dist. Ct. App. 2016).

The powers and authorities which Daughter held were specifically delineated in the Power of Attorney. These powers granted to Daughter the authority to make decisions regarding financial matters and decisions regarding healthcare.

This analysis is akin to that in Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13. As noted in Hodge, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most, [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" Id at 29 quoting Dickerson v. Longoria, 95 A.2d 721, 743, 414 Md. 419 (2010). The Hodge court further noted that the authority to sign healthcare documents does not include the authority to sign an arbitration agreement. Hodge at 40. Our courts have held a healthcare power of attorney does not provide authority to sign an arbitration agreement. Hodge v. UniHealth Post-Acute Care of Bamberg, 2018 S.C. App. LEXIS 13; Thompson v. Pruitt Corp., 784 S.E.2d, 679, 416 S.C. 43, 55 (Ct. App. 2016), *cert. denied*, S.C. Sup. Ct. Order dated Dec. 2, 2016.

Furthermore, the South Carolina Supreme Court has held that "The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby

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waiving the principal's right of access to the courts and to a jury trial." Hodge at 37 quoting Thompson at 55, 784 S.E.2d at 686. As previously indicated, this Power of Attorney did not have the "catch all" language of many general powers of attorney and does not encompass the executing of an agreement to resolve legal claims by arbitration and waiving a jury trial, but rather, deals with the limited circumstances enumerated therein of making financial or healthcare decisions for Decedent. Therefore, no actual authority existed for Daughter to sign the Arbitration Agreement.

B. No Apparent Agency/Authority NAAA

Daughter did not have apparent authority/agency to execute the Arbitration Agreement on behalf of the Decedent. Apparent authority is based on "representations made by the principal to the third party and reliance by the third party on those representations". Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649, S.E.2d 488, 491 (2007). Apparent authority exists when the principal is bound by the acts of its agent after the principal has placed the agent in such a position that a person of ordinary prudence, reasonably familiar with business usages and custom is led to believe the agent has certain authority and in turn, deals with the agent based on the assumption. Muller v. Myrtle Beach Golf and Yacht Club, 303 S.C. 137, 399 S.E.2d 430 (Ct. App. 1990), *rev'd on other grounds.*

South Carolina law requires that to prove apparent authority, the Defendants must show "... (1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party's detriment." Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made

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by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance, Company, 306 S.C. 423, 412 S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists.

Nursing Home Defendants have presented no evidence that Decedent represented, implicitly or explicitly, to the Nursing Home Defendants that Daughter had the authority to enter into the Arbitration Agreement on his behalf. The Affidavit presented by Plaintiff reflects that Decedent was not present when Daughter signed the Arbitration Agreement as he was still in the hospital. The Affidavit further reflects that Decedent was never aware that Daughter had signed the Arbitration Agreement and never authorized Daughter to sign such contracts or agreements. Further, based upon the Affidavit of Daughter and the records submitted as exhibits at the hearing, Decedent was confused from the effects of the anesthesia and had "moderate" mental impairment.

It should further be noted that despite the fact that Decedent's mental impairment improved to "cognitively intact", according to Nursing Home Defendants' own records during his admission, Defendants never requested that Decedent sign the Arbitration Agreement personally. Further, the Arbitration Agreement does not reflect any authority which Daughter had to execute such agreement despite the Arbitration Agreement's own requirement that any such authority be delineated.

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Nursing Home Defendants must also show a detrimental change of position. It should also be noted that the Arbitration Agreement is separate from the Admissions Agreement. The facility cannot show that it changed its position for the worse as required to prove any apparent authority/agency as reflected in Hodge.

Because Decedent did not consciously or impliedly represent that Daughter was his agent and because there was no change of position by the Nursing Home Defendants, Nursing Home Defendants cannot show that Daughter had apparent authority/agency to execute the Arbitration Agreement on behalf of Decedent.

II. The Arbitration Agreement is Unenforceable Against the Decedent's Wrongful Death Statutory Beneficiaries

It is the conclusion and order of this Court that the Arbitration Agreement is unenforceable for the above-stated reasons. However, even if Daughter had actual or apparent authority/agency to sign the Arbitration Agreement on behalf of Decedent, the Arbitration Agreement is unenforceable against the Decedent's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.

South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Decedent's admission to the facility, he might have had the authority to

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bind himself and his claims to arbitration but was never given the chance. However, even if Decedent had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Decedent and NHC Healthcare/Mauldin, LLC. No other persons are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Decedent and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors. Daughter's Affidavit reflects that other statutory beneficiaries exist in this case.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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Many other states have come to this same conclusion, Daniels v. Sunrise Senior Living, Inc., 212 Cal.App 4th 674, 151 Cal.Rptr.3d 273 (Cal.App.4 Dist, 2013) (Wrongful Death claims not bound to arbitration), Lawrence v. Beverly Manor, 273 S.W.3d 525 (Mo. 2009) (Wrongful Death claimants not bound by arbitration agreement.) As previously discussed, the only parties executing this Agreement were Daughter purportedly on behalf of Decedent and employee as an Agent for NHC Mauldin. NHC Mauldin would contend that this agreement is binding on the non-signatory statutory beneficiaries simply because it contends the Arbitration Agreement says so.

However, as the Supreme Court of Kentucky said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises. Inc.:

> [A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third-party are appropriately subjected the contract's arbitration provisions, at least where the tort and contract are significantly intertwined. See, In re Weekley Homes, L.P., 180 S.W. 3d 127 (Tex. 2005) (negligent repair claim by homeowner's daughter against contractor was subject to repair contract's arbitration clause because daughter, although a non-party, was direct and principal beneficiary under the contract). It is something else entirely, however, to say that incidental beneficiaries of a contact-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely be being mentioned in the contract as potential claimants. This is

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> what Beverly purports to do. Arbitration is a matter of contract, however, it is something the contracting parties, or their proxies, must agree to. It is not something that one party may simply impose upon another. Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79;83, 123 S. Ct. 588, 154 L. Ed.2d 491 (2002) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", Citation and internal quotation marks omitted.) Since Beverly's theory would allow just that, i.e., would allow one party merely by referring to someone else in an arbitration clause to thereby bind that other person to arbitration as a "third party beneficiary" of the arbitration agreement, we reject it out of hand.

Ping v. Beverly Enterprises, Inc., 376 S.W.3d 581, 599-600 (KY 2012).

Likewise, NHC-Mauldin's mentioning of "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", as being bound by the Arbitration Agreement does not make it so. It is no more than an *ipse elixir* which Defendants expect this Court to embrace. The law simply does not permit a party to cut off the rights of a non-signatory to an agreement who receives no benefit thereunder.

The wrongful death claims are separate claims apart from the Decedent's claims. According to South Carolina's Wrongful Death Act:

> "Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person

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> who would have been liable, if death had not ensued shall be liable to an action for damages."

South Carolina Code Annotated §15-51-10 (1977)

> The wrongful death beneficiaries are as follows:
>
> "Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused."

South Carolina Code Annotated §15-51-20 (Supp. 2001)

The general element of damages recoverable are pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of companionship, and deprivation of the use and comfort of the Decedent, society, including the loss of his experience, knowledge, and judgment in managing the affairs of himself and his beneficiaries. Self v. Goodrich, 300 S.C. 349, 351, 387 S.E.2d. 713, 714 S.C. (Ct. App. 1989).

The wrongful death claim is a separate claim from the claims a decedent might bring on his own behalf under the survival statute. In Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914), the Supreme Court held that wrongful death and survival actions are different claims for different injuries. The Court stated "necessarily, therefore, there must be separate verdicts and separate judgments, there should be separate actions." Id. at 31. See also Strickland v. Southern Ry Co., 111 S.C. 248, 97 S.E. 695 (1918) (Supreme Court Affirmed Appeal from Circuit Court's ruling noting that survival claims are independent of wrongful death claims), Claussen v. Brothers, 148 S.C. 1, 145 S.E. 539 (1928) (discussing the difference between survival and wrongful death claims as being independent of each other).

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The Pennsylvania Superior Court in Pisano v. Extended Homes, Inc., operating under the fictitious name Belaire Health 84 Rehabilitation Center, 2013 PA Super 232, 77 A.3d 651, 662 (PA 2013) affirmed the trial court decision that the nursing home arbitration agreement did not apply to the statutory beneficiaries' wrongful death claim. The Court noted the wrongful death and survival actions are not derivative of each other but are flowing from the same underlining tortious conduct. Like the South Carolina statute, Pennsylvania's wrongful death statute provides that the right of action exists only for the benefit of the spouse, children, parents, or parents of the deceased. Id. at 656. The Pennsylvania Court further held that since the wrongful death claim is independent of the survival action and because the wrongful death statute does not characterize the wrongful death claim as that of a third-party beneficiary, that the trial court properly refused to compel arbitration to the non-signatory wrongful death beneficiaries who were not parties to the arbitration agreement.

Likewise, in Bybee v. Abdulla, M.D., 189. P.3d 40, 2008 UT 35 (Utah, 2008), the Supreme Court of Utah held that an agreement to arbitrate that was signed by the decedent cannot extend to the statutory beneficiaries of a wrongful death claim. The Utah Supreme Court noted that certain defenses from the decedent's personal injury action may be raised against the heirs of a wrongful death action such as comparative negligence and statutes of limitations as key common characteristics. However, as the Supreme Court of Utah noted, both of these defenses go to the viability of the underlying personal injury action. The Court further stated that "by contract, an agreement to bind heirs to arbitrate disputes does not implicate the viability of underlying claims." Id. at 47, citing Horwich v. Superior Court, 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P. 2d 927, 935 (1999). The Utah Supreme Court

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went on to note that "we have never intended to suggest, however, that because Decedent is the master of his claim he may by contract expose his unwilling heirs to any imaginable defense." Bybee v. Abdulla, M.D. at 46. The Utah Supreme Court further held that the defenses against the decedent's claim which are less likely to be found enforceable against the heirs' claims in a wrongful death action "are contract provisions that purport to affect the rights of heirs that do not affect the existence of the decedent's personal injury claim during his lifetime. The arbitration agreement...falls squarely within this category and is, therefore, unenforceable against the heir." Id. at 47.

The Court of Appeals in Washington in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 231 P. 3d 1252 (Wash. App. Div. 1 2010) held that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he [or she] has not agreed so to submit." Id. quoting Satomi Owners Association v. Satomi. LLC, 167 Wash. 2d 781, 225 P.3d 213 (2009). The Washington Court of Appeals further noted that the wrongful death claims asserted in that case were not on behalf of the estate just as South Carolina's wrongful death claims are not on behalf of the estate. The Washington Court of Appeals further discussed the Supreme Court of Ohio's ruling in Peters v. Columbus Steel Casting Co., 115 Ohio St.3d 134, 873 N.E.2d 1258 (2007), wherein the Supreme Court of Ohio held that the wrongful death claim of a spouse who was Administrator of her husband's estate was not subject to the Decedent's arbitration agreement. The Washington Court of Appeals in discussing Peters, stated "In sum, the decedent's agreement was an agreement 'to arbitrate his claims against the company,' and thus the provision in the agreement binding the decedent's heirs applied to a survival action. But the decedent could not 'restrict his beneficiaries to arbitration of their

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wrongful death claims because he held no right to those claims." Woodall v. Avalon Care Center - Federal Way, LLC at 929. In the Washington Court of Appeals' analysis, the Court concluded that the wrongful death beneficiaries could not be bound to the arbitration agreement which they did not sign.

Therefore, even if Daughter had actual or apparent authority/agency to execute the Arbitration Agreement, the Arbitration Agreement did not include the wrongful death statutory beneficiaries' claims within the scope of the Arbitration Agreement, nor did Decedent and/or Daughter have authority to bind the wrongful death statutory beneficiaries' claims to the Arbitration Agreement. As a result, the Arbitration Agreement cannot reach the claims of the wrongful death statutory beneficiaries.

WHEREFORE, for the reasons stated herein, the Court denies Defendants' Motion to Dismiss and Motion to Compel Arbitration.

IT IS SO ORDERED.

_____
The Honorable Michael G. Nettles
Presiding Judge

Greenville, South Carolina
Date: _____

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Greenville Common Pleas

Case Caption: Marlene Wilson , plaintiff, et al vs. NHC Healthcare/Mauldin LLC , defendant, et al

Case Number: 2018CP2300120

Type: Order/Other

So Ordered

s/ Michael Nettles

Electronically signed on 2018-06-21 09:47:02 page 15 of 15

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE)

Ann Coleman, Individually, and as Personal Represenatative of the Estate of Mary Brinson,
☒ Plaintiff

v.

Mariner Health Care, Inc. F/K/A Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC Midamerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC Midatlantic Holding Company, Living Centers-Southeast, Inc., Grancare South Carolina, Inc., Individually And D/B/A Faith Health Care Center, Savaseniorcare Management, LLC, Savaseniorcare Administrative Services, LLC, Savaseniorcare, LLC, Savaseniorcare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually And D/B/A Faith Health Care Center, Ask Holdings, LLC, Leonard Gruntesin, An Individual, Murray Forman, An Individual, Boyd P. Gentry, An Individual, Abraham Shaulson A/K/A Abraham Shavlson A/K/A A. Shawson, A/K/A Abraham Shawson, An Individual, Avi Klein, An Individual, SC Property Holdings, LLC, SC Faith, LLC, And John Does 1-26.
☐ Defendant.

CASE NO.

2010-CP-21-00835

MOTION AND ORDER INFORMATION FORM AND COVER SHEET

FILED
2011 MAR 25 PM 4:02
CONNIE REEL-SHEARIN
CCP & GS
FLORENCE COUNTY, SC

Plaintiff's Attorney:	Defendant's Attorney:
Matthew Chrisitian, Bar No. 70516 Address: 1007 East Washington Street, Greenville, SC 29601 phone: 864-232-7363 fax: 864-370-3731 e-mail: mchristian@christianandavis.com other:	, Bar No. Address: phone: fax: e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

SCCA/233 (11-03)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

March 24, 2011
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: 25.00

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other:

JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____

☐ CONTESTED – AMOUNT DUE: _____

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE)
) C.A. No.: 2010-CP-21-00835

Ann Coleman, Individually, and as Personal Representative of the Estate of Mary Brinson,

Plaintiff,

v.

Mariner Health Care, Inc. f/k/a Mariner Post-Acute Network, LLC, Mariner Health Care Management Company, Mariner Health Central, Inc., Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., GranCare South Carolina, Inc., Individually and d/b/a Faith Health Care Center, SavaSeniorCare Management, LLC, SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Palmetto Health Care, LLC, Palmetto Faith Operating, LLC, Individually and d/b/a Faith Health Care Center, Ask Holdings, LLC, Leonard Grunstein, an Individual, Murray Forman, an Individual, Boyd P. Gentry, an Individual, Abraham Shaulson a/k/a Abraham Shavlson a/k/a A. Shawson a/k/a Abraham Shawson, an Individual, Avi Klein, an Individual, SC Property Holdings, LLC, SC Faith, LLC, and John Does 1-26.,

Defendant(s).

ORDER DENYING DEFENDANTS PALMETTO HEALTHCARE, LLC and PALMETTO FAITH OPERATING d/b/a FAITH HEALTHCARE CENTER'S MOTION TO DISMISS AND COMPEL ARBITRATION, OR ALTERNATIVELY, TO STAY THE ACTION PENDING ARBITRATION (of whom PALMETTO HEALTHCARE, LLC has withdrawn its motion) (WRONGFUL DEATH ACTION)

FILED
2011 MAR 25 PM 3:59
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

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PROCEDURAL

This matter came before the Court on the motion of Defendants Palmetto Healthcare, LLC and Palmetto Faith Operating, LLC d/b/a Faith Healthcare Center's Motion to Dismiss and Compel Arbitration or, alternatively to Stay Action Pending Arbitration, of whom Defendant Palmetto Healthcare, LLC, withdrew its motion prior to hearing, and was heard on January 6, 2011. All parties were represented by counsel and provided oral arguments and also submitted written memoranda and exhibits supporting their positions. The Court hereby denies Defendant's Motion to Dismiss and Compel Arbitration or, alternatively Stay Action Pending Arbitration for the reasons set forth below.

BACKGROUND

Mary Brinson, deceased, was admitted to Faith Health Care Center on June 2, 2006 where she remained until September 16, 2006. She was then readmitted to Faith Health Care Center on December 13, 2006 and resided there until December 26, 2006. When Mary Brinson was admitted on June 2, 2006, the licensee was Grancare South Carolina, Inc., and when she was admitted on December 13, 2006, the licensee was Palmetto Faith Operating, LLC.

Ann Coleman is the Personal Representative of the estate of Mary Brinson. Ann Coleman is the sister of Mary Brinson, deceased. When Mary Brinson was admitted to Faith Health Care Center on June 2, 2006 and on December 13, 2006, no one had a Power of Attorney for Mary Brinson. Furthermore, at this that no one had a conservatorship and no one had been appointed guardian for Mary Brinson during these times. Despite the fact that Ann Coleman did not have a Power of Attorney for her sister,

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Faith Health Care Center requested that Ann Coleman sign an Arbitration Agreement during the admission process when Mary Brinson was admitted on both occasions. It is from the December 13, 2006, Arbitration Agreement which this Defendant seeks to enforce.

DISCUSSION

1. The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister.

The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister. South Carolina law recognizes that arbitration agreements are contracts. The interpretation and enforcement of arbitration agreements are scrutinized using contract principles of law. The Defendant's own Admissions Agreement also recognizes that the Arbitration Agreement is a contract. It is a basic tenant of contract law that the parties to the contract must have the capacity to contract.

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32). Ann Coleman did not have the authority. Furthermore, Defendant admitted that it was not aware of any Power of Attorney held by Ann Coleman on behalf of Mary Brinson at the time that the Arbitration Agreement was signed (Defendant's Response to Request to Admit 1 and Answer to Interrogatory 32).

Defendant relies upon the South Carolina Adult Health Care Consent Act (S.C. Code Ann. §44-66-10 *et seq*) and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. §44-81-10 *et seq*) as granting authority to Ann Coleman to enter into the Arbitration Agreement on behalf of her sister, Mary

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Brinson. S.C. Code Ann. §44-66-30 notes that "(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in order of priority:... (6) an adult sibling... of the patient..." S.C. Code Ann. §44-66-20(1) provides the definition of "health care" as meaning "a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of the injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care." It says nothing that could be construed as conferring the ability to enter into a separate legal document waiving an individual's rights to due process under the law for another individual. Clearly, this act does not confer legal authority to enter into contracts for another person.

It is admitted by all parties that Mary Brinson did not have the capacity to contract for herself. The Defendant admits that Ms. Brinson was incompetent by virtue of its responses to Plaintiff's Requests to Admit in addition to the fact that the medical director at Faith Healthcare Center certified that Ms. Brinson was unable to consent to make her own healthcare decisions.

While the South Carolina Adult Healthcare Consent Act does grant Ms. Coleman the authority to make "healthcare decisions" on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement without the authority to do so.

Defendant also relies on S.C. Code Ann. §44-81-10 *et seq* to argue that Ms. Coleman has the legal authority to bind her sister to a contract and waive her sister's

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rights under the law. This Court declines to adopt this application of this Act. The Bill of Rights for long-term care facilities sets out the rights given to a long term care resident or resident's representative under the law; however, these rights are, once again, rights concerning the resident's access to healthcare and to be free from abuse and does not purport to grant others authority to enter into contracts for the resident. The Bill does not contemplate the resident's or the resident's representative's rights under the law for the authority or capacity to contract. The Bill defines representative as "a legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." The fact that the authors of this Bill felt it necessary to note that the resident may not have a guardian appointed under the law affirms their intentions that the Bill was designed to protect an individual's right of access to healthcare whether or not the individual has appointed a representative under the law. The Bill does not allow for an individual without any authority from the resident to be imbued with the legal authority to enter a contract waiving a resident's rights under the law.

The courts in North Carolina have recently decided an issue similar to the one at hand, finding that the authority granted by a state's Health Care Consent Act does not grant legal authority for the purpose of entering binding contracts. *Munn v. Haymount Rehabilitation & Nursing Center, Inc., et. al.*, No. COA 10-105 (NC Ct.App., Filed 21 Dec. 2010). In fact, in *Munn,* the Court specifically notes that "consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement."

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Therefore, with similar reasoning this Court finds that Ann Coleman did not have actual authority to enter into the Arbitration Agreement on behalf of Mary Brinson.

The Defendant further argued that Ann Coleman acted as Mary Brinson's apparent agent. South Carolina case law on this issue is well established. Defendant argues that an agent's implied authority can be circumstantially provided by evidence and conduct and in doing so, relies *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004). This reliance is misplaced. *WDI Meredith & Co.* holds that apparent agency is based upon the principal holding the agent out or allowing the agent to hold himself or herself out with the alleged authority. "A principal creates apparent authority as to a third person by the principal's written or spoken words or any other conduct which 'reasonably interpreted causes the third person to believe the principal consents to have the act done on his behalf by the person purporting to act for him'." *Id* at 478 citing *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142, 399 S.E.2d 430, 433 (Ct.App.1990) overruled on other grounds by *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000). Because Mary Brinson was incompetent, she was incapable of granting the power to Ann Coleman and incapable of making a decision to allow Ann Coleman to hold herself out as Mary Brinson's agent. Therefore, Mary Brinson as the principal did never and could never exercise such an intent. If a person does not possess the capacity to make their own healthcare decisions, they would not possess the capacity to convey their rights under the law to another individual. Furthermore, even if such an individual could convey such rights in such circumstances, there is no evidence that Mary Brinson exhibited such an intent.

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The Defendant further relies on *WDI Meredith & Co.* for the proposition that "to establish apparent authority, either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief". As the court also noted in *WDI Meredith*, "an agency may not, however, be established solely by the declarations and conduct of an alleged agent." (citing *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142-143, 399 S.E.2d at 433 (Ct.App. 1990) overruled on other grounds by *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000)). An incompetent individual such as Mary Brinson would be unable to possess this intent or realize that any conduct would create such a belief. This Court finds the reasoning of *Munn* to be on point and applicable. Therefore, since Mary Brinson, the principal, was incapable of making any decisions or demonstrating any intentions conveying any authority to Ann Coleman, Ann Coleman did not have the apparent authority to contract or to enter into a binding contractual agreement such as an arbitration agreement on behalf of Mary Brinson.

Furthermore, according to the Defendant's admissions documents on June 2, 2006, it was aware that Ann Coleman did not have a Power of Attorney. The face sheet from June 2, 2006 the admissions documents as well as other documents indicate that Ann Coleman did not have any other legal oversight, durable power of attorney or healthcare proxy. There does not appear to be such a face sheet for Ms. Brinson's December 13, 2006 admission; however, the face sheet from the June admission was incorporated as part of the chart for the December admission. The Defendant is a sophisticated corporation that is accustomed to dealing with arbitration provisions and understands the implications of a Power of Attorney. (*Small v. HCF of Perrysburg, Inc.*,

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159 Ohio.App.3d 66, 823 N.E.2d 19 at 24 {¶29}). The Defendant cannot reasonably assert that Ann Coleman was the apparent agent of Mary Brinson when it had the knowledge to understand the meaning of a Power of Attorney and the fact that Ann Coleman did not have one. The fact that the Defendant has a form which would allow documentation of some form of authority indicates that it knew that there are certain requirements which must be met before an individual can be imbued with the authority to act as an agent, and further demonstrates that it knew that none of the documents which would give Ann Coleman such authority existed at the time that Mary Brinson was admitted to its facility on June 2, 2006, and that no changes were documented since that June admission..

Therefore, Ann Coleman had neither actual nor apparent authority to act on behalf of Mary Brinson and sign away her right to a jury trial by entering into an arbitration agreement. As a result, the arbitration agreement is null and void because Ann Coleman lacked the capacity and authority to ever execute it on behalf of Mary Brinson.

2. The Arbitration Agreement is not enforceable against the statutory beneficiaries.

The agreement to arbitrate explicitly specifies that "[t]his agreement is made between Faith Healthcare Center ("Facility") and Mary Brinson ("Resident" or "Resident's Authorized Representative")..." The agreement clearly allowed for the application of the agreement to extend to a resident's representative and recognized that such a representative would need some form of authorization. Ann Coleman's exclusion from this agreement demonstrates the Defendant's knowledge of her lack of authority. Yet, even if she had such authority, the current actions contemplate both a wrongful death and a survival action. While the Court finds independently that Ann Coleman lacked the

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authority to enter into the contract on behalf of Mary Brinson and is therefore null and void, the Court also finds that the arbitration agreement cannot be enforced because it cannot apply to statutory beneficiaries who are not parties to the agreement. This principal has been specifically upheld in other jurisdictions. (*Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wash.App. 919, 231 P.3d 1252 (2010). *Small v. HCF of Perrysburg, Inc.*, 159 Ohio.App.3d 66, 823 N.E.2d 19).

While Ann Coleman did not have the authority to waive the rights of Mary Brinson, even if she did, she did not have the authority to waive the rights of the statutory beneficiaries under the arbitration agreement at hand. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries. Because the statutory beneficiaries are not parties to the contract, and because the statutory beneficiaries have not conveyed any power to the signatory of the agreement, their claims could not be waived and any attempt to apply the agreement to them would be null and void.

3. The Arbitration Agreement is procedurally and substantively unconscionable and impossible to enforce.

The Defendant acted in a manner inconsistent with its own policies and procedures. The facility policy in effect at the time of Mary Brinson's admission clearly required that a member of the admissions staff explain the admissions and financial documents to the person signing them. This includes the Arbitration Agreement at issue here. Specifically, its policy states its purpose as intended to "[p]rovide an informative environment that should reduce the fears and anxieties of the resident and family during the admission process" and requires that "the Admissions staff will explain and offer an Arbitration Agreement to the resident or responsible party" [emphasis added]. On the basis of the Affidavit of Ann Coleman and the admission of the Defendant that the

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Arbitration Agreement was presented as part of a larger admissions package, the Court finds that these documents were not explained to Ms. Coleman, nor was it made clear to her that the Arbitration Agreement was voluntary and not a requirement for Mary Brinson's admission to the facility.

Additionally, it is the finding of this Court that, even were the Arbitration Agreement valid, it cannot be construed to apply to all claims at issue in the case at hand. An Arbitration Agreement, or any contract, for that matter, applies only to claims arising which would be made by someone standing in the shoes of the contractor, in this case, Mary Brinson, and cannot be construed so as to apply to those claims which may be brought on behalf of others with standing to a claim. Claims that have been made on behalf of Ann Coleman and other statutory beneficiaries of Mary Brinson's estate are not and were not parties to the Arbitration Agreement and cannot retroactively be joined to the contract.

Moreover, not all of the Defendants to this case have moved for arbitration—specifically, there are five defendants to the case at hand who are not currently seeking to enforce arbitration. In fact, one of these defendants, Palmetto Health Care, LLC, had previously moved for enforcement and has subsequently withdrawn its petition. Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid, portions of the claim along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. Should this be

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allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.

Instructive on this issue is the matter of *Birl v. Heritage Healthcare, LLC*, 172 Cal.App.4th 1313, 91 Cal.Rptr.3d 777. In *Birl* a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility sought to compel arbitration. Of relevance, the Court here noted that "(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement." In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that "the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not jointed to the court action with the other defendants... Different triers of fact in different proceedings could come to different conclusions..." *Id.* at 1321.

The Court in *Birl* also took note that the Plaintiffs in that action asserted claims "not just as successors in interest, but also individually and as surviving heirs." (*Id.* at 1321), just as Ms. Coleman has done in the cases at issue now, and that such claims for "wrongful death and emotional distress were brought by plaintiffs in their individual capacities" and not as persons who had stepped into the shoes of the decedent. It was the conclusion of the *Birl* Court that the possibility of conflicting rulings on a common issue of law or fact was real and that "different triers of fact could reach different conclusions as to which party was at fault, the cause of any injuries, and the apportionment of

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liability—unless all the parties are joined to one action" (*Id.* at 1322). Based on such finding, the Court determined that it was proper to deny the nursing facility's motion to compel arbitration.

While the circumstances of the current actions differ slightly from those of *Birl*, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in *Birl*. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums. Therefore, to uphold the Arbitration Agreement would not only pose a potential impossibility, it is also unreasonable and unconscionable to force a Plaintiff to prosecute her claims in such a fashion, especially when this issue was not explained to her. Our Courts have also discussed and recognized that it is proper to deny Arbitration Agreements with the impossibility of enforcement. (*Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (S.C. 2009)). Therefore, based upon the above reasons, the Court finds the Arbitration Agreement to be impossible to enforce and unconscionable.

4. The Defendant's delay has effectively nullified the agreement and waived any right the Defendant may have had to force Arbitration.

The Plaintiff's Notice of Intent was filed in July of 2009, providing the Defendant with notice of impending litigation. The Notice of Intent stage took a usual course and, in fact, was extended beyond the normal time frame due to the substantial number of defendants in the case. The parties completed the required pre-suit mediation in January of 2010 which was unsuccessful in reaching a resolution. The Plaintiff filed the

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Summons and Complaint in March of 2010. Defendant filed its Answer on May 19, 2010, and it was at this time that Plaintiff was provided with the first notice of the existence of an Arbitration Agreement and the Defendant's allegation that the issues and incidents addressed by Plaintiff's Complaint were governed by said Arbitration Agreement, and then only by virtue of one of Defendant's affirmative defenses. Even in light of said notice, Defendant did not move to seek enforcement of the Arbitration Agreement until August of 2010, more than a year after they had been first placed on notice of pending litigation and had been served with the Notice of Intent to Sue. This was also well after Plaintiff had served Discovery.

The Courts in South Carolina have long recognized the act of abandonment as a valid basis for an exception to a contract's enforceability:

> Generally, no-damage-for-delay provisions are valid and enforceable so long as they meet ordinary rules governing the validity of contracts. *See* Annot., *Validity and Construction of "No Damage Clause" with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 §2[a] (1976). A certain majority of jurisdictions, however, recognize certain exceptions to such clauses. *Id.* Among the recognized exceptions are (a) delay caused by fraud, misrepresentation, or other bad faith... (c) delay which has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract... *U.S. f/u/b/a Williams Electric Company, Inc. v. Metric Constructors, Inc.* 325 S.C. 129, 480 S.E.2d 447 (1997).

The contract at issue here is, of course, the Arbitration Agreement. First, the Agreement does not contain a "no-damage-for-delay" provision, and, as such, had Defendant intended to rely upon the Agreement, it should have acted promptly upon the first notice of a civil action. Secondly, and being generous to the Defendant, it waited a full nine months after Plaintiff's first filings to make any mention of an Arbitration

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Agreement and an additional three months more before moving to enforce said Agreement.

"[I]n South Carolina, there exists in every contract an implied obligation of good faith and fair dealing." *Id.* citing *Adams v. Creel*, 320 S.C. 274, 465 S.E.2d 84 (1995); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *Tharpe v. G.E. Moore*, 254 S.C. 196, 174 S.E.2d 397 (1970). Continuing, "A number of courts recognize an exception to a no-damage clause where delays are so unreasonable in length or duration that they amount to an abandonment of the contract..." *U.S. f/u/b/a Williams Electric* at 134-135 citing *74 A.L.R.3d* at 226-230 §7(i). "An abandonment need not be express but may be inferred from the conduct of the parties and attendant circumstances." *Quality Concrete Products, Inc. v. Thomason*, 253 S.C 579, 172 S.E.2d 297 (1970). "Abandonment of a contract by one party is the giving up of the right of benefit due from the other party." *Ro-Lo Enterprises v. Hicks Enterprises*, 294 S.C. 111, 362 S.E.2d 888 (Ct.App.1987). "As with the above mentioned exceptions, an abandonment of the contract involves a breach of the implied obligation of good faith and fair dealing. Accordingly, we adopt this exception and find that if a party abandons the contract, they also abandon their right to rely on a no damage for delay clause." *U.S. f/u/b/a Williams Electric* at 135. Likewise, South Carolina Courts have previously considered and found that significant delay is tantamount to abandonment and constitutes a sufficient basis to support a finding of abandonment with respect to an arbitration agreement. (See also *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (S.C.App.2003), *Deloitte & Touche, LLP v. Unisys Corp*, 358 S.C. 179, 594 S.E.2d 523).

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As previously discussed, the Arbitration Agreement the Defendant now seeks to enforce does not contain a no-damage-for delay clause, which makes the performance under the Agreement an even more time-sensitive issue. The Defendant delayed almost a year before moving for the enforcement of the Agreement. During the entire length of its delay, it conducted itself in a manner consistent with a party that intended to proceed with litigation through the confines of the judicial process. It is the ruling of this Court that, the Defendant, through its actions and delay, abandoned any rights it may have been afforded to force this matter to arbitration. To allow the Defendant to now insist on adherence to the Arbitration Agreement which was the subject of the Motion before this Court, not only amounts to an unconscionable act, but is also in disagreement with established precedent—precedent that finds contracts far more lenient on the issue of delay than the one at hand to have been abandoned in the face of acts such as those displayed by the Defendant here.

5. The Defendant's argument that Mary Brinson was a third party beneficiary to the contract is illogical and premised on the rights of Ann Coleman as signatory, which said rights do not exist.

Defendant has sought to argue that Mary Brinson was the third party beneficiary to the Admissions and Arbitration Agreements. While this Court concedes that it was Ms. Brinson's admission into Faith Healthcare Center that was contemplated by the Admissions Agreement, the Defendant's extension of this argument that seeks to cast Ms. Brinson as a third party beneficiary of said agreements is misplaced as it assumes that Ann Coleman had the right to contract on behalf of Ms. Brinson. As this Court has already discussed at length, while Ann Coleman did have the right under the Adult Health Care Consent Act to consent to medical treatment, she did not have the right to

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commit her sister to a legally binding contract that agreed to the removal of Ms. Brinson's rights under the law. Because Ann Coleman did not have the right to contract on behalf of her sister, Mary Brinson cannot possibly be a third party beneficiary as the contract itself was never valid.

6. The Defendant's argument that Plaintiff should be equitably estopped from denying the existence of an enforceable Arbitration Agreement is rejected.

As with the argument concerning the third party beneficiary status of Mary Brinson, the Court finds that the Defendant's argument with respect to the Arbitration Agreement and estoppel of the Plaintiff is, once again, misguided and assumes a premise which this Court has previously rejected.

> The principle of estoppel in equity stands on the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other and gives that effect and meanings to their actions which common sense and justice dictate. The essential elements of equitable estoppel are ignorance of the party invoking the estoppel of the truth as to the facts in question and a misrepresentation or deceptive conduct of the party against whom estoppel is sought to be applied, which in fact misleads the person asserting the estoppel to rely on the misrepresentation or conduct to change his position prejudicially as a result of the reliance. *SCJur* "Estoppel" §4.

The Defendant's estoppel argument is not only misguided, it misses the true nature of estoppel. As this Court has previously discussed, it was Faith Healthcare Center's failure to explain the Arbitration Agreement in accordance with the Defendant's policies and procedures coupled with the manner in which the Arbitration Agreement was presented to Ann Coleman that caused and contributed to Ms. Coleman not understanding the true nature of the document she was signing. The unconscionability of this process as described hereinabove serves as an additional sustaining ground for the

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finding that the Arbitration Agreement is not valid. The Defendant could not reasonably rely on the contract/agreement when they knew that Ann Coleman lacked the authority to enter into such a contract/agreement. The Defendant is assuming that it is the representation of the agent and not the principal that is the determinant of apparent authority and an establishment of agency when, as this Court has already discussed, it is the actions of the principal. As such, this Court rejects the Defendant's argument for equitable estoppel.

Furthermore, the Defendant has argued that Plaintiff cannot deny the validity of the Arbitration Agreement yet rely on the Admissions Agreement in alleging that the Defendant's were in breach of contract with respect to their contractual obligation to provide appropriate medical care to Mary Brinson. It is the Defendant's contention that the Arbitration Agreement is part of the Admissions Agreement and, as such, a denial of the validity of the Arbitration Agreement also negates the Admissions Agreement, thus precluding any claim by the Plaintiff for breach of Contract. The errors in this argument have already been discussed. The Defendant again assumes that the Arbitration Agreement and Admissions Agreement are on the same footing. As this Court has stated before, they are not. An agreement concerning the provision of health care is a far different matter than an agreement to waive legal and constitutional rights. As such, the Defendant's argument concerning estoppel is rejected.

CONCLUSION

This Court declines to enforce the Arbitration Agreement. Ann Coleman lacked the authority to bind her sister to any contract which removed her rights under the law and the Constitution. That she has the statutory authority to assist in making healthcare

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decisions regarding the treatment and care on behalf of her sister is irrelevant to the determination of whether she had the authority to contract on behalf of her sister in a separate legal document. The determination of agency is made based upon the principal and not the agent, and the Defendant's own documents demonstrate that they were aware that Mary Brinson was incapable of demonstrating any such intention or making any such representation. The Defendant cannot now reasonably argue that they thought Ms. Coleman had "apparent" authority, as they were aware of the legal requirements governing arbitration agreements.

Likewise, the Arbitration Agreement does not apply to all parties to this suit as it governs neither the claims brought on behalf of Mary Brinson's statutory beneficiaries, nor a portion of the Defendants who have not sought to force arbitration. Such circumstances give rise to the possibility of conflicting findings based on the same facts depending on the forum in which the issues are heard. These circumstances render the Arbitration Agreement unconscionable and impossible. Adding to the Agreement's unconscionability is Faith Healthcare Center's failure to adequately and appropriately inform Ms. Coleman as to the nature of the document she was signing. She was not advised of the meaning of the Arbitration Agreement, nor was she advised that her signature on said Agreement was voluntary and that a refusal to sign would have no affect on her sister's admission to the facility.

The Arbitration Agreement was further abandoned by the Defendant through its delay. The Defendant proceeded to engage in the litigation process with Plaintiff, allowing this case to move forward for more than a year after the filing of the Notice of Intent before it sought any enforcement of the Arbitration Agreement. South Carolina

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precedent is clear that, had the Defendant intended to seek enforcement of the Agreement, it should have done so at the outset of this matter, not more than a year after its genesis.

Finally, it is the belief of this Court that the Defendant's arguments concerning the third party beneficiary status of Mary Brinson and the argument concerning equitable estoppel are misguided and premised on "facts" which this Court has determined are false. As such, this Court rejects the Defendant's arguments on these issues.

Therefore, it is the finding of this Court that the Plaintiff did not have the legal authority to execute the Arbitration Agreement on behalf of her sister, the Arbitration Agreement does not apply to all parties to this suit, giving rise to the possibility of divergent outcomes premised on the same facts; that the Arbitration Agreement itself is impossible and unconscionable; and that the Defendant abandoned the Agreement though its delay in seeking its enforcement. As such, Defendant's Motion to Dismiss and Compel Arbitration, or Alternatively, to Stay the Action Pending Arbitration is denied in its entirety.

IT IS SO ORDERED.

The Honorable Michael G. Nettles
Twelfth Circuit of the State of South Carolina

Florence, South Carolina
Date: 3-19-18

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FLORENCE COUNTY, SC

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JANET L. HAWTHORNE, as Administratrix of the Estate of **DONALD C. HAWTHORNE,** deceased,	)	
Plaintiff,	)	
v.	)	2:12cv1826 **Electronic Filing**
FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC; THI OF PENNSYLVANIA AT GREENERY OF CANONSBURG, LLC d/b/a GREENERY SPECIALTY CARE CENTER OF CANONSBURG; **FUNDAMENTAL CLINICAL CONSULTING, LLC** a/k/a FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; **FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC; THI OF PENNSYLVANIA, LLC; THI OF BALTIMORE, INC.; ANDREW LEROY, NHA,**	)	
Defendants.	)	

OPINION

Plaintiff commenced this wrongful death action in her capacity as the personal representative of the estate of her deceased husband, Donald C. Hawthorne ("decedent"). Plaintiff's complaint seeks to establish defendants' liability pursuant to causes of action for negligence, corporate negligence and wrongful death. Presently before the court is a motion to compel arbitration which has been filed by all defendants except Fundamental Long Term Care Holdings, LLC., and Fundamental Administrative Services, LLC. For the reasons set forth below, the motion will be granted.

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When ruling on a motion to compel arbitration, the court employs the summary judgment standard. Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980). "Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." Id. The party opposing the motion receives "the benefit of all reasonable doubts and inferences that may arise." Id. If there is a genuine issue of fact, the Federal Arbitration Act directs that a trial be held to determine whether an arbitration agreement exists. 9 U.S.C. § 4.

In determining whether the parties agreed to arbitrate a particular claim, the ordinary state-law principles governing contract formation apply. China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 285 (3d Cir. 2003). "Under Pennsylvania law, contract formation requires: (1) a mutual manifestation of an intention to be bound, (2) terms sufficiently definite to be enforced, and (3) consideration." Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009). Even where these requirements are satisfied, an agreement to arbitrate may be unenforceable based on a generally applicable contractual defense, such as unconscionability. Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 264 (3d Cir. 2003) (citation omitted).

On February 2, 2011, decedent was discharged from Kindred Hospital and transferred to the THI of Pennsylvania at Greenery of Canonsburg, LLC, doing business as Greenery Specialty Care Center of Canonsburg ("the facility"), for admission and long-term skilled nursing care. His medical history included diagnoses for COPD, respiratory failure, pneumonitis, on-going tobacco and narcotic abuse, gastro esophageal reflux disease, hypertension, anxiety, depression, chronic pain, deep vein thrombus, pneumonia, left below knee amputation, MRSA in his left knee stump, osteomyelitis, cellulitis, tracheostomy, aspiration, peripheral vascular disease, sepsis and multiple pressure ulcers. At the time of transfer neither decedent nor his family could

provide the sustained level of care decedent required and he was dependent upon the staff at the facility to accomplish all of his activities of daily living.

On February 11, 2011, plaintiff executed an admission agreement for decedent and signed a "voluntary arbitration agreement."[1] The admission agreement expressly provided for decedent's admission into the facility. It outlined the treatment and care the facility would provide and the terms and conditions under which such treatment and care would be provided. It also outlined the obligations of (1) decedent as a resident receiving such treatment and care and (2) any representative of the decedent.

Plaintiff acknowledged in the admission agreement that she was entering into the agreement in her personal capacity and as decedent's "representative." In doing so she specifically agreed to "abide by the terms and conditions set forth in this agreement and the policies of [the] facility." She also acknowledged that she had received and read the admission handbook and the other admission materials that had been provided by the facility and understood that by expressed reference to these documents they were being made part of the admission agreement. The arbitration agreement was one of the referenced documents.

The arbitration agreement was a separate document. It directed the recipient to read it carefully and provided that the agreement was "voluntary and not a condition of admission." It further provided an executing party seven days to rescind the agreement and explained that the patient's "admission to [the] Facility and the services provided will not be effected [sic] by the exercise of this cancellation provision." Plaintiff signed the document as the "representative" of decedent. See Doc. No. 8-1 at 16. Plaintiff did not rescind the arbitration agreement.

The arbitration agreement provides:

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[1] Decedent was competent and coherent at this time and could have executed these documents.

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> It is further understood that in the event of any controversy or dispute between the parties, arising out of or relating to the Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at the Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim, or any federal or state statutory or regulatory claim of any kind, or whether or not there has been a violation of any right(s) granted under State law (collectively disputes), and the parties are unable to resolve such through negotiation, the parties agree that such Dispute(s) shall be resolved by arbitration.

Decedent was identified as the "Resident" in the agreement. The agreement further provides that discovery shall be governed by the Pennsylvania Rules of Civil Procedure, the arbitration shall occur at the facility or as close thereto as practical, and the cost of arbitration shall be borne by the facility (save that the arbitrator may shift certain costs to the resident/representative in the event the facility prevails in the proceeding). The decision of the arbitrator shall be binding on the parties and may be enforced in a court of competent jurisdiction.

Defendants seek to enforce the arbitration agreement pursuant to a third-party beneficiary theory and equitable estoppel. They maintain that plaintiff signed the admission and arbitration agreements as decedent's representative and those agreements are enforceable against plaintiff as a contracting party and against decedent's estate as a third-party beneficiary. The arbitration agreement contractually is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances and Pennsylvania law in any event. In addition, defendants argue that decedent and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable by each of the defendants.

Plaintiff contends that discovery is required in order to develop an evidentiary record and rule on the motion to compel. Specifically, plaintiff did not possess the

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authority to waive decedent's constitutional right to a jury trial at the time the agreements were executed. In addition, plaintiff "anticipates that there will be significant issues regarding who the actual parties to the arbitration agreement are." She seeks 90 days of discovery in order to develop an evidentiary record and a jury trial on any disputed matters. Plaintiff also argues that the arbitration agreement is unconscionable and/or unenforceable because it (1) was procured by fraud, (2) violates the Pennsylvania and United States Constitutions (3) lacks consideration, (4) is void as against public policy and (5) is a contract of adhesion.

Plaintiff has failed to identify any issue of material fact that precludes enforcement of the arbitration agreement pursuant to a third-party beneficiary theory. A party will be recognized as a third-party beneficiary "where both parties to the contract express an intention to benefit the third party in the contract itself" or " the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Scarpitti v. Weborg, 609 A.2d 147, 150-51 (Pa. 1992).

The basic purpose of the admission agreement was to provide for the treatment and care of decedent. It identified the terms and conditions pursuant to which the facility would provide the same and the obligations of decedent as the resident and plaintiff as his representative in return. In other words, in the formation of their agreement the executing parties had the expressed intent to benefit decedent. In addition, plaintiff entered into the agreement solely for the purpose of obtaining the facility's treatment and care for decedent and the facility promised to provide the benefit of its promised performance to

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decedent. Consequently, decedent was a third-party beneficiary of the agreement between plaintiff and the facility.

Third-party beneficiaries enjoy the same contractual rights and can be required to bear the same obligations and limitations as the original contracting parties. Miller v. Allstate Ins. Co., 763 A.2d 401, 404 n.1 (Pa. Super. 2000) (citing General Accident Insurance Company of America v. Parker, 665 A.2d 502, 504 (Pa. Super. 1995) (collecting cases)). These principles apply with equal force to agreements to arbitrate. Highmark Inc. v. Hospital Service Association of Northeastern Pennsylvania, 785 A.2d 93, 99 (Pa. Super. 2001) (third-party beneficiary may enforce an arbitration provision pursuant to the principle that it enjoys the same rights and limitations as the contracting parties). In other words, a third-party beneficiary may enforce an arbitration provision in a contract providing it with benefits and is bound to comply with such a provision when it properly has been invoked. See Johnson v. Pennsylvania National Ins. Companies, 594 A.2d 296, 509 (Pa. 1991) ("As a third party beneficiary under that [contract of insurance], the appellee's rights are 'vulnerable to the same limitations which may be asserted between the promisor and the promisee.' . . . Thus, appellee is bound by the limitations contained in the contract she seeks to enforce.") (quoting Jewelcor Jewelers & Distributors, Inc. v. Corr, 542 A.2d 72, 80 (Pa. Super. 1988), appeal denied, sub nom., Granjewel Jewelers & Distributors, Inc. v. Corr, 569 A.2d 1367 (Pa. 1989)); accord Ross Brothers Const. Co., Inc. v. International Steel Services, Inc., 283 F.3d 867, 876 (7th Cir. 2002) (under Pennsylvania law an arbitration agreement may be enforced by and against a third-party beneficiary) (citing Highmark, 785 A.2d at 99 and Johnson, 594 A.2d at 298-99)).

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Decedent was the third-party beneficiary of the admission agreement. The agreement incorporated the arbitration agreement as one of its terms. By voluntary choice of the contracting parties the arbitration agreement was executed, not rescinded and became part of the operative contract. As part of the executed contract the arbitration agreement is enforceable against plaintiff as a contracting party. It also is enforceable against decedent as a third-party beneficiary and by extension decedent's estate.[2]

Each of the moving defendants are entitled to enforce the arbitration agreement. Plaintiff essentially alleges that each defendant may be held accountable under theories of ownership and control, agency, joint venture and integrated enterprise. Specifically, it is averred that defendants collectively managed the (1) operation, (2) planning and (3) quality control of the facility, which included control over the quality of care provided.

THI of Pennsylvania is a parent corporation of the facility and THI of Baltimore is the parent corporation of THI of Pennsylvania. Fundamental Clinical and Operational Services, LLC, and Fundamental Clinical Consulting, LLC, were agents providing services to the facility. Andrew Leroy was an employee of the facility. The arbitration agreement is expressly applicable to plaintiff's claims against the facility's parent entities,

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[2] The same result follows under the principles of equitable estoppel. See THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435, *6 (D.S.C. Sept. 13, 2011) reconsideration denied, 2011 WL 6012498 (D.S.C. Nov. 30, 2011) ("It is undisputed that the Contract was signed by an immediate family member of Hall (Wiggins) for the purpose of obtaining residential care for Hall at Magnolia Manor. After execution of the Contract, Hall became a resident of Magnolia Manor and, for an extended period of time, received the benefits provided for in the Contract. Under these circumstances, where the entity operating Magnolia Manor performed in reliance on the terms of the Contract and Hall received the benefit of the Contract, it would be inequitable for Hall's estate (through its personal representative, Wiggins) to avoid the Contract's Arbitration Provision.") (citing Int'l Paper Co. v. Schwabedizzen Maschinen & Anlagen GMBH, 206 F.3d 411, 417–18 (4th Cir. 2000) (To permit a party to "claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].").

affiliates, owners, employees and agents. Thus, the provisions of the contract extend to each of these defendants.

Furthermore, plaintiff claims against all the moving parties are based on a theory of unified operation and control. Each is said to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory." Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993). Under all accounts advanced by plaintiff each of the moving parties is a parent entity, agent or employee of the facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against these defendants and in turn each can rely on the principles of agent law and the broad scope of the FAA to compel and participate in the arbitration agreement. Cf. Id. ("Where the parties to such a clause unmistakably intend to arbitrate all controversies which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories."); Sharp Properties, 998 F.2d at 155 ("Applying Barrowclough [v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985)]' s logic here, because Bared's and ARI's interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared's interests. There is, therefore, no reason to conclude that the Federal Arbitration Act's overarching policy favoring the enforcement of arbitration awards does not apply to this case.").

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Against this backdrop plaintiff has failed to identify any material issue of fact that might bar enforcement of the arbitration agreement and would therefore warrant further discovery and adjudication. She was a contracting party and thus fully was aware of the circumstances surrounding her assent to the agreements. She has not identified any factual basis that plausibly would support a finding that the agreements are unconscionable and/or unenforceable because they were procured by fraud, violate the Pennsylvania and United States Constitutions, lack consideration, or are void as against public policy. Plaintiff also has not explained how defendants would hold exclusive information that is unique or informative to these defenses.

Similarly, plaintiff has failed to allege any factual grounds to support the notion that she was forced into a contract of adhesion with the facility. Plaintiff has not asserted that other facilities offering long-tern nursing care were unavailable to decedent or that no other facility would admit him under the attendant circumstances. She does not dispute that the arbitration agreement was a voluntary document that did not affect decedent's admission into the facility or the care he would receive.

Plaintiff's litany of defenses are not based on any factual foundation that can be gleaned from the facts and circumstances. The operative facts and circumstances generally are known to plaintiff at this juncture. As aptly noted by defendants in their reply brief, each advanced defense is undermined sufficiently by the current record. The invocation of the right to discovery must be based on more than a thinly veiled attempt to initiate a fishing expedition.

Moreover, it is well settled that under the standards governing summary judgment the opponent cannot "merely rely upon conclusory allegations in [its] pleadings or in memoranda and briefs." Harter v. GAF Corp., 967 F.2d 846 (3d Cir. 1992). Likewise,

mere conjecture or speculation by the resisting party will not provide a basis upon which to deny the motion. Robertson v. Allied Signal, Inc., 914 F.2d 360, 382-83 n.12 (3d Cir. 1990). It follows from these principles that plaintiff's factually unsupported boiler-plate defenses fail to provide shelter from the enforcement of an unwanted contractual obligation.

For the reasons set forth above, defendants' motion to compel arbitration will be granted. An appropriate order will follow.

Date: September 19, 2013

s/ David Stewart Cercone
David Stewart Cercone
United States District Judge

cc: Peter D. Giglione, Esquire
Ryan J. Duty, Esquire
Joseph D. Talarico, Esquire
Michael H. Weiss, Esquire
Benjamin R. Ogletree, Esquire
William J. Moorhead, Jr., Esquire
Eugene A. Giotto, Esquire
Patrick M. Quinn, Esquire
Rick L. Brunner, Esquire

(*Via CM/ECF Electronic Mail*)

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William F. Pearson, M.D., Respondent,
v.
Hilton Head Hospital a/k/a Hilton Head Health System, L.P., Tenet Healthsystem Medical, Inc., Tenet Physician Services-Hilton Head, Inc. and LocumTenens.com, LLC, Defendants,
Of whom Hilton Head Hospital a/k/a Hilton Head Health System, L.P., Tenet Healthsystem Medical, Inc. are the Appellants.
Opinion No. 5036
STATE OF SOUTH CAROLINA In The Court of Appeals
Heard May 9, 2012
Filed October 3, 2012

Appeal From Beaufort CountyMarvin H. Dukes, III, Special Circuit Court Judge
REVERSED

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C. Mitchell Brown and Sue Erwin Harper, both of Columbia, for Appellants.

Anne Louise Peterson-Hutto, of Charleston, for Respondent.

KONDUROS, J.: Hilton Head Hospital a/k/a Hilton Head Health System, L.P.; Tenet HealthSystem Medical, Inc.; and Tenet Physician Services-Hilton Head, Inc. (collectively the Hospital) appeal the circuit court's denial of its motion to compel arbitration against Dr. William F. Pearson. It contends because the circuit court granted a co-defendant's motion to compel, the court also should have granted the Hospital's motion because the claims are intertwined and based upon the same facts. It further argues because Dr. Pearson has received the benefit of the contract between it and the co-defendant, which contains an arbitration clause, and because it received a benefit under Dr. Pearson and the co-defendant's contract, which also contained an arbitration clause, he should be forced to arbitrate with it when his causes of action against the Hospital included breach of contract. We reverse.

FACTS/PROCEDURAL HISTORY

LocumTenens.com, LLC (Locum) is an online medical professional placement corporation, headquartered in Georgia, that recruits medical professionals online and through electronic mail and places them throughout the United States, particularly in South Carolina. The Hospital and Locum entered into a contract in 2006 in which Locum would place temporary physicians at the Hospital to work as independent contractors. In 2007, Locum entered into a contract with Dr. Pearson to place him at the Hospital as an anesthesiologist for forty days in July, August, and September of 2007.

The contract between the Hospital and Locum provided, "Any controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement or the relationship between the parties hereto shall be resolved by binding arbitration in accordance with the

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Commercial Arbitration Rules for the American Arbitration Association . . . ." The contract between Dr. Pearson and Locum contained the same clause.

On August 27, 2007, Dr. Pearson was the anesthesiologist on call at the Hospital when complications occurred in a delivery of twins. The Hospital and Locums fired Dr. Pearson on August 28, 2007. Dr. Pearson filed a complaint on August 28, 2009, against the Hospital and Locum requesting relief under the South Carolina Payment of Wages Act and alleging

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retaliatory discharge, defamation, and breach of contract. On October 22, 2009, the Hospital filed a motion to compel arbitration. On December 8, 2009, Locum also filed a motion to compel arbitration. The circuit court granted Locum's motion to compel arbitration but denied the Hospital's motion to compel arbitration. The court stated the contract between Locum and the Hospital was a general one, not specific to Dr. Pearson and predated the contract between Locum and Dr. Pearson. It found Dr. Pearson did not sign an agreement with the Hospital to arbitrate any claims arising out of their relationship. The court found the case of International Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411 (4th Cir. 2000), unpersuasive as it involved only one contract. This appeal followed.

STANDARD OF REVIEW

Unless the parties otherwise provide, the question of the arbitrability of a claim is an issue for judicial determination. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings. Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 609-10, 571 S.E.2d 711, 713 (Ct. App. 2002).

LAW/ANALYSIS

The Hospital contends the circuit court erred in denying its motion to compel arbitration because (1) Dr. Pearson's claims fall within the arbitration agreement he signed with Locum; (2) federal law recognizes the right to compel non-signatories to arbitrate and for non-signatories to compel signatories to arbitrate; (3) Dr. Pearson is relying on the terms in the

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agreement between Locum and the Hospital and Dr. Pearson sought to benefit from it; and (4) the Hospital is a third-party beneficiary to Dr. Pearson and Locum's contract. We agree.

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Id. However, "[a]rbitration rests on the agreement of the parties . . . . A party cannot be compelled to arbitrate a particular dispute unless his agreement expressly encompasses the subject matter of the dispute." Simmons v. Lucas & Stubbs Assocs., 283 S.C. 326, 332-33, 322 S.E.2d 467, 470 (Ct. App. 1984). However, "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." Id. at 597, 553 S.E.2d at 118-19.

"Unless the parties have contracted to the contrary, the [Federal Arbitration Act (FAA)] applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 363 (2001) (footnote omitted). "The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent." Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) (citing Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding

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facts." Zabinski, 346 S.C. at 594, 553 S.E.2d at 117.

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"Generally, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) (citation and internal quotation marks omitted). "While a contract cannot bind parties to arbitrate disputes they have not agreed to arbitrate, '[i]t does not follow . . . that under the [Federal Arbitration] Act an obligation to arbitrate attaches only to one who has personally signed the written arbitration provision.'" Id. (quoting Fisser v. Int'l Bank, 282 F.2d 231, 233 (2d Cir. 1960)) (alterations by court). "Rather, a party can agree to submit to arbitration by means other than personally signing a contract containing an arbitration clause." Id. South Carolina has recognized "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint . . . because this would nullify the rule requiring arbitration." S.C. Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc., 312 S.C. 559, 563, 437 S.E.2d 22, 24 (1993) (citing Arnold v. Arnold Corp., 920 F.2d 1269 (6th Cir. 1990)). The rule in the Fourth Circuit is that "a broadly-worded arbitration clause applies to disputes that do not arise under the governing contract when a 'significant relationship' exists between the asserted claims and the contract in which the arbitration clause is contained." Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001).

"Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties." Int'l Paper Co., 206 F.3d at 416-17. A parent company has been forced to arbitrate even though not a party to the agreement when the subsidiary was a party to the agreement under a theory of equitable estoppel. Id. at 417 (quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993) (holding that because claims against nonsignatory parent were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims); Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bldg. Corp., 659 F.2d 836, 840-41 (7th Cir. 1981) (finding signatory equitably estopped from repudiating arbitration clause in agreement on which suit against nonsignatory was based)). "Moreover, the Second Circuit recently noted that it had recognized that five theories 'aris[ing] out of common law principles of contract and

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agency law' could provide a basis 'for binding nonsignatories to arbitration agreements: 1) incorporation by references; 2) assumption; 3) agency; 4) veil piercing/alter ego; and 5) estoppel.'" Id. (citing Thomson-CSF, S.A. v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995); Bel-Ray Co. v. Chemrite (Pty) Ltd., 181 F.3d 435, 440-43 (3d Cir. 1999); Amoco Transport Co. v. Bugsier Reederei & Bergungs, A.G. (In re Oil Spill by the "Amoco Cadiz"), 659 F.2d 789, 795-96 (7th Cir. 1981)) (alteration by court).

"[S]tate law determines questions 'concerning the validity, revocability, or enforceability of contracts generally,' . . . but the Federal Arbitration Act, 9 U.S.C. § 2 (1994), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, enforced by 9 U.S.C. §§ 201-08 (1994), 'create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'" Id. at 417 n.4 (quoting Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987); Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). "These statutes constitute a congressional declaration of liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Id. (citation and quotation marks omitted). Because the determination of whether a nonsignatory is

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bound by a contract presents no state law question of contract formation or validity, the court looks to the federal substantive law of arbitrability to resolve the question. Id.

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." Id. at 417-18 (citation and quotation marks omitted).

> In the arbitration context, the doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract's arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

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Id. at 418 (emphasis added). "'To allow [a plaintiff] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the Arbitration Act.'" Id. (quoting Avila Grp., Inc. v. Norma J. of Cal., 426 F. Supp. 537, 542 (S.D.N.Y. 1977)) (alteration by court).

"A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (citing Deloitte Noraudit A/S v. Deloitte Haskins & Sells, 9 F.3d 1060, 1064 (2d Cir. 1993) (holding nonsignatory bound to arbitrate when it knew of the arbitration agreement and "knowingly accepted the benefits of" that agreement)) (comparing Hughes Masonry Co., 659 F.2d at 838-39 ("[I]t would be manifestly inequitable to permit Hughes to both claim that J.A.[a nonsignatory] is liable to Hughes for its failure to perform the contractual duties described in the [arbitration agreement] and at the same time deny that J.A. is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause.") (alterations by court)).

> Some courts have, at a nonsignatory's instance, required a signatory of an arbitration agreement to arbitrate with the nonsignatory because of "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract . . . and [the fact that] the claims were intimately founded in and intertwined with the underlying contract obligations."

Id. at 418 n.6 (quoting Sunkist, 10 F.3d at 757) (alterations by court). The International Paper Co. court recognized that the Second Circuit has held that "a 'close relationship' and 'intimate [ ]' factual connection provide no independent basis to require a nonsignatory of an arbitration agreement to arbitrate with a signatory, and therefore that a nonsignatory cannot be bound without receiving a 'direct benefit' from or pursuing a 'claim . . . integrally related to the contract containing the arbitration clause.'" Id. (quoting

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Thomson-CSF, 64 F.3d at 778-80) (alterations by court). The court determined it did not need to reach that question "because International Paper clearly does seek a 'direct benefit' from the Wood-Schwabedissen agreement and makes a 'claim . . . integrally related to' that contract." Id. (alteration by court).

In Jackson v. Iris.com, the court summarized International Paper Co.:

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> International Paper bought an industrial saw from Wood Systems, a distributor. The saw was manufactured by Schwabedissen pursuant to a contract between Wood Systems and Schwabedissen containing an arbitration clause. International Paper was not a signatory to the contract. The industrial saw was defective, and International Paper sued Schwabedissen for breach of the terms and warranties of the contract. The Fourth Circuit found that International Paper was equitably estopped from denying the applicability of the arbitration clause to its claims against Schwabedissen because International Paper could not both accept the contract's benefits (the warranty provisions) and, at the same time, reject the contract's burdens (the arbitration provisions).

524 F. Supp. 2d 742, 750 (E.D.Va. 2007) (citing Int'l Paper Co., 206 F.3d at 414, 416-19).

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 200 (3d Cir. 2001) (citing Tencara Shipyard, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). The Third Circuit has noted:

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> many of these cases resemble the third party beneficiary cases. In Tencara Shipyard, for example, the non-signatory was the intended third party beneficiary of the contract containing the arbitration clause. The two theories of liability are, however, distinct. Under the third party beneficiary theory, a court must look to the intentions of the parties at the time the contract was executed. Under the equitable estoppel theory, a court looks to the parties' conduct after the contract was executed. Thus, the snapshot this Court examines under equitable estoppel is much later in time than the snapshot for third party beneficiary analysis.

Id. at 200 n.7.

In E.I. DuPont de Nemours & Co., the court was troubled

> that a close examination of the Amended Complaint reveals that, at bottom, DuPont's claims against the subsidiary, Rhodia Fiber, arise, at least in part, from the underlying Agreement. Parenthetically, it is difficult to decipher exactly what DuPont claims each appellant has done giving rise to liability because in its Amended Complaint DuPont lumps them together as "the Rhodia Group," just as in the Complaint, it lumped them together as "RP."

Id. at 200-01. The court further noted:

> The Amended Complaint does not allege only that Rhodia, the parent, breached its oral agreement to provide loan guarantees to its subsidiary. If this were DuPont's only claim in this case, the Amended Complaint would have named

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one, and only one, defendant-Rhodia. Instead, the Amended Complaint also named Rhodia Fiber, the subsidiary, as a

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defendant because, DuPont alleges, Rhodia Fiber breached its oral promise to DuPont that it would continue to abide by its obligations in the Agreement, i.e., securing loan guarantees for the joint venture. To the extent that DuPont presses a claim against Rhodia Fiber for breaching its oral commitment to perform under the Agreement, DuPont alleges a claim which can well be argued (a) embraces the underlying Agreement and (b) requires proof that Rhodia Fiber ultimately breached the underlying Agreement. The question, then, is whether having alleged that it entered into a separate oral agreement with Rhodia Fiber binding Rhodia Fiber to the very obligations it undertook in the Agreement, DuPont is now equitably estopped from avoiding another provision of the Agreement, i.e., the arbitration clause. This is a close call. On the one hand, we must be careful about disregarding the corporate form and treating a non-signatory like a signatory. On the other hand, by alleging, albeit by virtue of a separate oral agreement, that Rhodia Fiber failed to secure loan guarantees, DuPont's claim against Rhodia Fiber implicates, at least in part, the very Agreement which DuPont repudiates to avoid arbitration. It is, however, that separate oral agreement that saves the day for DuPont because, wholly apart from whether Rhodia Fiber breached the Agreement, what is at the core of this case is the conduct and the statements of appellants' representative in January of 1998. With reference to the second theory of equitable estoppel, appellants rely on a series of cases in which signatories were held to arbitrate related claims against parent companies who were not signatories to the arbitration clause. In each of these cases, a

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signatory was bound to arbitrate claims brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory's obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations. . . . Appellants recognize that these cases bind a signatory not a non-signatory to arbitration, but argue that this is a distinction without a difference. They are wrong.

Id. at 201-02.

The court noted that the Second Circuit had rejected the "distinction without a difference" argument:

"As these cases indicate, the circuits have been willing to estop a signatory from avoiding arbitration with a nonsignatory when the issues the

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> nonsignatory is seeking to resolve in arbitration are intertwined with the agreement that the estopped party has signed. As the district court pointed out, however, '[t]he situation here is inverse: E & S, as signatory, seeks to compel Thomson, a non-signatory.' While E & S suggests that this is a non-distinction, the nature of arbitration makes it important. Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so. In the line of cases discussed above, the courts held that the parties were estopped from avoiding arbitration because they had entered into written arbitration agreements, albeit with the affiliates of those parties asserting the arbitration and not the parties themselves. Thomson, however, cannot be estopped from denying the existence of an arbitration clause to which it is a signatory because no such clause exists. At no point did Thomson

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> indicate a willingness to arbitrate with E & S. Therefore, the district court properly determined these estoppel cases to be inapposite and insufficient justification for binding Thomson to an agreement that it never signed."

Id. at 202 (quoting Thomson-CSF, S.A., 64 F.3d at 779) (alteration by court). The court found "[t]he distinction between signatories and non-signatories is important to ensure that short of piercing the corporate veil, a court does not ignore the corporate form of a non-signatory based solely on the interrelatedness of the claims alleged." Id. A non-signatory cannot be "required to arbitrate unless its conduct falls within one of the accepted principles of agency or contract law that permit doing so." Id. "In sum, the thrust of the claims in the Amended Complaint are far enough removed from the Agreement such that DuPont should not be equitably estopped from repudiating the arbitration clause contained in the Agreement." Id.

In Ellen v. A.C. Schultes of Maryland, Inc., 615 S.E.2d 729, 733 (N.C. Ct. App. 2005), the court found

> plaintiffs are not seeking any direct benefits from the contracts containing the relevant arbitration clause, nor are they asserting any rights arising under the ACCU-AC Schultes contracts. Neither plaintiffs' allegations of unfair and deceptive trade practices nor plaintiffs' allegations of tortious interference depend upon the contracts containing the arbitration clause. Both of the claims are dependent upon legal duties imposed by North Carolina statutory or common law rather than contract law.

The court determined "because plaintiffs are not seeking a direct benefit from the provisions of the ACCU-AC Schultes contracts, we conclude that the doctrine of equitable estoppel cannot be used to force plaintiffs to arbitrate their individual claims[, and] the trial court did not err in denying defendants' motions to compel arbitration." Id.

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A South Carolina district court has noted the Eleventh Circuit's position on the ways nonsignatories could compel arbitration against signatories:

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> Existing case law demonstrates that equitable estoppel allows a non-signatory to compel arbitration in two different circumstances. First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. When each of a signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Goer v. Jasco Indus., Inc., 395 F. Supp. 2d 308, 314 n.9 (D.S.C. 2005) (quoting MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 947 (11th Cir. 1999)) (emphases added by court).

"[A] party may not 'rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.'" Jackson, 524 F. Supp. 2d at 749 (quoting Hughes Masonry Co., 659 F.2d at 839). When "a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a 'direct benefit' from a contract containing an arbitration clause." Id. at 749-50 (citing Int'l Paper Co., 206 F.3d at 417-18; Am. Bankers Ins. Group v. Long, 453 F.3d 623, 628 (4th Cir.

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2006); R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n, 384 F.3d 157, 162 (4th Cir. 2004); Tencara Shipyard S.P.A., 170 F.3d at 353 (holding non-signatory was estopped from denying applicability of arbitration clause when nonsignatory received "direct benefits" from contract including lowered insurance rates and the ability to sail under the French flag)).

In Jackson, the court found:

> Jackson seeks to have his cake and eat it too. Iris paid G*Town $550,000 pursuant to the G*Town Contract. No other sums were paid by Iris. G*Town then paid $450,000 to ATA, Jackson's undisputed agent. ATA then paid $150,000 to Jackson and $75,000 to Elliot. Jackson concedes that he retained the $150,000 payment. The $150,000 ultimately retained by Jackson was a "direct benefit" of the G*Town Contract executed by Iris and G*town. Pursuant to the test outlined by the Fourth Circuit, Jackson is therefore equitably estopped from denying the applicability of the arbitration clause, even though, allegedly, neither he nor his agents signed the G*Town Contract. Iris' $150,000 payment to Jackson, albeit indirect, was intended to be partial consideration for his performance in Africa pursuant to the G*Town Contract. It would be inequitable to permit Jackson to retain the direct benefits of the G*Town Contract (the $150,000 paid by

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> Iris) while, at the same time, permitting him to deny the contract's burdens (the arbitration provision).

Id. at 750 (citations and footnote omitted).

The Hospital argues that Dr. Pearson is bound by the arbitration clause both as a nonsignatory to the Hospital and Locum's agreement and as a signatory to his and Locum's agreement. Although some courts have been more inclined to compel arbitration when the person or entity to be

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compelled was a signatory because they actually consented to arbitration, the Fourth Circuit has recognized the right to compel a nonsignatory.

Here, looking at Dr. Pearson as a nonsignatory in the contract between Locum and the Hospital, he received a benefit due to the contract, in that he was able to work at the Hospital and receive payment for his work. If not for that contract, then Dr. Pearson would have had to make separate arrangements with the Hospital in order to work there. He knowingly accepted benefits of the contract between the Hospital and Locum. Accordingly, Dr. Pearson benefitted from that contract and should not be able to disclaim the arbitration agreement contained in it.

Additionally, looking at the Hospital as a nonsignatory in the contract between Dr. Pearson and Locum, Dr. Pearson has to rely on his contract or the Hospital's to have a breach of contract action against the Hospital. Because both of those contracts have arbitration clauses, he should not be allowed to hold the Hospital to one of the contracts to allege a breach but not be subject to the arbitration provisions. Dr. Pearson's contract stated that the Hospital was the client.

Further, in Dr. Pearson's complaint, he makes no distinction between the Hospital and Locum. He lumps them together as defendants and states they are jointly and severally liable. Additionally, the lawsuit arose against Locum and the Hospital from the same set of facts. Further, he raises a cause of action for breach of contract against the defendants, not just Locum. Accordingly, he is seeking either to receive damages under Locum and the Hospital's contract, or to hold the Hospital accountable under his and Locum's contract. Therefore, he is either seeking a benefit under the Hospital's contract or attempting to hold the Hospital accountable under his.

Lastly, the contract between Locum and Dr. Pearson further states that "[a]ny controversy or claim arising out of or relating to the interpretation, enforcement or breach of this Agreement . . . shall be resolved by binding arbitration." The causes of action against the Hospital arose as a result of Dr. Pearson's being placed there by Locum, which was the purpose of the contract. Based on all the forgoing, the circuit court's denial of the Hospital's motion to compel arbitration is

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REVERSED.

PIEPER and GEATHERS, JJ., concur.

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries, Plaintiffs, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville; and Rusty Flathmann, Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-23- **AFFIDAVIT OF GARY W. POLIAKOFF (ARBITRATION ISSUES)**

Personally appeared before me Gary W. Poliakoff, who having been duly sworn, deposes and states:

1. That he is above the age of 18 years and is competent to execute this Affidavit.

2. That he is attorney for the Clinkscales in the above-captioned matter (a case in which the Clinkscales allege neglect by a nursing home).

3. That he has been licensed as an attorney in the State of South Carolina for over 41 years (since November of 1977), has handled litigation extensively, is double Board Certified in Civil Trial Advocacy and Civil Pretrial Practice Advocacy by the National Board of Trial Advocacy, has won various professional awards, and has handled nursing home litigation extensively. (A copy of his Curriculum Vitae is attached hereto as **Exhibit 1**).

4. That he has also handled various matters which have been handled in Arbitration proceedings as well as in trial courts, including nursing home litigation.

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5. That, based upon his own experience as well as knowledge obtained in his profession, the process of Arbitration is often much more expensive, and therefore more burdensome to litigants (particularly to plaintiffs), who are typically unable to pay such costs. Frequently the fees and costs of the Arbitrator or Arbitrators alone can be tens of thousands of dollars, if not hundreds of thousands of dollars, in involved matters. This is compared to trial courts, where a modest filing fee ($150.00 in State Court; $400.00 in Federal Court) covers the entire cost to the litigants of the Judge and Jury.

6. As examples of the above:

(A) In Arbitration proceedings in a nursing home neglect case, tried for two weeks before a panel of three Arbitrators in 2013, the total fees and costs of the Arbitrators alone exceeded $220,000.00. (In State Court, the entire cost for the Judge and Jury to the litigants would have been $150.00, plus $25.00 fees for Motions). These Arbitration fees and costs were in addition to all other typical costs of litigation, including but not limited to expert witness fees and costs, travel costs, court reporters fees for depositions, service of process, investigative costs, and others. The costs and expenses for these other litigation needs was as expensive in Arbitration as it would have been in a Court Trial. The difference in overall costs was the amounts paid to the Arbitrators – over $220,000.00, as opposed to what would have been approximately $200.00 for filing fees and motion fees in State Court.

(B) In Arbitration proceedings managed by the American Arbitration Association (AAA), utilizing Arbitrators arranged through AAA, in a case several years ago involving students and a for-profit college, the total fees and costs of the Arbitrators and the AAA exceeded $100,000.00. In that case no hearing on the merits was held, as the

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matter was ended at the Summary Judgment stage. Said amount covered pre-trial matters only. This is compared to what would have been a filing fee of $150.00 in State Court, plus $25.00 fees for motions. All other litigation costs – expert fees, court reporters fees, travel expenses, service of process, investigation costs, and others – were the same in Arbitration as would have been in Court proceedings.

(C) That the undersigned himself served as an Arbitrator, in an environmental litigation matter in which the parties, post-dispute, agreed to arbitrate a narrowed, specified portion of a pending case, and agreed to the undersigned as the Arbitrator. The fees of the undersigned, to arbitrate said narrowed, specified portion of the case, exceeded $19,000.00. The comparable cost in Court would have been approximately $200.00 ($150.00 filing fee and $25.00 fees for motions). In that particular matter, Plaintiff and Defendant were both corporations, with educated and sophisticated principals, both ably represented by competent counsel, who, post-dispute, negotiated and determined to submit that narrowed, specified portion of the case to Arbitration. In that case both parties were fully aware of the implications and costs of Arbitration when they negotiated and determined to submit it to Arbitration. In that case both parties were fully able to pay the cost of Arbitration.

7. That the Clinkscales are unable to pay such fees and costs for Arbitration. The imposition of such fees and costs upon the Clinkscales is overly burdensome and oppressive. The Clinkscales have limited income and assets, and imposition of fees and costs of Arbitration would make it extremely difficult, if not impossible, for the Clinkscales to pay such fees and costs to arbitrate their case. Arbitration of this matter would be prohibitively expensive.

8. That the undersigned would show that in involved matters such as the case at hand, the fees and costs to arbitrate are so excessive as to deny the Clinksclaes the opportunity to

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vindicate their rights. Accordingly, the undersigned would show that Arbitration in this case is unconscionable.

9. That the undersigned, based on extensive experience in litigation, particularly including nursing home neglect cases, predicts that case presentation of the merits would require approximately two weeks of hearing, preceded by several Motion Hearings, and presentation and review of various Briefs. Based upon experience and acquired knowledge regarding Arbitration, and based upon the issues in this case, the undersigned predicts that the total fees and costs of a single Arbitrator could well exceed $75,000.00, if not $100,000.00, in the case at hand. The issues in this case will likely include discovery disputes to be resolved, including but not limited to disputes over nursing home records, corporate records and financial issues. The hearing on the merits will include complex corporate issues, as well as complex clinical issues such as treatment to prevent stroke; signs and symptoms of stroke, treatment for stroke, and causation and damages. The above predictions are based not only on the extensive experience of the undersigned in civil litigation, particularly including nursing home neglect cases, but also on extensive prior litigation against most of the same nursing homes/corporate defendants as in this case, and their law firms. Further, qualified Arbitrators in this area typically charge approximately $400.00 or more per hour, plus travel costs, to arbitrate similar matters. In the case referred to in paragraph 6(A) above, the Arbitrators charged $550.00 per hour each.

10. That the Clinksclaes in the present litigation are unable to pay the likely costs of Arbitration in this case. More specifically, the Decedent Mozana Clinkscales had no assets and only a modest Social Security check as income, which was entirely used to pay nursing home expense in her final months. Her Estate has no assets of any significance. The Personal

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Representative, Charlie Clinkscales has no significant assets and only modest income as he and his wife are both retired.

11. That the alleged Arbitration Clause in the present case does not permit a party to waive or reduce the costs of Arbitration based on financial hardship or any other hardship.

12. In addition to the enormous costs to Arbitrate this case (which would not be charged in court proceedings), it is estimated that the Clinkscales will require three or more experts and various witnesses, and other costs of litigation, further imposing financial burdens on the Clinkscales.

13. That, based upon extensive litigation experience for over 36 years, including extensive nursing home neglect litigation, and knowledge acquired in this field, as well as experience in Arbitration matters and knowledge acquired in said field, and based upon an understanding of the complex issues involved in nursing home litigation, and more specifically, the complex issues present in the case at hand, it is predicted that the costs of Arbitration (over and above the anticipated costs in litigating this case in any forum) will be enormous. Based upon the limited assets, income and resources of the Clinkscales, requiring the Clinkscales to Arbitrate this case would significantly impair the ability of the Clinkscales to obtain redress for their claims, and would therefore be unconscionable.

SWORN and subscribed to before
me this 13th day of December 2018.

Olivia G. Weeks
Notary Public for South Carolina
My Commission Expires: _____

Gary W. Poliakoff, Federal I.D. # 3078
Attorney for the Clinkscales

OLIVIA G. WEEKS
Notary Public, State of South Carolina
My Commission Expires Aug. 3, 2028

Gary W. Poliakoff
atty@gpoliakoff.com

Raymond P. Mullman, Jr.
rmullmanjr@gmail.com

POLIAKOFF & ASSOCIATES

Bernard B. Poliakoff
(1916-1955)

J. Manning Poliakoff
(1923-1949)

Matthew Poliakoff
(1919-1979)

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GARY W. POLIAKOFF

Curriculum Vitae

Education:

Washington and Lee University - B. A., 1973
University of South Carolina School of Law - J. D., 1977

Honors and Awards:

Double Board Certified in Civil Trial Advocacy and Civil Pretrial Practice by National Board of Trial Advocacy (NBTA)
Leadership in Law Award, S. C. Lawyers Weekly, 2013
Public Citizen Award, S. C. Trial Lawyers Association, 1996
Victims Voice Award, S. C. Jury Trial Foundation, 1995
S. C. Bar Pro Bono Lawyer of the Year Award, 1988
American Jurisprudence Award for Excellence in Constitutional Law, 1977
The Bar Register of Pre-Eminent Lawyers (Martindale-Hubbell)
South Carolina Super Lawyers
The Best Lawyers in America

State Commissions

S. C. Forestry Commission, Commissioner and Vice Chair (appt. by Governor, 2001-2006).

Publications:

Editor and Co-Author of Environmental Law in South Carolina, book published with Federal funding, 1977.
Author: "Bad Boy Environmental Legislation - A Necessary Regulatory Tool for South Carolina," 1992, S. C. Environmental Law Journal.
Author: "Environmental Law in S.C.: Protection v. Pollution," published in The Bulletin Magazine, S. C. Trial Lawyers Association, Spring, 1991.
Author: "Practicing Environmental Law in S. C.," Spotlight, S. C. Association of Legal Secretaries Magazine, 1995.
Author: "Practicing Environmental Law," The Bulletin magazine, S. C. Trial Lawyers Association, June, 2000; reprinted in Texas Trial Lawyers Magazine, Feb., 2001.

Seminar Presentations

– "Discovery in Toxic Tort/Contamination Cases," S. C. Trial Lawyers Association, Annual Convention, 1999.
– "Toxic Exposure - Proof and Causation," S. C. Trial Lawyers Association, Annual Convention, 2001.
– "Environmental Enforcement," S. C. Environmental Symposium, 1996.
– "Citizen Suits and Related Issues," S. C. Environmental Law & Technology Conference, 1996.

Courthouse Square
215 Magnolia Street, Spartanburg, South Carolina 29306
Mailing Address: P.O. Box 1571, Spartanburg, South Carolina 29304
Telephone: 864-582-5472, 864-582-8101 • Facsimile: 864-582-7280
www.gpoliakoff.com

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– "Criminal Enforcement of Environmental Statutes - Citizens Perspective," S. C. Environmental Law & Technology Conference, 1997.
– "Environmental Law in S. C., An Overview," 1991, for the Law for Non-Lawyers Program, S. C. Bar Association.
– "S. C.: Nuclear, Hazardous, Infectious, and Now Solid Waste Dumping Ground - Litigation," S. C. Trial Lawyers Association, Annual Convention, 1994.
– "Trash in Transition - New Solutions for Old Landfills," American Bar Association, Section of Natural Resources, Energy and Environmental Law, Annual Convention, 1998.
– "Workers' Compensation in South Carolina - Issues and Answers," National Business Institute, December, 1992.
– "Administrative and Regulatory Case Law Update," S. C. Administrative and Regulatory Law Association (SCARLA) Annual Seminar, September, 2001.
– "Issues Involved in Taking the Case to Trial," Protecting Our Elderly/Nursing Home Accountability, National Business Institute, 2006.
– "Nursing Home Malpractice: Evaluating and Addressing Accountability," National Business Institute Annual Seminar, 2007.
– "Nuisance Litigation," Arkansas Trial Lawyers Association, 2013.
– "Nuisance, Trespass and Negligence: Property Torts after Babb," S. C. Bar Tort Law Update, 2014.

Legal Associations (current or former):
Board of Advisors, Charleston School of Law
Board of Directors, S. C. Administrative and Regulatory Law Association
Board of Governors, S. C. Trial Lawyers Association, 1987-1989
Board of Directors, S. C. Bar Pro Bono Program, 1989-1992
Board of Directors, Spartanburg County Public Defender Program, 1978-1982
Rules Committee, S. C. Administrative Law Judge Division, 1994-Continuing
Life Fellow, S. C. Bar Association
Secretary-Treasurer, Spartanburg County Bar Association, 1977-1979
S. C. Bar Committees: (Past)
- Lawyer/Physician Relationship, 1995-1999
- Lawyer Referral, 1993-1994
- Trial and Appellate Practice
- Public Affairs (Chairman, 4th District)
- Judicial Modernization

Chairman, Spartanburg County Bar Medical-Legal Committee, 1990-2000
Advisor, Law Explorer Post
Chairman, Environmental Law Committee, S. C. Trial Lawyers Association, 1993-2007
Admitted to S. C. Bar - 1977
Authorized to practice before all S. C. Courts and all levels of Federal Courts, including U. S. District Court, 4th Circuit Court of Appeals, and the U. S. Supreme Court.

Civic and Charitable Boards, Memberships (current or former):
Board of Advisors, University of S.C. - Upstate
Board of Directors, S. C. Environmental Law Project (SCELP), 1992-1995

Board of Directors, Citizens Local Environmental Action Network (CLEAN), 1993-1996
Chairman, Spartanburg County Democratic Party, 1982-1984 (Also, Treasurer 1986-1994; Vice Chair 1994-1998)
Board of Directors, Sertoma Club
Board of Directors, Piedmont Conservancy, Inc.
Board of Directors, Safe Home/Rape Crisis (Council on Sexual Assault)
Legal Adviser, Spartanburg Conservation Endowment (SPACE)
Chamber of Commerce Legislative Committee
Member or Officer (Past or Present) of numerous civic and charitable organizations

Qualified as Expert in Environmental Law, Court of General Sessions, 2014.

Martindale-Hubbell Law Directory Rating: AV Preeminent® (highest rating available - competence and ethics)

Named one of "The Big Three" of "The Green Fifteen" by State Newspaper for legal victories protecting the environment.

Website: http://www.gpoliakoff.com

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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Estate of Mozana Clinkscales, By and through the Appointed Personal Representative Charlie E. Clinkscales, Individually and on behalf of Statutory Beneficiaries, Plaintiff, v. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place - Greenville and Rusty Flathmann, Defendant(s).	)	IN THE COURT OF COMMON PLEAS C.A. No.: 2018-CP-23-05088 **AFFIDAVIT OF CHARLIE E. CLINKSCALES**

Personally appeared before me, the undersigned, after duly being sworn, hereby states and attests that the following is true and correct under penalties of perjury:

1. That I am the Personal Representative of the Estate of Mozana Clinkscales. The Estate has no assets, and there are creditor's claims filed against the Estate totaling $230,792.82.

2. That based on my income and assets, I am unable to pay the likely costs of arbitration. I live on a fixed income and have no money to spare for arbitration proceedings. I am unable to pay the administrative fee or the arbitrator's fees needed to arbitrate the case.

3. My wife and I are retired and do not have any stocks, bonds, or other assets.

4. My house is subject to a mortgage lien.

Date: 12/6/18

Charlie E. Clinkscales

SWORN and subscribed before ~~me this~~
6th day of ~~December~~, 2018.

_____(SEAL)
Notary Public ~~for South Carolina~~
My Commission Expires: 7-11-23

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232 Ariz. 510
307 P.3d 77
666 Ariz. Adv. Rep. 29

John H. CLARK, a single man, Plaintiff/Appellee,
v.
RENAISSANCE WEST, LLC, a foreign limited liability company doing business in Arizona as Springdale West; Renaissance West Realty, LLC, Defendants/Appellants.

No. 1 CA–CV 12–0692.

Court of Appeals of Arizona, Division 1, Department D.

July 30, 2013.

[307 P.3d 78]

Hornstein & Bennett PLLC by Gail R. Hornstein, James G. Bennett, Scottsdale, Attorneys for Appellants.

Udall Shumway PLC by H. Micheal Wright, Lincoln M. Wright, Mesa, Attorneys for Appellee.

OPINION

GOULD, Judge.

¶ 1 This appeal examines whether the trial court erred in ruling that an arbitration agreement was substantively unconscionable because the cost to arbitrate was prohibitively high. For the following reasons, we affirm.

Facts and Procedural Background

¶ 2 After having surgery for a hip fracture, eighty-eight-year-old John H. Clark ("Plaintiff") was admitted into Springdale West, a skilled nursing facility owned by Renaissance West, LLC and Renaissance West Realty, LLC (collectively, "Defendants"). Three days later, he signed an arbitration agreement (the "Agreement") which required Plaintiff to arbitrate all disputes with the facility.

¶ 3 After his discharge, Plaintiff filed a complaint against Defendants in Superior

[307 P.3d 79]

Court, which included claims for medical negligence and abuse and neglect of a vulnerable adult pursuant to Arizona Revised Statutes ("A.R.S.") section 46–455, *et seq.* The claims were based on Plaintiff's allegation that while he was at Defendants' facility, he was neglected by nursing staff and consequently developed a severe pressure ulcer on his back that tunneled to the bone and required medical treatment and long-term care.

¶ 4 Defendants moved to dismiss and to compel arbitration. The court held an evidentiary hearing at which Plaintiff's expert testified that based on the complex nature of Plaintiff's claims, it would cost Plaintiff approximately $22,800 in arbitrator's fees to arbitrate the case. Plaintiff testified that he was retired and lived on a fixed income, and that based on the likely amount of arbitrator's fees, he could not afford to arbitrate his claims.

¶ 5 After the evidentiary hearing, the trial court ruled that the Agreement was substantively unconscionable and therefore unenforceable as a matter of law. The court based this finding in part on its determination that Plaintiff's limited income would make it extremely difficult, if not impossible, for Plaintiff to pay the arbitrator's fees necessary to arbitrate his case.[1] Accordingly, the trial court denied Defendants' motion to dismiss and to compel arbitration.

¶ 6 Defendants timely appealed. We have jurisdiction over the order denying the

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motion to compel arbitration pursuant to A.R.S. § 12–2101.01(A)(1).

Discussion

¶ 7 Whether a contract is unconscionable is a question of law that we review de novo. *Maxwell v. Fid. Fin. Servs., Inc.*, 184 Ariz. 82, 88–89, 907 P.2d 51, 57–58 (1995). However, we defer to any factual findings made by the trial court, unless such findings are clearly erroneous. *Harrington v. Pulte Home Corp.*, 211 Ariz. 241, 247, 252, ¶¶ 16, 40, 119 P.3d 1044, 1050, 1055 (App.2005).

¶ 8 An unconscionable contract is unenforceable. *Id.* at 252, ¶ 39, 119 P.3d at 1055;*see also*A.R.S. § 12–1501 (arbitration agreements are not enforceable on "such grounds as exist at law or in equity for the revocation of any contract"). There are two types of contractual unconscionability: substantive and procedural. *Nelson v. Rice*, 198 Ariz. 563, 567, 12 P.3d 238, 242 (App.2000). Procedural unconscionability addresses the fairness of the bargaining process, which "is concerned with 'unfair surprise,' fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." *Maxwell*, 184 Ariz. at 88–89, 907 P.2d at 57–58 (quoting Dan B. Dobbs, 2 *Law of Remedies* § 10.7, at 706 (2d ed.1993)).[2] In contrast, substantive unconscionability addresses the fairness of the terms of the contract itself. *Id.* at 88, 907 P.2d at 58. A contract may be substantively unconscionable when the terms of the contract are so one-sided as to be overly oppressive or unduly harsh to one of the parties. *Harrington*, 211 Ariz. at 252, ¶ 39, 119 P.3d at 1055;*Maxwell*, 184 Ariz. at 88, 907 P.2d at 58.

¶ 9 An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights." *Harrington*, 211 Ariz. at 252, ¶ 43, 119 P.3d at 1055;*seealso*

[307 P.3d 80]

Green Tree Fin. Corp. -Ala. v. Randolph, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. *Harrington*, 211 Ariz. at 252, ¶ 43, 119 P.3d at 1055;*Randolph*, 531 U.S. at 90, 121 S.Ct. 513. Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case. *See Harrington*, 211 Ariz. at 252, ¶ 43, 119 P.3d at 1055 (explaining that "the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights") (citing *Randolph*, 531 U.S. at 92, 121 S.Ct. 513).

¶ 10 In determining whether arbitration costs are prohibitively expensive, courts have considered several factors. First, the party seeking to invalidate the arbitration agreement must present evidence concerning the cost to arbitrate. *Randolph*, 531 U.S. at 91–92, 121 S.Ct. 513;*Harrington*, 211 Ariz. at 252, ¶¶ 41–44, 119 P.3d at 1055. This evidence cannot be speculative; it must be based on specific facts showing with reasonable certainty the likely costs of arbitration. *Randolph*, 531 U.S. at 91–92, 121 S.Ct. 513;*Harrington*, 211 Ariz. at 252, ¶¶ 41–44, 119 P.3d at 1055;*see also Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F.Supp.2d 840, 847 (N.D.Ill.2002) (party must make "a reasonable, good faith effort to estimate" arbitration costs).

¶ 11 Second, a party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. *Id.* at ¶ 47. This evidence must consist of more than conclusory allegations stating a person is unable to pay

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the costs of arbitration. *Id.* Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration. *Id.*

¶ 12 Third, a court must consider whether the arbitration agreement or the applicable arbitration rules referenced in the arbitration agreement permit a party to waive or reduce the costs of arbitration based on financial hardship. *Id.* at ¶¶ 47, 49 (holding an arbitration agreement was not substantively unconscionable because, in part, the agreement provided that any claim or dispute would be resolved under the American Arbitration Rules ("AAA"); the applicable AAA rules provided for waiver or reduction in arbitration fees based on "extreme hardship"); *Jones v. Gen. Motors Corp.,* 640 F.Supp.2d 1124, 1134 (D.Ariz.2009) (finding arbitration fee not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship).

¶ 13 We conclude there is reasonable evidence to support the trial court's finding that "[i]n this particular case, Plaintiff has established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim."

Cost to Arbitrate

¶ 14 At the hearing, Plaintiff's expert Jeffrey Victor testified about the amount of arbitrator's fees Plaintiff would likely incur to arbitrate his case. Victor testified that arbitrators in the Phoenix area typically charge between $300 and $475 per hour, and that arbitrators with expertise in medical malpractice usually charge at least $400 per hour. An exhibit containing three arbitrators' billing statements showing rates of $380–400 per hour was admitted at the hearing. Regarding how long the hearing would likely take, Victor also testified that due to the complex nature of Plaintiff's claims, it was likely that Plaintiff would need to call between five and seven experts, as well as several witnesses, including two to three members of the nursing staff, the administrator of the facility, the wound nurse, the attending physician, the treating wound surgeon, a specialist in geriatric or internal medicine, a nursing expert, a nursing home expert, Plaintiff, and Plaintiff's nephew. Accordingly, Plaintiff provided evidence it would likely take at least five days for the arbitration hearing (assuming eight hours per day).

[307 P.3d 81]

¶ 15 Because the Agreement required that three arbitrators be appointed if the parties could not agree on a single arbitrator,[3] and to split the arbitration fees regardless of who prevailed, Victor testified that it would cost Plaintiff approximately $22,800 in arbitrators' fees alone to arbitrate his claims.

¶ 16 Defendants argue that Victor's testimony was speculative and that he lacked the foundation to testify because Defendants had not yet filed an answer, making it impossible for Victor to know with certainty what issues would be litigated in the arbitration. However, any lack of certainty about the exact cost of this arbitration goes to the weight, not the admissibility or evidentiary foundation of Victor's testimony. *See Faber v. Menard, Inc.,* 367 F.3d 1048, 1054 (8th Cir.2004) (instructing the party seeking to avoid arbitration to "present specific evidence of *likely* arbitrator's fees and its financial ability to pay those fees so that the court can determine whether the arbital forum is accessible to the party") (emphasis added). On this record, the trial court properly concluded that while "the amount of discovery necessary to prepare for an arbitration hearing, the number of witnesses who would be called to testify and the length of the hearing are all difficult to predict at this

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early stage of the process," it is reasonable to infer "from the evidence and statements of counsel and the Court's experience as a judicial officer in similar cases ... that this type of case is expensive to litigate."

¶ 17 Defendants also argued that Victor was not qualified to testify about the amount of time needed to arbitrate Plaintiff's claims because he had not actually represented a client in a medical malpractice arbitration. We note, however, that Victor had practiced law for nearly thirty years, had been dealing with long-term care cases for twelve years, and that approximately ten to twelve of his cases had involved arbitration agreement issues. Again, Defendants' argument goes to the weight of Victor's testimony, not its foundation or admissibility. *See City of Phoenix v. Brown*, 88 Ariz. 60, 64, 352 P.2d 754, 756 (1960) (explaining that the lack of the highest degree of skill or qualification of an expert witness goes to the weight of his testimony rather than to its admissibility).

Plaintiff's Ability to Pay

¶ 18 Plaintiff testified that he was retired, living on a fixed income, [4] and did not have any financial resources such as savings or stocks. Plaintiff further testified that a portion of his monthly income consisted of veteran's assistance that is provided to veterans who are "hard pressed for money." Based on his financial situation, Plaintiff stated he would be unable to pay the arbitrators' fees needed to arbitrate his case. We conclude this evidence supports the trial court's factual finding that arbitration would be cost-prohibitive for Plaintiff.

¶ 19 Defendants contend that Plaintiff's income, which Defendants estimate to be $55,560 per year, was sufficient to pay the estimated $22,800 in arbitration costs. However, as explained above, the trial court is in the best position to evaluate witness credibility and demeanor, and we therefore defer to the trial court's factual findings absent a clear abuse of discretion (and there was no such abuse here).

Waiver or Reduction in Fees

¶ 20 Finally, unlike *Harrington*, the Agreement does not provide for a reduction or waiver of Plaintiff's fees based on financial hardship. The Agreement simply states the parties will "contribute equally to payment of the fees charged by the Arbitrator or Arbitrators." Moreover, the Agreement is not subject to any arbitration rules, such as AAA, that provide for waiver/reduction of fees based on financial hardship.[5]

[307 P.3d 82]

Agreement Unconscionable

¶ 21 Because we defer to the trial court's findings of fact absent clear error, *Harrington*, 211 Ariz. at 247, ¶ 16, 119 P.3d at 1050, we conclude there is reasonable evidence supporting the trial court's determination that Plaintiff would be unable to afford to arbitrate his claims. As a result, the Agreement effectively precludes Plaintiff from obtaining redress for any of his claims, and is therefore substantively unconscionable and unenforceable. *See id.* at 252, ¶ 42, 119 P.3d at 1055 ("The Court has made it clear that arbitration is appropriate only '[s]o long as the prospective litigant effectively may vindicate' his or her rights in the arbital forum.") (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).[6]

Conclusion

¶ 22 For the foregoing reasons, we affirm.

CONCURRING: MARGARET H. DOWNIE, and PATRICIA A. OROZCO, Judges.

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Notes:

[1] The court also reasoned the Agreement was substantively unconscionable because the terms of the Agreement were one-sided, requiring mandatory arbitration for the types of claims a patient could bring against the facility, but not for the types of claims the facility could bring against a patient.

[2] The trial court found the Agreement was not procedurally unconscionable, and Plaintiff has not challenged that finding on appeal. Thus, Defendants' arguments referencing the fact the Agreement was a separate document from other admission paperwork and was conspicuously written in bold print and large type are largely irrelevant, because while these facts may be relevant to procedural unconscionability, they do not bear on substantive unconscionability. For the same reason, Defendants' arguments referencing the fact the Agreement was not a "take it or leave it" agreement or a pre-condition to admittance to the facility, and that it could have been rescinded within thirty days of signature primarily relate to procedural unconscionability.

[3] Plaintiff's assertion that three arbitrators would be necessary was not challenged by Defendants in their briefs on appeal. *See State Farm Mut. Auto. Ins. Co. v. Novak*, 167 Ariz. 363, 370, 807 P.2d 531, 538 (App.1990) (failing to develop an argument properly results in waiver on appeal).

[4] Plaintiff's total monthly income was $4,630, which consisted of the following: $1,717 in social security; $1,200 from a pension; and $1,703 in "veteran's assistance." Plaintiff testified that apart from his monthly income, he had no other financial resources.

[5] We note that parties not subject to arbitration may request a waiver or deferral of court fees and costs based on financial hardship if they litigate in court. *See* A.R.S. 12–302(C) (deferral); A.R.S. 12–302(D) (waiver).

[6] Having determined that the Agreement was substantively unconscionable, we need not reach Plaintiff's argument that the Agreement would also contravene the purposes of the Adult Protective Services Act, A.R.S. § 46–455.

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Mozana Clinkscales
c/o Charlie Clinkscales
206 Marshcreek Drive
Mauldin, SC 29662
(864)419-8978

Magnolia Place of Greenville
Attn: Medical Records
35 Southpointe Drive
Greenville, SC 29607

Re: Name: Mozana Clinkscales
Date of Birth: 12/7/26
Social Security No.: 249-38-7773
Dates of Service: June 1, 2015 – October 31, 2015

Dear Records Custodian:

I am writing to request a complete copy of my entire file for the dates listed above, including your administrative records, medical records, admission records, photographs and any other document in your possession. Please forward these documents in electronic format (on a CD) to the following address:

Matthew W. Christian
Christian & Davis, LLC
PO Box 332
Greenville, SC 29602

Sincerely,

Charlie E. Clinkscales

Note: Please provide the records in electronic form, in the Adobe Acrobat (.pdf) format.

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FILED IN GREENVILLE COUNTY,SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

POWER OF ATTORNEY

I, **MOZANA CLINKSCALES**, the undersigned, of Greenville County, South Carolina State, hereby revoking all instruments of Power of Attorney heretofore previously made by me, I hereby, make, constitute, and appoint my son, **Charlie E. Clinkscales,** of Greenville County, South Carolina State, place and stead, and on my behalf, and for my use and benefit:

1. To exercise or perform any act, power, duty, right or obligation whatsoever that I now have or my hereafter acquire the legal right, power or capacity to exercise or perform, in connection with, arising from or relating to any person, item, transaction, thing, business property, real or personal, tangible or intangible, or matter whatsoever;

2. To request, ask, demand, sue for, recover, collect, receive, and hold and possess all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, requests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension and retirement benefits, insurance benefits and proceeds, any and all documents of title, chooses in action personal and real property, intangible and tangible property and property rights, and demands whatsoever, liquidated or unliquidated, as now are, or shall hereafter become, owned by, or due, owing, payable, or belonging to me or in which I have or may hereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for me, on my behalf, receipts, or other sufficient discharges for the same;

3. To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess

DATE JAN 24 2011
CERTIFIED TO BE A TRUE AND CORRECT COPY
OF DOCUMENT ON FILE IN THIS OFFICE
REGISTER OF DEEDS, GREENVILLE COUNTY

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any real or personal property whatsoever, tangible or intangible, or interest thereon, on such terms and conditions, and under such covenants, as said attorney in fact shall deem proper;

4. To maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds to trust, and hypothecate, and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest therein, that I now own or may hereafter acquire, for me, in my behalf, and in my name and under such terms, and conditions, and under such covenants, as said attorney in fact shall deem proper;

5. To conduct, engage in , and transact any and all lawful business of whatever nature or kind for me, on my behalf, and in my name;

6. To make, receive, sign, endorse, execute, acknowledge, deliver, and possess such applications, contracts, agreements, options, covenants, deeds, trust deeds, security agreements, bills of sale, leases, mortgages, assignment, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds debentures, checks, drafts,, bills of exchange, letters of credit, notes, stock certificates, proxies, warrants, commercial paper, receipts, withdrawal receipts and deposition instruments relating to accounts or deposits in, or certificates of depositions of, banks, savings and loan or other institutions or associations, proofs of loss, evidences of debts, releases, and satisfaction of mortgages, liens, judgments, security agreements and other debts and obligations and such other instruments in writing or whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

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7. I grant to said Attorney in fact full power and authority to do, take, and perform all and every act and thing whatsoever requisite, proper, or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney in fact, or his substitute or substitutes, shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers herein granted.

8. This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to said attorney in fact.

9. This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his/her own estate.

10. The rights, powers, and authority of said attorney in fact herein granted shall commence and be in full force and effect on this 24 day of January 2011, and such right, powers, and authority shall remain in full force and effect thereafter until specifically revoked.

I, **MOZANA CLINKSCALES**, Give Power of Attorney this 24 day of January 2011, and being first duly sworn, do hereby declare to the undersigned authority that I signed and executed this Power of Attorney and that I signed it willingly or willing direct another to sign for me, that I execute it as my free and voluntary act for the purpose herein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

MOZANA CLINKSCALES

We, Cushena Mansell and [signature], the witnesses, sign our names to this Power of Attorney, being first duly sworn, and hereby declare to the undersigned authority that the **MOZANA CLINKSCALES** signed and executes this Power of Attorney and that she signed it willingly (or willingly directs another to sign for **her/him**), and that each of us, in the presence of and gearing of **MOZANA CLINKSCALES**, hereby signs this Power of Attorney as witness to **MOZANA CLINKSCALES** signing, and that to the best of our knowledge, **MOZANA CLINKSCALES** is eighteen years of age or older, of sound mind, and under no constraint or under due influence.

[signature] [signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

SUBSCRIBED, SWORN TO, AND ACKNOWLEDGED before me by **MOZANA CLINKSCALES** the Power of Attorney, and subscribed and sworn to before me by Cushena Mansell and [signature] witnesses, this 24 day of January, 2011.

(SEAL) [signature]
Notary Public for South Carolina
My Commission Expires: 27 April 2020

FILED FOR RECORD IN GREENVILLE COUNTY,SC ROD
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Timothy J Hannery

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,)	
vs.)	**DEFENDANT THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC'S BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND IN REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION**
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,)	
DEFENDANTS.)	

The Defendant, THI of South Carolina at Magnolia Place, LLC d/b/a Magnolia Place-Greenville, by and through its undersigned counsel, hereby respectfully submits this Memorandum in Support of its Motion to Compel Arbitration and in Reply to Plaintiff's Memorandum in Opposition to the pending Motion to Compel Arbitration. For the reasons set forth below, a valid, binding agreement for arbitration exists, and the Court must enter an Order compelling this matter to arbitration in accordance with the Federal Arbitration Act, 9 U.SC. § 1, *et. seq.*

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FACTUAL BACKGROUND

On August 30, 2013, Plaintiff's decedent, Mozana Clinkscales, was admitted to Magnolia Place of Greenville after a short hospital stay. Ms. Clinkscales had previously resided at Magnolia Place in for nearly two and half years prior to her hospitalization. Upon admission, an arbitration agreement was executed by Charlie Clinkscales, the named Plaintiff in this action, on behalf of his 89 year old mother. (**Arbitration Agreement attached hereto as Exhibit A)**. Mr. Clinkscales held a General Durable Power of Attorney over his mother which was duly executed and filed in Greenville County on January 24, 2011. **(General Durable Power of Attorney attached hereto as Exhibit B).** A copy of the same was provided to the admissions staff at Magnolia Place of Greenville upon Ms. Clinkscales admission. Without question, Plaintiff possessed actual legal authority to act as his mother's agent in all affairs including with regard to the execution of the instant arbitration agreement. Plaintiff does not, and could not, question his authority to bind his mother to the Arbitration Agreement.

The Arbitration Agreement was presented separately from all other admission paperwork, a stand-alone document that specifically delineated that Mr. Clinkscales was waiving his mother's right to jury trial as well as all "successors, assigns, heirs, personal representatives, guardians, or any other persons deriving their claims through or on behalf of the Resident." **(See Exhibit A)**. The Arbitration Agreement includes a specific provisions regarding governing law, how an arbitrator will be chosen, and details the type of claims that must be submitted to arbitration. In bold, it is noted that the agreement should be "read carefully" and specifically notes in a stand-alone paragraph that both parties "understand and agree that [they] are waiving [their] right to a jury trial." The agreement was also executed by Clint Richey, Admissions Coordinator for Magnolia Place of Greenville on the same day.

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Ms. Clinkscales remained at Magnolia Place of Greenville for the next two and a half years, ultimately being discharged on December 18, 2015. During her residency at Magnolia Place, the Plaintiff (nor any family member or Ms. Clinkscales herself) never contested, questioned, or raised any single concerns regarding the Arbitration Agreement whatsoever. On October 4, 2018, Plaintiff instituted the instant lawsuit asserting claims which fall directly within the governance of the Arbitration Agreement.

On November 16, 2018, this Defendant filed the instant Motion asserting its right to arbitration. Since that time, the parties have attempted to resolve this dispute and seemingly had made substantial progress. Indeed, as recently as December 12, 2018, Plaintiff's counsel had proposed potential arbitrators for this very case. **(See E-Mail Correspondence Attached Hereto As Exhibit C).** However, five days later, on the eve of the hearing, Plaintiff submitted a Memorandum in Opposition, which totals more than 285 pages including exhibits. Until that time, counsel for the undersigned was unaware of any opposition to the instant Motion.

ARGUMENT & CITATION OF AUTHORITY

Plaintiff's opposition to the instant Motion and enforcement of the Arbitration Agreement rests entirely upon five distinct grounds: 1) that the Arbitration is void for lack of consideration of mutuality, 2) that the Arbitration Agreement should be invalidated because it is missing material and definitive terms, 3) that wrongful death claims cannot be submitted to arbitration, 4) that the Arbitration Agreement is unconscionable, 5) and that this Defendant waived its right to arbitration by not producing the Arbitration Agreement immediately upon receipt of a records

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request months before any litigation commenced. The Defendant will address each of these claims in their respective order. [1]

I. THE ARBITRATION AGREEMENT IS SUPPORTED BY VALID, LEGAL CONSIDERATION AND CONTAINS COMPLETE MUTUALITY

The Arbitration Agreement possesses valid, legal consideration because the parties exchanged mutual promises to arbitrate by voluntarily assenting to the provision that both parties' right to a jury trial would be waived. It is well-settled under South Carolina law that mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate that contract. *Furman v.* Walker, 124 S.C. 68, 117 S.E.2d 356 (1923); *Johnson v. Spartanburg County Fair* Ass'n, 201 S.C. 56, 41 S.E.2d 599 (1947). This undisputed notion is bedrock, black-letter contract law. This long standing principle is of equal application in the context of arbitration agreements where both parties mutually assent to arbitration. *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997)(holding a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement); *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999)(citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration.)).

[1] Plaintiff also asserts that the claims against Co-Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC should not be stayed. This Defendant does not address those arguments but would rather defer to those respective Defendants for their arguments. Plaintiff also asserts that equitable estoppel is not a valid legal argument to support the enforcement of arbitration in this case. However, Defendant does not assert equitable estoppel as grounds for enforcement unless the Court were to rule that the applicable Power of Attorney was not sufficient legal authority for Mr. Clinkscales to bind his mother. Given that Plaintiff does not imply, much less assert, that the Arbitration Agreement is invalid because of a lack of authority, equitable estoppel is unlikely to be relevant to these proceedings; however, this Defendant would reserve the right to make such rulings were Plaintiff to argue something contrary to his briefing.

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In support of his argument that the Arbitration Agreement is void for lack of consideration, Plaintiff erroneously cites to *Riedman Corp. v. Jarosh*, 290 S.C. 252, 349 S.E.2d 404 (1986) and *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997) for the proposition that "[o]ur courts have held that where there is a mutual promise to arbitrate, there must be additional consideration." Neither of these cases supports Plaintiff's position.

In *Reidman*, the Supreme Court summarily affirmed the Court of Appeals in holding "that a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself." 290 S.C. 253, 329 S.E.2d at 405. In *O'Neil*, the Fourth Circuit held, in direct contradiction to Plaintiff's assertions, that **"[a] mutual promise to arbitrate is sufficient consideration for [an] arbitration agreement.**" 115 F.3d at 275 (4th Cir. 1997)(citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996)(emphasis added); *accord Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998)("[N]o consideration above and beyond the agreement to be bound by the arbitration process [is] required."). Obviously, Plaintiff's counsel's claim that consideration beyond the mutual promise to arbitrate is necessary for a valid arbitration agreement is unfounded and not supported by the law.

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both the Defendant and Ms. Clinkscales. *See* **Exhibit A** ("It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving claims through or on behalf of Resident."). Accordingly, the Arbitration Agreement contains adequate consideration in the form

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of mutual promises to arbitrate and Plaintiff's unsupported claims to the contrary should be disregarded. [2]

It is similarly unclear how Plaintiff could concoct any form of a "lack of mutuality" argument. Undoubtedly, there is complete mutuality of submission to arbitration and complete mutuality of remedy. Plaintiff may not now unilaterally claim, over five years after execution of a contract, the lack of any "direct benefit" in order to invalidate the agreement under a lack of mutuality argument. To be sure, proving a mutuality of promises requires no showing of a "direct benefit." Plaintiff appears to inject the requirements of an estoppel argument not being currently advanced of Plaintiff. Additionally, cites to no precedent, much less binding precedent, whatsoever to support the lack of mutuality argument.

Plaintiff's Memorandum in Opposition also suggests the Arbitration Agreement is illegal, and therefore should be voided, because the Arbitration Agreement constitutes "other consideration" in violation pertinent Medicare and Medicaid regulations. This argument has been dispensed by seemingly every single court who has ever addressed it. *See Benson v. THI of South Carolina at Magnolia Place at Spartanburg,* LLC, No. CA 7:11-2613- HMH (D.S.C. Nov. 3, 2011)(citing cases from Indiana, Alabama, Tennessee, Ohio, and Florida for the ruling that arbitration agreements do not violate 42 U.S.C. 1396r(c)(5)(A)(iii) or 42 C.F.R. §483.12(d)(3)). Again, Plaintiff cites to no legal precedent to support his argument. As a result, such an argument should similarly fail and arbitration should be compelled accordingly.

[2] The Plaintiff also cites to Judge Diane Goodstein's trial court order in *Rawl v. West Ashley Nursing & Rehab* for the proposition that more is needed for valid, legal consideration than a mutual promise to arbitrate. After careful study, it is clear that this trial court order errantly cited to *Reidman* and *O'Neil* in reaching such a holding. However, more recently, Judge Goodstein, in recognition of this error, found that a mutual exchange of promises is, in fact, valid, legal consideration in the nursing home arbitration context. *See* **Circuit Court Order, attached hereto as Exhibit D)**

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II. THE ARBITRATION AGREEMENT IS CLEAR AND UNAMBIGUOUS WITH RESPECT TO THE INTENT OF THE PARTIES AND CONTAINS ALL ESSENTIAL AND MATERIAL TERMS

The Plaintiff next contends that the Arbitration Agreement lacks material terms and is unenforceable because there was no meeting of the minds. Specifically, the Plaintiff argues that because the Arbitration Agreement does not name a specific individual as arbitrator and does not mention the specific rules of evidence or the allowance of pre-hearing discovery, it should be void for vagueness. Such an argument lacks merit and must be rejected.

The Arbitration Agreement includes specific, explicit provisions regarding how an arbitrator is chosen, what rules will govern the arbitration itself, and what types of claims must be submitted to arbitration. Indeed, the Agreement expressly denotes that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which itself contains exacting details such as the location of the arbitration, how evidentiary rulings should be made, when subpoenas can be issued, rules for confidentiality of the proceedings, compensation of arbitrators, and nearly every conceivable aspect of the arbitration itself. The lack of a specifically delineated arbitrator should not be held against the Arbitration Agreement which attempts to create a cooperative process wherein the parties attempt to mutually agree upon an arbitrator before seeking court assistance.

Plaintiff attempts to argue vagueness by noting that details such as scheduling, discovery process, and rules of evidence are not contained within the four corners of the Arbitration Agreement. However, Rule 12 of the South Carolina ADR Rules provides for the issuance of subpoenas, the compelling of witnesses, and how evidentiary rulings are to be conducted. The

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extensive detail which Plaintiff apparently demands in order to declare a meeting of the minds is not supported by any case law, much less in the arbitration context.

Moreover, the Plaintiff has failed to cite and the Defendant is unaware of any binding precedent mandating that an arbitration agreement must contain such terms to be enforceable. Furthermore, arbitration agreements which are substantially similar to the one here have been held to be enforceable and were not void because they lacked the terms that the plaintiff urges are required. *See THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *7 (D.S.C. Sept. 13, 2011); *See also THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015).

In a last ditch effort to invalidate the agreement, Plaintiff also argues that rules adopted by the AAA, AHLA, and NAF preclude arbitration of the present dispute. However, none of those organizations are relevant to the Arbitration Agreement presently before this Court. Thus, Plaintiff's argument that they preclude arbitration in this case fails.

III. THE ARBITRATION AGREEMENT APPLIES TO WRONGFUL DEATH CLAIMS

Plaintiff next argues that the wrongful death claim pursued by him is not subject to the Arbitration Agreement. Plaintiff's argument must be rejected. In support of his contention, Plaintiff cites to two trial court orders denying motions to compel arbitration of wrongful death claims. However, appellate courts in South Carolina have found that like here, where a decedent's personal representative executes an arbitration agreement in connection with the decedent's admission to a nursing home, wrongful death actions brought by the personal representative can be subject to binding arbitration. *See Dean v. Heritage Healthcare of Ridgeway*, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014). In *Dean,* the personal representative of a

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decedent's estate brought actions against a skilled nursing facility for wrongful death, medical malpractice, and survival. *Id.*, 408 S.C. at 376, 759 S.E.2d at 731. The plaintiff, decedent's daughter, executed an admissions agreement and separate arbitration agreement in connection with the decedent's admission to the facility. *Id.* 408 S.C. at 377, 759 S.E.2d at 729. At the time the agreements were executed, the decedent was allegedly competent, and the plaintiff lacked a healthcare power of attorney. *Id.*, 408 S.C. at 379, 759 S.E.2d at 731, n.4. Ultimately, the Supreme Court reversed the trial court's decision denying the nursing home's motion to compel arbitration and remanded the case for the trial court to determine whether the arbitration agreement was valid based on the decedent's competence and the lack of a health care power of attorney authorizing the decedent's daughter to execute the arbitration agreement on her behalf. *Id.*, 408 S.C. at 389, 759 S.E.2d at 736.

By reversing the trial court's decision to deny the motion to compel arbitration, the court implicitly held that the plaintiff's wrongful death claims could be arbitrable, if the trial court determined the arbitration agreement was ultimately valid. Otherwise, there would have been no reason to remand those claims for further consideration by the trial court. Additionally, with respect to the arbitrability of the decedent's wrongful death claims, the court importantly noted that "*courts may not refuse to compel arbitration simply because a wrongful death claim is involved.*" *Id.,* 408 S.C. 371, 378, 759 S.E.2d at 731, n.3 (emphasis added). *See also, THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("*Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death*")(emphasis added)(citing *Dean,* 759 S.E.2d at 731 n. 3.) Neither trial court order cited by Plaintiff mentions, much less addresses, *Dean.*

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Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, a case factually similar to the case at the bar, the court by granting the defendant's motion to compel arbitration, implicitly held that the plaintiff's wrongful death claims were subject to arbitration. No. 2:11-CV-02861, 2011 WL 6318575, at *6 (D.S.C. Dec. 15, 2011). In *McCutcheon*, the plaintiff, decedent's husband, signed an arbitration agreement as the decedent's "'Durable Power of Attorney for Health Care' / 'Legal Guardian' / 'Responsible Party, '" upon the decedent's admission to a nursing home. *Id.* at *1. Subsequently, the plaintiff brought several claims, including one for wrongful death, for a dispute arising out of the nursing homes care of the decedent. The nursing home filed a motion to dismiss and to compel arbitration. *Id.* Ultimately, the court found that the arbitration agreement at issue was valid and applicable to the plaintiff's claims. *Id.* at *6. Thus, by subjecting the plaintiff's wrongful death claim to binding arbitration, the court implicitly held that wrongful death claims brought by a plaintiff who like in the case at the bar, has signed an arbitration agreement in a representative capacity on behalf a of a decedent, are subject to binding arbitration.

In *Boland v. Unihealth Post Acute Care- Columbia*, the Honorable Allison Renee Lee granted a defendant motion to compel arbitration against the personal representative of a nursing home decedent's estate, thus subjecting the plaintiff's wrongful death claim to binding arbitration. *Boland v Unihealth Post Acute Care - Columbia, LLC*, No. 2010CP25489, 2010 WL 9932512 (S.C.Com.Pl. Jan. 12, 2010). Boland involved a plaintiff who signed an arbitration agreement in connection with his mother's admission to a skilled nursing facility. *Id.* There, like in *McCutcheon* and the case at the bar, the plaintiff had a power of attorney. After the plaintiff's mother died, the plaintiff brought an action against the nursing home alleging wrongful death

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and survival claims. *Id.* The Defendant filed a motion to dismiss and compel arbitration. *Id.* The Court granted the Defendant's motion to dismiss the action and compel arbitration. *Id.*

The Arbitration Agreement here clearly encompasses wrongful death claims, which are purely derivative in nature. The Arbitration agreement plainly states "*It is the intention of the parties to this Agreement to bind not only themselves, but also, their, successors, assigns, heir, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.*" The Agreement was executed by Charlie Clinkscales in his individual and representative capacity. As such, the Arbitration Agreement must be found binding on the wrongful death claims. To be sure, statutory beneficiaries have no right to a claim but through the standing of the personal representative. *THI of New Mexico at Hobbs Ctr., LLC v. Spradlin*, 532 F. App'x 813, 816–18 (10th Cir. 2013).

The South Carolina Probate code itself tells us that such claims must be considered derivative. Because Ms. Clinkscales would have been bound by the arbitration agreement immediately prior to her death, the Plaintiff, as her personal representative is also bound in his capacity as her personal representative. *See* THI of S.C. at Columbia, LLC v. Wiggins, No. CA 3:11-888-CMC, 2011 WL 4089435, at *5 (D.S.C. Sept. 13, 2011)("a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death") (citing S.C. Code §62-3-703); *See also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010)(citing *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 941 (D.S.C. 1988)(recognizing that wrongful death claims are derivative claims and are conditioned upon a decedent's ability, "if he had lived, to bring an action at the time of his death"). Therefore, it follows that if a decedent's claims would have

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been subject to arbitration, had she survived, her beneficiaries' claims must also be subject to arbitration. In addition, and in contrast to case law relied upon by the plaintiff, Ms. Clinkscales granted her son a general durable power of attorney, and as such, his authority was not limited to decisions relating to his mother's healthcare. Mr. Clinkscales signed the arbitration agreement in his representative capacity and therefore had the power to bind his mother and her beneficiaries to the arbitration agreement.

IV. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

The Arbitration Agreement at issue cannot be invalidated upon grounds of unconscionability. An arbitration agreement may only be found invalid for "unconscionability" if this Court makes a two-fold determination: (1) that there is "absence of meaningful choice on the part of one party due to one-sided contract provisions" *and* (2) that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 53 1 U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C.*, Inc., No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this instance, it is therefore Plaintiff's burden to prove unconscionability.

Regarding the absence of a meaningful choice, Plaintiff resorts to a multitude of generalized complaints about nursing home arbitration contracts that are not tailored to this case and are entirely unsupported with regard to Mr. Clinkscales execution about the Arbitration Agreement at issue in this case. Given Plaintiff's burden, this shortcoming is fatal to Plaintiff.

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"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. As such, "meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. In his attempt to show the lack of a meaningful choice, Plaintiff cites to Mr. Clinkscales lack of sophistication, his playing no part in drafting the agreement, and seemingly suggests that he "had" to sign the agreement "without option." Such arguments are either insufficient or not supported by the record before the Court.

The fact that Mr. Clinkscales is an individual and this Defendant is a commercial entity is not sufficient grounds, standing alone, to prove the absence of a meaningful choice. While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that Magnolia Place, a skilled nursing facility, unilaterally drafted this agreement and presented it to Mr. Clinksclaes for consideration cannot justify a finding of unconscionability. *See, Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (S.C.2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement.").

Furthermore, the Arbitration Agreement was not "forced" or mandatory. To the contrary, this Admission Agreement was not a pre-condition for admission. The Arbitration Agreement was, in fact, a separate agreement from the admissions agreement. Additionally, by executing and consenting to the Arbitration Agreement, Mr. Clinkscales expressly acknowledged that he "[was] not required to use the aforesaid facility for [his mother's] healthcare needs and that there are numerous other health care providers in the State where [Defendant] is located that are qualified to provide such care to [her.]" Plaintiff cites to no limitation or restriction upon where

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Mr. Clinkscales could have been admitted to ensure that he was properly provided care and treatment.

Mr. Clinkscales was given the option of entering into the Arbitration Agreement and made the decision to proceed. He did not have to accept this offer nor has there been any allegation or evidence that he was actually coerced into signing this document. The waiver of his right to a jury trial was presented as a separate contract, and he was expressly instructed to read carefully before executing the Arbitration Agreement.

Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case as Plaintiff must still show that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to jointly select a third party arbitrator "from a panel having experience and knowledge of the health care industry." If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. That neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. These provisions

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cannot be deemed oppressive or unjust. As a result, the Arbitration Agreement cannot be deemed unconscionable.

Lastly, the District Court of South Carolina has repeatedly upheld the validity of arbitration agreement nearly identical to the one at issue in this matter. In evaluating these agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (Norton, C.J.); *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson v. THI of S.C. at Magnolia Place at Spartanburg, LLC*, C.A. 7:11-2613-HMH.

V. NO WAIVER OF ARBITRATION RIGHTS HAS OCCURRED

Plaintiff's last eleventh hour attempt to negate enforcement of the Arbitration Agreement rest upon the assertion that this Defendant somehow has waived its rights under the Arbitration Agreement by not providing it in response to a medical records request that occurred earlier this year. Additionally, Plaintiff suggests that Defendant did not timely provide the Arbitration Agreement in accordance with Plaintiff's counsel's own demands. Of course, Plaintiff cites to no legal authority whatsoever in support of his claim that such conduct amounts to waiver.

"The FAA requires courts to resolve 'any doubts concerning the scope of arbitrable issues... in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Accordingly, "*there is a strong presumption against finding that a party has waived its right to compel arbitration[.]*" *Id.* (emphasis added). To overcome this presumption, "the party seeking to avoid

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arbitration 'must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). "Mere inconvenience to an opposing party is not sufficient to establish prejudice." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003)(citing *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct.App.2003)). South Carolina "follow[s]the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver." *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003)

In this case, despite Plaintiff's demonstrably false claims to the contrary, no real delay has occurred and no prejudice has been suffered. This Defendant was served with process of the Notice of Intent to File Suit on January 18, 2018. Less than 45 days later, on March 7, 2018 Plaintiff's counsel was in possession of the Arbitration Agreement. **(See E-Mail Correspondence attached hereto as Exhibit E).** As a result, Plaintiff's submissions to this Court that Defendants "participated in pre-suit mediation without once mentioning the arbitration clause" is false and should be given no credence by this Court. Additionally, participation in the NOI process alone is not grounds for waiver of arbitration, and under South Carolina law, there is no obligation to seek enforcement upon service of the NOI. *See Dean* at 388 ("We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity.") Here, Defendant moved to compel arbitration within 30 days after the filing of Plaintiff's Complaint as its initial response to the lawsuit. Under binding South Carolina precedent, this conduct cannot amount to a waiver.

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CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Honorable Court GRANT its Motion and COMPEL this matter to arbitration in accordance with the valid, binding Arbitration Agreement.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
P.O. Box 993, Charleston, SC 29402
(843) 720-5415; pbuckner@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Magnolia Place at Greenville, LLC

Charleston, South Carolina

Dated: December 17, 2018

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

POWER OF ATTORNEY

I, MOZANA CLINKSCALES, the undersigned, of Greenville County, South Carolina State, hereby revoking all instruments of Power of Attorney heretofore previously made by me, I hereby, make, constitute, and appoint my ~~brother~~ SON, Charlie E. Clinkscales, of Greenville County, South Carolina State, place and stead, and on my behalf, and for my use and benefit:

1. To exercise or perform any act, power, duty, right or obligation whatsoever that I now have or my hereafter acquire the legal right, power or capacity to exercise or perform, in connection with, arising from or relating to any person, item, transaction, thing, business property, real or personal, tangible or intangible, or matter whatsoever;

2. To request, ask, demand, sue for, recover, collect, receive, and hold and possess all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, requests, devises, notes, interests, stock certificates, bonds, dividends, certificates of deposit, annuities, pension and retirement benefits, insurance benefits and proceeds, any and all documents of title, chooses in action personal and real property, intangible and tangible property and property rights, and demands whatsoever, liquidated or unliquidated, as now are, or shall hereafter become, owned by, or due, owing, payable, or belonging to me or in which I have or may hereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for me, on my behalf, receipts, or other sufficient discharges for the same;

3. To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess

DATE JAN 24 2011
CERTIFIED TO BE A TRUE AND CORRECT COPY
OF DOCUMENT ON FILE IN THIS OFFICE
REGISTER OF DEEDS, GREENVILLE

EXHIBIT B
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any real or personal property whatsoever, tangible or intangible, or interest thereon, on such terms and conditions, and under such covenants, as said attorney in fact shall deem proper;

4. To maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds to trust, and hypothecate, and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest therein, that I now own or may hereafter acquire, for me, in my behalf, and in my name and under such terms, and conditions, and under such covenants, as said attorney in fact shall deem proper;

5. To conduct, engage in , and transact any and all lawful business of whatever nature or kind for me, on my behalf, and in my name;

6. To make, receive, sign, endorse, execute, acknowledge, deliver, and possess such applications, contracts, agreements, options, covenants, deeds, trust deeds, security agreements, bills of sale, leases, mortgages, assignment, insurance policies, bills of lading, warehouse receipts, documents of title, bills, bonds debentures, checks, drafts,, bills of exchange, letters of credit, notes, stock certificates, proxies, warrants, commercial paper, receipts, withdrawal receipts and deposition instruments relating to accounts or deposits in, or certificates of depositions of, banks, savings and loan or other institutions or associations, proofs of loss, evidences of debts, releases, and satisfaction of mortgages, liens, judgments, security agreements and other debts and obligations and such other instruments in writing or whatever kind and nature as may be necessary or proper in the exercise of the rights and powers herein granted.

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7. I grant to said Attorney in fact full power and authority to do, take, and perform all and every act and thing whatsoever requisite, proper, or necessary to be done, in the exercise of any of the rights and powers herein granted, as fully to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that said attorney in fact, or his substitute or substitutes, shall lawfully do or cause to be done by virtue of this power of attorney and the rights and powers herein granted.

8. This instrument is to be construed and interpreted as a general power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it, limit or restrict, and is not to be construed or interpreted as limiting or restricting, the general powers herein granted to said attorney in fact.

9. This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing his/her own estate.

10. The rights, powers, and authority of said attorney in fact herein granted shall commence and be in full force and effect on this 24 day of January 2011, and such right, powers, and authority shall remain in full force and effect thereafter until specifically revoked.

I, **MOZANA CLINKSCALES**, Give Power of Attorney this 24 day of January 2011, and being first duly sworn, do hereby declare to the undersigned authority that I signed and executed this Power of Attorney and that I signed it willingly or willing direct another to sign for me, that I execute it as my free and voluntary act for the purpose herein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

MOZANA CLINKSCALES

We, Cushena Mansell and [signature], the witnesses, sign our names to this Power of Attorney, being first duly sworn, and hereby declare to the undersigned authority that the MOZANA CLINKSCALES signed and executes this Power of Attorney and that she signed it willingly (or willingly directs another to sign for her/him), and that each of us, in the presence of and gearing of MOZANA CLINKSCALES, hereby signs this Power of Attorney as witness to MOZANA CLINKSCALES signing, and that to the best of our knowledge, MOZANA CLINKSCALES is eighteen years of age or older, of sound mind, and under no constraint or under due influence.

[signature] [signature]

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

SUBSCRIBED, SWORN TO, AND ACKNOWLEDGED before me by MOZANA CLINKSCALES the Power of Attorney, and subscribed and sworn to before me by Cushena Mansell and [signature] witnesses, this 24 day of January, 2011.

(SEAL) [signature]
Notary Public for South Carolina
My Commission Expires: 7 April 2020

FILED FOR RECORD IN GREENVILLE COUNTY,SC RGD
2011004912 Book:OE 2383 Page:2212-2215
January 24, 2011 02:01:22 PM
[signature]

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ELECTRONICALLY FILED - 2018 Dec 17 6:53 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

From: Buckner, Perry
To: Wakeham, Rebecca (Becky)
Subject: Fwd: Clinkscales [redacted]
Date: Monday, December 17, 2018 2:49:44 PM

Sent from my iPhone

Begin forwarded message:

> **From:** Ray Mullman <rmullmanjr@gmail.com>
> **Date:** December 12, 2018 at 1:02:30 PM EST
> **To:** "Buckner, Perry" <pbuckner@ycrlaw.com>
> **Cc:** "Owens, J. Joseph (Joe)" <jowens@ycrlaw.com>
> **Subject: Re: Clinkscales** [redacted]
>
> For Clinkscales: We propose Anne Culbreath, Dan Pruitt, James Segura, or Jim Parham.
>
> I think the arbitration agreement limits the choice to Greenville arbitrators but I'll doublecheck.
>
> [redacted]
>
> Ray
>
> Ray Mullman, Jr.
> Poliakoff & Associates, P.A.
> 864-582-5472

EXHIBIT C
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
STEPHANIE JENKINS-FLEMMINGS AS GUARDIAN AD LITEM FOR STEVIN JENKINS,	)	CASE NO. 2017-CP-10-2964
PLAINTIFF,	)	
vs.	)	
THI OF SOUTH CAROLINA AT CHARLESTON, LLC D/B/A RIVERSIDE HEALTH AND REHAB; CHRISTY DRINKARD AS EMPLOYEE/MANAGER OF RIVERSIDE HEALTH AND REHAB; AND PERSONAL CARE, INC. D/B/A PERSONAL CARE AMBULANCE,	)	
DEFENDANTS.	)	

FILED
2018 JUN 26 AM 9:56
JULIE ... CLERK OF COURT

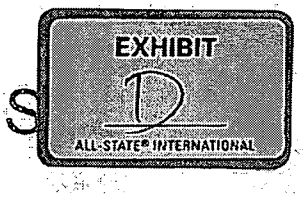
ORDER GRANTING DEFENDANT THI OF SOUTH CAROLINA, LLC D/B/A RIVERSIDE HEALTH AND REHAB'S MOTION TO COMPEL ARBITRATION AND DENYING PLAINTIFF'S MOTION TO COMPEL DISCOVERY AS MOOT

This matter was before the Court on May 23, 2018 upon Defendant THI of South Carolina at Charleston, LLC d/b/a Riverside Health and Rehab's ("Riverside" or "Defendant Riverside") Motion to Dismiss and Compel Arbitration. Counsel of record for all pertinent parties were present including Perry M. Buckner, IV for Defendant Riverside and Stefan B. Fielder for the Plaintiff. Having reviewed the submissions by counsel and heard all arguments advanced, the Court hereby **GRANTS** Riverside's Motion and orders that this matter be compelled to arbitration in accordance with the below findings. Plaintiff's Motion to Compel is **DENIED** as moot.

FACTUAL BACKGROUND

Mr. Stevin Jenkins was admitted to Defendant Riverside on February 7, 2012 following a hospital admission to the Medical University of South Carolina (MUSC). According to the hospital

Rec'd 7/2/18



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discharge summary provided to Riverside by MUSC, Mr. Jenkins suffered a fall at his home on and was not able to get up due to progressive "generalized weakness" secondary to complications from end-stage renal disease (ESRD), hypertension, type II diabetes, and a variety of other medical issues. Notably, there is nothing submitted to this Court that indicates that Mr. Jenkins suffered from any cognitive deficiencies or lacked mental capacity as a result of this fall. Furthermore, there is nothing before this Court that suggests Mr. Jenkins suffered from any cognitive deficiencies whatsoever prior to this fall and hospitalization. To the contrary, after treatment for seven days at MUSC, Mr. Jenkins was transferred to Riverside "in good health" for continued skilled nursing care/rehabilitation and scheduled hemodialysis treatments three times per week.[1]

Upon his admission on February 7, 2012, Mr. Jenkins entered into an Admission Agreement and an Arbitration Agreement with Riverside. Both of these separate contracts were signed by Mr. Jenkins *on his own behalf* and by an authorized agent of Riverside on its behalf. Both were signed by the same parties, on the same date, and as part of the general admission process. Mr. Jenkins signed several more agreements and acknowledgements this very same day. Shortly thereafter, Mr. Jenkins was admitted to Riverside and began receiving skilled nursing care.

The Arbitration Agreement at issue defines Riverside as the "Facility" and Mr. Jenkins as the "Resident" and was made binding upon Riverside, Mr. Jenkins, and all "successors, assigns, heirs, personal representatives, guardians, or any persons deriving their claims through or on behalf of" Mr. Jenkins. The relevant provisions of the Arbitration Agreement state the following:

> It is understood by Resident/Representative that he/she is not required to use the aforesaid facility for Resident's healthcare needs and that there are numerous

[1] Plaintiff's counsel's submissions to this Court reference a stroke alleged suffered by Mr. Jenkins just prior to his admission to Riverside, but such assertions were withdrawn by counsel at the hearing on this matter. As a result, there is no challenge to Mr. Jenkins' capacity or authority to enter into the Arbitration Agreement at issue.

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> other health care providers in the State where Facility is located that are qualified to provide such care to Resident.
>
> It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The Arbitration Agreement further provides:

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

In bold print, the Arbitration Agreement then states:

> **I understand and agree that I am giving up and waiving my right to a jury trial.**

Following his admission in 2012, Mr. Jenkins remained as a resident at Riverside for over five and a half years, including for over ten months after he filed a Notice of Intent and five months after he filed the Complaint against the Defendants in this action alleging medical malpractice. At no time during his residency did Mr. Jenkins attempt to revoke the Arbitration Agreement at issue in this matter. Ultimately, Mr. Jenkins passed away on or about November 18, 2017. At this time, there are no allegations of wrongdoing regarding his death.

LAW & ANALYSIS

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th

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

As an initial matter, the parties agree that the Arbitration Agreement (if deemed valid) is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Under the FAA, any written provision in "a contract evidencing a transaction involving commerce" providing that disputes be settled by arbitration is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. Section 4 of the FAA provides, in pertinent part, as-follows:

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

9 U.S.C. § 4 (emphasis added).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. Demonstrating a written agreement to arbitrate does requires some deference to state law however. Indeed, "an agreement to arbitrate is valid, irrevocable, and enforceable, as a matter of federal law . . . 'save upon such

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grounds as exist at law or in equity for the revocation of any contract.' *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)). Ordinary state-law principles of contract formation, not the federal common law, determine whether an agreement to arbitrate exists. *See Perry*, 482 U.S. at 492; *Towles*, 338 S.C. at 37 ("In determining whether an agreement to arbitrate exists, the court should apply 'ordinary state-law principles that govern the formation of contracts.' ")

Plaintiff initially formally opposed Riverside's Motion on four grounds: 1) lack of capacity by Mr. Steven Jenkins to enter into the arbitration agreement, 2) lack of sufficient consideration to render the arbitration agreement valid, 3) that the arbitration agreement was unconscionable, and 4) that Riverside waived its right to arbitration. However, at the hearing of this Motion, Plaintiff's counsel withdrew both its capacity and waiver arguments. As a result, the sole opposition to enforcement of the arbitration agreement before this Court is an alleged 1) lack of consideration and 2) an assertion that the arbitration agreement should be deemed unconscionable.

A. Consideration

This Court finds that the Arbitration Agreement at issue possessed sufficient, valid consideration so as to render it enforceable. It is well-settled under South Carolina law that "mutual and concurrent promises afford sufficient legal consideration for the support of each other." *Furman v. Waller*, 124 S.C. 68, 117 S.E.2d 356 (1923); *Johnson v. Spartanburg County Fair Ass'n*, 201 S.C. 56, 41 S.E.2d 599 (1947)(citing *Furman* for the same proposition). This long standing legal principle is of equal application in the context of arbitration agreements where both parties mutually assent to arbitration. *O'Neil, supra* 115 F.3d at 272 (4th Cir. 1997)((holding a mutual promise to arbitrate constituted sufficient consideration to enforce an

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arbitration agreement); *see also*, *Towles* 338 S.C. at 42 fn. 4 (citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration). I find the agreement clearly demonstrates that both parties are bound to arbitrate by the express terms of the contract such that mutual promises have been undoubtedly been made.

Plaintiff cites both to *O'Neill* and to *Riedman Corp. v. Jarosh*, 290 S.C. 252, 349 S.E.2d 404 (1986) for the proposition that more is required for consideration than mere mutual agreements to arbitrate. Neither case cited by Plaintiff supports this contention. In fact, *O'Neill* stands for the exact opposite proposition.

B. Unconscionability

This Court also finds that the Arbitration Agreement at issue should not be invalidated upon grounds of unconscionability. An arbitration agreement may only be found invalid for "unconscionability" if this Court makes a two-fold determination: (1) that there is "absence of meaningful choice on the part of one party due to one-sided contract provisions" *and* (2) that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 53 1 U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C.*, Inc., No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this instance, it is therefore Plaintiff's burden to prove unconscionability. I find that Plaintiff cannot meet the burden of demonstrating unconscionability.

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"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. As such, "meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. In her attempt to show the lack of a meaningful choice, Plaintiff cites to Mr. Jenkins' lack of sophistication, his playing no part in drafting the agreement, and that Mr. Jenkins "had" to sign the agreement "without option." The Court finds these arguments are either insufficient or not supported by the record before it.

The fact that Mr. Jenkins is an individual and Riverside is a commercial entity is not sufficient grounds, standing alone, to prove the absence of a meaningful choice. While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that Riverside, a skilled nursing facility, unilaterally drafted this agreement and presented it to Mr. Jenkins for consideration cannot justify a finding of unconscionability. *See, Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (S.C.2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement.").

Furthermore, this Court finds that that the arbitration agreement was not "forced" or mandatory based on the record before it. To the contrary, this Admission Agreement was not a pre-condition for admission. The arbitration agreement was, in fact, a separate agreement from the admissions agreement. Additionally, by executing and consenting to the Arbitration Agreement, Mr. Jenkins expressly acknowledged that he "[was] not required to use the aforesaid facility for [his] healthcare needs and that there are numerous other health care providers in the State where [Riverside] is located that are qualified to provide such care to [him.]" Plaintiff cites to no limitation or restriction upon where Mr. Jenkins could have been admitted to ensure that he was properly provided care and treatment.

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Mr. Jenkins was given the option of entering into the Arbitration Agreement and made the decision to proceed. He did not have to accept this offer nor has there been any allegation or evidence that he was actually coerced into signing this document. Mr. Jenkins also takes inconsistent positions regarding the Admission Agreement and Arbitration Agreement. It should be noted that the Plaintiff has asserted a claim for breach of contract regarding Mr. Jenkins' admission to Riverside, which the Complaint expressly states was a "bargained-for exchange." However, Plaintiff still argue that the Admission Agreement was "forced" upon him.

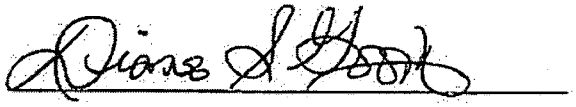
Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case as Plaintiff must still show that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to jointly select a third party arbitrator "from a panel having experience and knowledge of the health care industry." If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. That neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." I find the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. These provisions cannot be deemed oppressive or unjust. As a result, the Arbitration Agreement cannot be deemed unconscionable.

Lastly, the District Court of South Carolina has repeatedly upheld the validity of arbitration agreement nearly identical to the one at issue in this matter. In evaluating these agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (Norton, C.J.); *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson v. THI of S.C. at Magnolia Place at Spartanburg, LLC*, C.A. 7:11-2613-HMH.

Based on the foregoing, Defendant Riverside's Motion to Compel Arbitration is hereby GRANTED and Plaintiff's Motion to Compel is DENIED as moot.

It is SO ORDERED!



The Honorable Diane S. Goodstein

Date: 6-20-2018

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State of South Carolina
The Circuit Court of the First Judicial Circuit

DIANE SCHAFER GOODSTEIN
JUDGE

POST OFFICE BOX 234
ST. GEORGE, SOUTH CAROLINA 29477
TELEPHONE: (843) 832-0332
FAX: (843) 832-0389
E-MAIL: dgoodsteinsc@sccourts.org

June 21, 2018

Charleston County Clerk of Court
Attn: Caroline C. Leonard
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Stephanie Jenkins-Flemmings as Guardian ad Litem for Stevin Jenkins v. THI of South Carolina, LLC d/b/a Riverside Health and Rehab; Christy Drinkard as Employee/Manager of Riverside Health and Rehab; and Personal Care, Inc. d/b/a Personal Care Ambulance
Case No.: 2017-CP-10-02964

Dear Ms. Leonard:

I have enclosed the original signed Order Granting Defendant THI of South Carolina, LLC d/b/a Riverside Health and Rehab's Motion to Compel Arbitration and Denying Plaintiff's Motion to Compel Discovery as Moot in regards to the above matter heard before Judge Goodstein in Charleston County. Please file and serve certified copy to all parties.

Thank you for your assistance in this matter. Please do not hesitate to give me a call should you have any questions.

Sincerely,

Karen "Kaye" M. Parker
Administrative Assistant to
Judge Diane S. Goodstein

Enclosure

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Wakeham, Rebecca (Becky)

From: Wakeham, Rebecca (Becky)
Sent: Wednesday, March 07, 2018 5:57 PM
To: Ray Mullman; Shelley Hogan
Cc: Davis, Jay
Subject: RE: Mediations with Fundamental

Ray and Shelley,
Please find attached arbitration agreements for Clinkscales and [redacted] [redacted] representative refused.

We have trial in late April so we are working on May dates with the client and hope to let you know something soon.

Thanks,
Becky

Becky Wakeham, Legal Assistant
Young Clement Rivers, LLP
Phone: 843.724.6630

EXHIBIT
E
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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES , PLAINTIFFS, vs. FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN , DEFENDANTS.	)	CASE NO. 2018-CP-23-05088 **DEFENDANT FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY**

COMES NOW, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

BACKGROUND FACTS

Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place of Greenville (misidentified in Plaintiff's Complaint as "THI of South Carolina, d/b/a/ Magnolia Place-Greenville and hereinafter, "Facility Defendant" or "Magnolia Place"), entered into a valid Arbitration Agreement with Plaintiff, Charlie Clinkscales (the "Arbitration Agreement"), on behalf of his mother, Mozana Clinkscales, around the time of Ms. Clinkscales'

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admission to Magnolia Place. Per the Arbitration Agreement, Ms. Clinkscales and Magnolia Place agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the "FAA"), because the services and reimbursement thereof to be provided to Ms. Clinkscales upon her admission to the facility affected and involved interstate commerce.

As set forth, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court's inherent power to manage its own docket and the statutory mandates of the FAA, this Defendant respectfully requests that this matter must be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Place's pending motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

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(Emphasis added.)[1]

Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it "may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court's discretion. *Id. See also Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

The Court's decision on whether to stay the pending action against this Defendant "should be motivated by the court's 'concern that litigation against a party not bound by an arbitration provision may impair an arbitrator's consideration of claims against a party that is

[1] The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See* S.C. Code Ann. § 15-48-20(d)("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section…" (emphasis added)

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compelled to arbitrate.'" *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Place, a party and signatory to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Place are solely concerned with Ms. Clinkscales' stay at Magnolia Place and the provision of care and treatment provided to her. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Magnolia Place. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Place, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff's allegations of liability in the Complaint make very little distinction between this Defendant and Magnolia Place. Rather, Plaintiff repeatedly alleges that the "Defendants" are liable to Plaintiff under the various causes of action set forth in the Complaint. *See* Pltf.'s Complaint at ¶¶ 283-322. In no uncertain terms, Plaintiff seeks to prove that this Defendant and Magnolia Place should be viewed as one in the same by this Court. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Place could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Place. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Magnolia Place would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would

adversely affect signatory's right to arbitrate.). Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

By: *s/D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Magnolia Place at Greenville d/b/a Magnolia Place of Greenville

Charleston, South Carolina

Dated: December 17, 2018

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,)	
vs.)	
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,)	**DEFENDANT FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY**
DEFENDANTS.)	

COMES NOW, Defendant Fundamental Administrative Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

BACKGROUND FACTS

Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place of Greenville (misidentified in Plaintiff's Complaint as "THI of South Carolina, d/b/a/ Magnolia Place-Greenville and hereinafter, "Facility Defendant" or "Magnolia Place"), entered into a valid Arbitration Agreement with Plaintiff, James Boyd, Jr., (the "Arbitration Agreement"), around the time of Ms. Clinkscales' admission to Magnolia Place. Per the

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Arbitration Agreement, Ms. Clinkscales and Magnolia Place agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the "FAA"), because the services and reimbursement thereof to be provided to Ms. Clinkscales upon her admission to the facility affected and involved interstate commerce.

As set forth, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court's inherent power to manage its own docket and the federal statutory mandates of the FAA, this Defendant respectfully requests that this matter be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Place's pending motion to Compel Arbitration, the arbitration process is complete, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

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(Emphasis added.)[1] Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it "may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court's discretion. *Id. See also Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

The Court's decision on whether to stay the pending action against this Defendant "should be motivated by the court's 'concern that litigation against a party not bound by an arbitration provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.'" *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

[1] The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See* S.C. Code Ann. § 15-48-20(d)("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section..." (emphasis added)

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In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as his claims against Magnolia Place, a party and signatory to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Place are solely concerned with Ms. Clinkscales' residency at Magnolia Place and the provision of care and treatment provided to her during that time. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration between Plaintiff and Magnolia Place. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Place, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Generally, Plaintiff's allegations of liability in the Complaint make very little distinction between this Defendant and Magnolia Place. Rather, Plaintiff repeatedly alleges that the "Defendants" are liable to Plaintiff under the various causes of action set forth in the Complaint. *See* Pltf.'s Complaint at ¶¶ 283 – 322. In no uncertain terms, Plaintiff seeks to prove that this Defendant and Magnolia Place should be viewed as one in the same by this Court. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Place could become redundant and meaningless because of the possibility of substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Place. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Magnolia Place would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.). Furthermore, staying this

action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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By: *s/D. Jay Davis, Jr.*
D. Jay Davis, Jr.
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J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: December 17, 2018

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From: Buckner, Perry
Sent: Friday, December 21, 2018 2:20 PM
To: rstillwellj@sccourts.org; 'rstilwelllc@sccourts.org'
Cc: 'rmullmanjr@gmail.com'; 'MChristian@christiananddavis.com'; Wakeham, Rebecca (Becky); Davis, Jay
Subject: Clinkscales v. Magnolia Place of Greenville, et al CASE NO. 2018-CP-23-05088

Your Honor-

I hope you are doing well. With regard to Tuesday's hearing before your Honor on Defendant THI of South Carolina at Magnolia Place at Greenville, LLC's Motion to Compel Arbitration, I wanted to submit some additional items to the Court for consideration.

As you may recall, the Court inquired specifically about whether Plaintiff was presented with an arbitration agreement in August of 2013 when his mother might have been a continuing resident of Magnolia Place of Greenville. Defendant submitted to the Court that Ms. Clinkscales was not a continuing resident at the time, but rather had in fact been discharged and was re-admitted at a later time when the Arbitration Agreement was presented to her son.

Please find attached above confirmation of Ms. Clinkscales's discharge from Magnolia Place of Greenville in early August of 2013 and her re-admission in late August of 2013. The attachments above include a new Admission Agreement for her August 30, 2013 admission to Magnolia Place as well as additional admission materials, all of which were signed by Charlie Clinkscales, the Power of Attorney. The Arbitration Agreement, which was previously submitted as an exhibit, is also included in these materials. I have also attached above a chronology of Ms. Clinkscales discharge and admission from Magnolia Place of Greenville to clarify these submissions. This attachment shows that Ms. Clinkscales left the nursing facility on August 8, 2013 and did not return until August 30, 2013. We are providing these materials in an effort to clarify that Mr. Charlie Clinkscales was not simply presented an arbitration agreement in the midst of his mother's residency out of the blue. Until the hearing, Defendant did not realize these exhibits would be pertinent to the issue before the Court. I apologize for overlooking their potential relevance.

Lastly, our office submitted a Brief last week which included some clerical errors, so I am submitting a brief which remedies those typos. There are no substantive changes from the brief we filed with the Court.

Thank you and Merry Christmas,

-Perry

Perry M. Buckner, IV
Attorney

Young Clement Rivers LLP
Direct Dial: (843) 720-5406
Fax: (843)- 579-1306
Email: pbuckner@ycrlaw.com

Building on a strong foundation.

25 Calhoun Street
Suite 400
Charleston, SC 29401
www.ycrlaw.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
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PLAINTIFFS,	)	
vs.	)	**DEFENDANT THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC'S AMENDED BRIEF IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND IN REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION**
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN,	)	
DEFENDANTS.	)	

The Defendant, THI of South Carolina at Magnolia Place, LLC d/b/a Magnolia Place-Greenville, by and through its undersigned counsel, hereby respectfully submits this Memorandum in Support of its Motion to Compel Arbitration and in Reply to Plaintiff's Memorandum in Opposition to the pending Motion to Compel Arbitration. For the reasons set forth below, a valid, binding agreement for arbitration exists, and the Court must enter an Order compelling this matter to arbitration in accordance with the Federal Arbitration Act, 9 U.SC. § 1, *et. seq.*

FACTUAL BACKGROUND

On August 30, 2013, Plaintiff's decedent, Mozana Clinkscales, was admitted to Magnolia Place of Greenville after a short hospital stay. Ms. Clinkscales had previously resided at Magnolia Place for nearly two and half years prior to her hospitalization. Upon admission, an arbitration agreement was executed by Charlie Clinkscales, the named Plaintiff in this action, on behalf of his 89 year old mother. **(Arbitration Agreement attached hereto as Exhibit A)**. Mr. Clinkscales held a General Durable Power of Attorney over his mother, which was duly executed and filed in Greenville County on January 24, 2011. **(General Durable Power of Attorney attached hereto as Exhibit B).** A copy of the same was provided to the admissions staff at Magnolia Place of Greenville upon Ms. Clinkscales admission. Without question, Plaintiff possessed actual legal authority to act as his mother's agent in all affairs including with regard to the execution of the instant arbitration agreement. Plaintiff does not, and could not, question his authority to bind his mother to the Arbitration Agreement.

The Arbitration Agreement was presented separately from all other admission paperwork, a stand-alone document that specifically delineated that Mr. Clinkscales was waiving his mother's right to jury trial as well as all "successors, assigns, heirs, personal representatives, guardians, or any other persons deriving their claims through or on behalf of the Resident." **(See Exhibit A)**. The Arbitration Agreement includes a specific provisions regarding governing law, how an arbitrator will be chosen, and details the type of claims that must be submitted to arbitration. In bold, it is noted that the agreement should be "read carefully" and specifically notes in a stand-alone paragraph that both parties "understand and agree that [they] are waiving [their] right to a jury trial." The agreement was also executed by Clint Richey, Admissions Coordinator for Magnolia Place of Greenville, on the same day.

Ms. Clinkscales remained at Magnolia Place of Greenville for the next two and a half years, ultimately being discharged on December 18, 2015. During her residency at Magnolia Place, the Plaintiff (nor any family member or Ms. Clinkscales herself) never contested, questioned, or raised any single concerns regarding the Arbitration Agreement whatsoever. On October 4, 2018, Plaintiff instituted the instant lawsuit asserting claims which fall directly within the governance of the Arbitration Agreement.

On November 16, 2018, this Defendant filed the instant Motion asserting its right to arbitration. Since that time, the parties have attempted to resolve this dispute and seemingly had made substantial progress. Indeed, as recently as December 12, 2018, Plaintiff's counsel had proposed potential arbitrators for this very case. **(See E-Mail Correspondence Attached Hereto As Exhibit C).** However, five days later, on the eve of the hearing, Plaintiff submitted a Memorandum in Opposition, which totals more than 285 pages including exhibits. Until that time, counsel for the undersigned was unaware of any opposition to the instant Motion.

ARGUMENT & CITATION OF AUTHORITY

Plaintiff's opposition to the instant Motion and enforcement of the Arbitration Agreement rests entirely upon five distinct grounds: 1) that the Arbitration is void for lack of consideration of mutuality, 2) that the Arbitration Agreement should be invalidated because it is missing material and definitive terms, 3) that wrongful death claims cannot be submitted to arbitration, 4) that the Arbitration Agreement is unconscionable, 5) and that this Defendant waived its right to arbitration by not producing the Arbitration Agreement immediately upon receipt of a records

request months before any litigation commenced. The Defendant will address each of these claims in their respective order.[1]

I. THE ARBITRATION AGREEMENT IS SUPPORTED BY VALID, LEGAL CONSIDERATION AND CONTAINS COMPLETE MUTUALITY

The Arbitration Agreement possesses valid, legal consideration because the parties exchanged mutual promises to arbitrate by voluntarily assenting to the provision that both parties' right to a jury trial would be waived. It is well-settled under South Carolina law that mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate that contract. *Furman v.* Walker, 124 S.C. 68, 117 S.E.2d 356 (1923); *Johnson v. Spartanburg County Fair* Ass'n, 201 S.C. 56, 41 S.E.2d 599 (1947). This undisputed notion is bedrock, black-letter contract law. This long standing principle is of equal application in the context of arbitration agreements where both parties mutually assent to arbitration. *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997)(holding a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement); *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999)(citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration.)).

[1] Plaintiff also asserts that the claims against Co-Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC should not be stayed. This Defendant does not address those arguments but would rather defer to those respective Defendants for their arguments. Plaintiff also asserts that equitable estoppel is not a valid legal argument to support the enforcement of arbitration in this case. However, Defendant does not assert equitable estoppel as grounds for enforcement unless the Court were to rule that the applicable Power of Attorney was not sufficient legal authority for Mr. Clinkscales to bind his mother. Given that Plaintiff does not imply, much less assert, that the Arbitration Agreement is invalid because of a lack of authority, equitable estoppel is unlikely to be relevant to these proceedings; however, this Defendant would reserve the right to make such arguments were Plaintiff to argue something contrary to his briefing.

In support of his argument that the Arbitration Agreement is void for lack of consideration, Plaintiff erroneously cites to *Riedman Corp. v. Jarosh*, 290 S.C. 252, 349 S.E.2d 404 (1986) and *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997) for the proposition that "[o]ur courts have held that where there is a mutual promise to arbitrate, there must be additional consideration." Neither of these cases supports Plaintiff's position.

In *Reidman*, the Supreme Court summarily affirmed the Court of Appeals in holding "that a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself." 290 S.C. 253, 329 S.E.2d at 405. In *O'Neil*, the Fourth Circuit held, in direct contradiction to Plaintiff's assertions, that **"[a] mutual promise to arbitrate is sufficient consideration for [an] arbitration agreement.**" 115 F.3d at 275 (4th Cir. 1997)(citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996)(emphasis added); *accord Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998)("[N]o consideration above and beyond the agreement to be bound by the arbitration process [is] required."). Obviously, Plaintiff's counsel's claim that consideration beyond the mutual promise to arbitrate is necessary for a valid arbitration agreement is unfounded and not supported by the law.

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both the Defendant and Ms. Clinkscales. *See* **Exhibit A** ("It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving claims through or on behalf of Resident."). Accordingly, the Arbitration Agreement contains adequate consideration in the form

of mutual promises to arbitrate and Plaintiff's unsupported claims to the contrary should be disregarded.[2]

It is similarly unclear how Plaintiff could concoct any form of a "lack of mutuality" argument. Undoubtedly, there is complete mutuality of submission to arbitration and complete mutuality of remedy. Plaintiff may not now unilaterally claim, over five years after execution of a contract, the lack of any "direct benefit" in order to invalidate the agreement under a lack of mutuality argument. To be sure, proving a mutuality of promises requires no showing of a "direct benefit." Plaintiff appears to inject the requirements of an estoppel argument not being currently advanced of Plaintiff. Additionally, Plaintiff cites to no precedent whatsoever, much less binding precedent, to support the lack of mutuality argument.

Plaintiff's Memorandum in Opposition also suggests the Arbitration Agreement is illegal, and therefore should be voided, because the Arbitration Agreement constitutes "other consideration" in violation of pertinent Medicare and Medicaid regulations. This argument has been dispensed by seemingly every single court who has ever addressed it. *See Benson v. THI of South Carolina at Magnolia Place at Spartanburg,* LLC, No. CA 7:11-2613- HMH (D.S.C. Nov. 3, 2011)(citing cases from Indiana, Alabama, Tennessee, Ohio, and Florida for the ruling that arbitration agreements do not violate 42 U.S.C. 1396r(c)(5)(A)(iii) or 42 C.F.R. §483.12(d)(3)). Again, Plaintiff cites to no legal precedent to support his argument. As a result, such an argument should similarly fail and arbitration should be compelled accordingly.

[2] The Plaintiff also cites to Judge Diane Goodstein's trial court order in *Rawl v. West Ashley Nursing & Rehab* for the proposition that more is needed for valid, legal consideration than a mutual promise to arbitrate. After careful study, it is clear that this trial court order errantly cited to *Reidman* and *O'Neil* in reaching such a holding. However, more recently, Judge Goodstein, in recognition of this error, found that a mutual exchange of promises is, in fact, valid, legal consideration in the nursing home arbitration context. (*See* **Circuit Court Order, attached hereto as Exhibit D**)

II. THE ARBITRATION AGREEMENT IS CLEAR AND UNAMBIGUOUS WITH RESPECT TO THE INTENT OF THE PARTIES AND CONTAINS ALL ESSENTIAL AND MATERIAL TERMS

The Plaintiff next contends that the Arbitration Agreement lacks material terms and is unenforceable because there was no meeting of the minds. Specifically, the Plaintiff argues that because the Arbitration Agreement does not name a specific individual as arbitrator and does not mention the specific rules of evidence or the allowance of pre-hearing discovery, it should be void for vagueness. Such an argument lacks merit and must be rejected.

The Arbitration Agreement includes specific, explicit provisions regarding how an arbitrator is chosen, what rules will govern the arbitration itself, and what types of claims must be submitted to arbitration. Indeed, the Agreement expressly denotes that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which itself contains exacting details such as the location of the arbitration, how evidentiary rulings should be made, when subpoenas can be issued, rules for confidentiality of the proceedings, compensation of arbitrators, and nearly every conceivable aspect of the arbitration itself. The lack of a specifically delineated arbitrator should not be held against the Arbitration Agreement which attempts to create a cooperative process wherein the parties attempt to mutually agree upon an arbitrator before seeking court assistance.

Plaintiff attempts to argue vagueness by noting that details such as scheduling, discovery process, and rules of evidence are not contained within the four corners of the Arbitration Agreement. However, Rule 12 of the South Carolina ADR Rules provides for the issuance of subpoenas, the compelling of witnesses, and how evidentiary rulings are to be conducted. The

extensive detail which Plaintiff apparently demands in order to declare a meeting of the minds is not supported by any case law, much less in the arbitration context.

Moreover, the Plaintiff has failed to cite and the Defendant is unaware of any binding precedent mandating that an arbitration agreement must contain such terms to be enforceable. Furthermore, arbitration agreements which are substantially similar to the one here have been held to be enforceable and were not void because they lacked the terms that the plaintiff urges are required. *See THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at *7 (D.S.C. Sept. 13, 2011); *See also THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015).

In a last ditch effort to invalidate the agreement, Plaintiff also argues that rules adopted by the AAA, AHLA, and NAF preclude arbitration of the present dispute. However, none of those organizations are relevant to the Arbitration Agreement presently before this Court. Thus, Plaintiff's argument that they preclude arbitration in this case fails.

III. THE ARBITRATION AGREEMENT APPLIES TO WRONGFUL DEATH CLAIMS

Plaintiff next argues that the wrongful death claim pursued by him is not subject to the Arbitration Agreement. Plaintiff's argument must be rejected. In support of his contention, Plaintiff cites to two trial court orders denying motions to compel arbitration of wrongful death claims. However, appellate courts in South Carolina have found that like here, where a decedent's personal representative executes an arbitration agreement in connection with the decedent's admission to a nursing home, wrongful death actions brought by the personal representative can be subject to binding arbitration. *See Dean v. Heritage Healthcare of Ridgeway*, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014).

In *Dean,* the personal representative of a decedent's estate brought actions against a skilled nursing facility for wrongful death, medical malpractice, and survival. *Id.*, 408 S.C. at 376, 759 S.E.2d at 731. The plaintiff, decedent's daughter, executed an admissions agreement and separate arbitration agreement in connection with the decedent's admission to the facility. *Id.* 408 S.C. at 377, 759 S.E.2d at 729. At the time the agreements were executed, the decedent was allegedly competent, and the plaintiff lacked a healthcare power of attorney. *Id.*, 408 S.C. at 379, 759 S.E.2d at 731, n.4. Ultimately, the Supreme Court reversed the trial court's decision denying the nursing home's motion to compel arbitration and remanded the case for the trial court to determine whether the arbitration agreement was valid based on the decedent's competence and the lack of a health care power of attorney authorizing the decedent's daughter to execute the arbitration agreement on her behalf. *Id.*, 408 S.C. at 389, 759 S.E.2d at 736.

By reversing the trial court's decision to deny the motion to compel arbitration, the court implicitly held that the plaintiff's wrongful death claims could be arbitrable, if the trial court determined the arbitration agreement was ultimately valid. Otherwise, there would have been no reason to remand those claims for further consideration by the trial court. Additionally, with respect to the arbitrability of the decedent's wrongful death claims, the court importantly noted that "*courts may not refuse to compel arbitration simply because a wrongful death claim is involved.*" *Id.,* 408 S.C. 371, 378, 759 S.E.2d at 731, n.3 (emphasis added). *See also, THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("*Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death*")(emphasis added)(citing *Dean,* 759 S.E.2d at 731 n. 3.) Neither trial court order cited by Plaintiff mentions, much less addresses, *Dean.*

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, a case factually similar to the case at the bar, the court, by granting the defendant's motion to compel arbitration, implicitly held that the plaintiff's wrongful death claims were subject to arbitration. No. 2:11-CV-02861, 2011 WL 6318575, at *6 (D.S.C. Dec. 15, 2011). In *McCutcheon*, the plaintiff, decedent's husband, signed an arbitration agreement as the decedent's "'Durable Power of Attorney for Health Care' / 'Legal Guardian' / 'Responsible Party, '" upon the decedent's admission to a nursing home. *Id.* at *1. Subsequently, the plaintiff brought several claims, including one for wrongful death, for a dispute arising out of the nursing homes' care of the decedent. The nursing home filed a motion to dismiss and to compel arbitration. *Id.* Ultimately, the court found that the arbitration agreement at issue was valid and applicable to the plaintiff's claims. *Id.* at *6. Thus, by subjecting the plaintiff's wrongful death claim to binding arbitration, the court implicitly held that wrongful death claims brought by a plaintiff who, like in the case at the bar, has signed an arbitration agreement in a representative capacity on behalf a of a decedent, are subject to binding arbitration.

In *Boland v. Unihealth Post Acute Care-Columbia*, the Honorable Allison Renee Lee granted a defendant's motion to compel arbitration against the personal representative of a nursing home decedent's estate, thus subjecting the plaintiff's wrongful death claim to binding arbitration. *Boland v Unihealth Post Acute Care - Columbia, LLC*, No. 2010CP25489, 2010 WL 9932512 (S.C.Com.Pl. Jan. 12, 2010). *Boland* involved a plaintiff who signed an arbitration agreement in connection with his mother's admission to a skilled nursing facility. *Id.* There, like in *McCutcheon* and the case at the bar, the plaintiff had a power of attorney. After the plaintiff's mother died, the plaintiff brought an action against the nursing home alleging wrongful death

and survival claims. *Id.* The Defendant filed a motion to dismiss and compel arbitration. *Id.* The Court granted the Defendant's motion to dismiss the action and compel arbitration. *Id.*

The Arbitration Agreement here clearly encompasses wrongful death claims, which are purely derivative in nature. The Arbitration agreement plainly states "*It is the intention of the parties to this Agreement to bind not only themselves, but also, their, successors, assigns, heir, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.*" The Agreement was executed by Charlie Clinkscales in his individual and representative capacity. As such, the Arbitration Agreement must be found binding on the wrongful death claims. To be sure, statutory beneficiaries have no right to a claim but through the standing of the personal representative. *THI of New Mexico at Hobbs Ctr., LLC v. Spradlin,* 532 F. App'x 813, 816–18 (10th Cir. 2013).

The South Carolina Probate code itself tells us that such claims must be considered derivative. Because Ms. Clinkscales would have been bound by the arbitration agreement immediately prior to her death, the Plaintiff, as her personal representative is also bound in his capacity as her personal representative. *See* THI of S.C. at Columbia, LLC v. Wiggins, No. CA 3:11-888-CMC, 2011 WL 4089435, at *5 (D.S.C. Sept. 13, 2011)("a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death") (citing S.C. Code §62-3-703); *See also Estate of Stokes ex rel. Spell v. Pee Dee Family Physicians, L.L.P.*, 389 S.C. 343, 349, 699 S.E.2d 143, 146 (2010)(citing *Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939, 941 (D.S.C. 1988)(recognizing that wrongful death claims are derivative claims and are conditioned upon a decedent's ability, "if he had lived, to bring an action at the time of his death"). Therefore, it follows that if a decedent's claims would have

been subject to arbitration, had she survived, her beneficiaries' claims must also be subject to arbitration. In addition, and in contrast to case law relied upon by the plaintiff, Ms. Clinkscales granted her son a general durable power of attorney, and as such, his authority was not limited to decisions relating to his mother's healthcare. Mr. Clinkscales signed the arbitration agreement in his representative capacity and therefore had the power to bind his mother and her beneficiaries to the arbitration agreement.

IV. THE ARBITRATION AGREEMENT IS NOT UNCONSCIONABLE

The Arbitration Agreement at issue cannot be invalidated upon grounds of unconscionability. An arbitration agreement may only be found invalid for "unconscionability" if this Court makes a two-fold determination: (1) that there is "absence of meaningful choice on the part of one party due to one-sided contract provisions" *and* (2) that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 53 1 U.S. 79, 92 (2000); *accord Marzulli v. Tenet S.C.*, Inc., No. 2015-002363, 2018 WL 1531507, at *3 (S.C. Ct. App. Mar. 28, 2018). In this instance, it is therefore Plaintiff's burden to prove unconscionability.

Regarding the absence of a meaningful choice, Plaintiff resorts to a multitude of generalized complaints about nursing home arbitration contracts that are not tailored to this case and are entirely unsupported with regard to Mr. Clinkscales' execution of the Arbitration Agreement at issue in this case. Given Plaintiff's burden, this shortcoming is fatal to Plaintiff.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. As such, "meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. In his attempt to show the lack of a meaningful choice, Plaintiff cites to Mr. Clinkscales' lack of sophistication, his playing no part in drafting the agreement, and seemingly suggests that he "had" to sign the agreement "without option." Such arguments are either insufficient or not supported by the record before the Court.

The fact that Mr. Clinkscales is an individual and this Defendant is a commercial entity is not sufficient grounds, standing alone, to prove the absence of a meaningful choice. While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that Magnolia Place, a skilled nursing facility, unilaterally drafted this agreement and presented it to Mr. Clinksclaes for consideration cannot justify a finding of unconscionability. *See, Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) ("[I]nequality of bargaining power alone will not invalidate an arbitration agreement.").

Furthermore, the Arbitration Agreement was not "forced" or mandatory. To the contrary, this Admission Agreement was not a pre-condition for admission. The Arbitration Agreement was, in fact, a separate agreement from the admissions agreement. Additionally, by executing and consenting to the Arbitration Agreement, Mr. Clinkscales expressly acknowledged that he "[was] not required to use the aforesaid facility for [his mother's] healthcare needs and that there are numerous other health care providers in the State where [Defendant] is located that are qualified to provide such care to [her.]" Plaintiff cites to no limitation or restriction upon where Mr. Clinkscales could have been admitted to ensure that he was properly provided care and treatment.

Mr. Clinkscales was given the option of entering into the Arbitration Agreement and made the decision to proceed. He did not have to accept this offer, nor has there been any allegation or evidence that he was actually coerced into signing this document. The waiver of the right to a jury trial was presented as a separate contract, and he was expressly instructed to read carefully before executing the Arbitration Agreement.

Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to jointly select a third party arbitrator "from a panel having experience and knowledge of the health care industry." If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. That neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. These provisions cannot be deemed oppressive or unjust. As a result, the Arbitration Agreement cannot be deemed unconscionable.

Lastly, the District Court of South Carolina has repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these

agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at *3 (D.S.C. Dec. 15, 2011) (Norton, C.J.); *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at *6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson v. THI of S.C. at Magnolia Place at Spartanburg, LLC*, C.A. 7:11-2613-HMH.

V. NO WAIVER OF ARBITRATION RIGHTS HAS OCCURRED

Plaintiff's last eleventh hour attempt to negate enforcement of the Arbitration Agreement rest upon the assertion that this Defendant somehow has waived its rights under the Arbitration Agreement by not providing it in response to a medical records request that occurred earlier this year. Additionally, Plaintiff suggests that Defendant did not timely provide the Arbitration Agreement in accordance with Plaintiff's counsel's own demands. Of course, Plaintiff cites to no legal authority whatsoever in support of his claim that such conduct amounts to waiver.

"The FAA requires courts to resolve 'any doubts concerning the scope of arbitrable issues... in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Accordingly, "*there is a strong presumption against finding that a party has waived its right to compel arbitration[.]*" *Id.* (emphasis added). To overcome this presumption, "the party seeking to avoid arbitration 'must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). "Mere inconvenience to an opposing party is not sufficient to establish prejudice." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 612, 586

S.E.2d 581, 585 (2003)(citing *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct.App.2003)). South Carolina "follow[s]the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver." *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003)

In this case, despite Plaintiff's demonstrably false claims to the contrary, no real delay has occurred and no prejudice has been suffered. This Defendant was served with process of the Notice of Intent to File Suit on January 18, 2018. Less than 45 days later, on March 7, 2018 Plaintiff's counsel was in possession of the Arbitration Agreement. **(See E-Mail Correspondence attached hereto as Exhibit E).** As a result, Plaintiff's submissions to this Court that Defendants "participated in pre-suit mediation without once mentioning the arbitration clause" is false and should be given no credence by this Court. Additionally, participation in the NOI process alone is not grounds for waiver of arbitration, and under South Carolina law, there is no obligation to seek enforcement upon service of the NOI. *See Dean* at 388 ("We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity.") Here, Defendant moved to compel arbitration within 30 days after the filing of Plaintiff's Complaint as its initial response to the lawsuit. Under binding South Carolina precedent, this conduct cannot amount to a waiver.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Honorable Court GRANT its Motion and COMPEL this matter to arbitration in accordance with the valid, binding Arbitration Agreement.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
P.O. Box 993, Charleston, SC 29402
(843) 720-5415; pbuckner@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Magnolia Place at Greenville, LLC

Charleston, South Carolina

Dated: December 21, 2018

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME: MOZANA CLINKSCALES

RESIDENT NUMBER: 300242-02

DATE OF ADMISSION: 8/30/2013

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among MAGNOLIA PLACE GREENVILLE ("Facility"), MOZANA CLINKSCALES ("Resident") and/or CHARLIE CLINKSCALES ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

II. AGREEMENT FOR CARE

A. FACILITY AGREES TO:

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

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

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

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

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

6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.

8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

9. Provide an activities program for Resident, components of which will be at the discretion of Facility.

10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold.*

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☒-semi-private) accommodations, for a basic fee of $ 180.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.

b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.

c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

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

IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
c. Resident's death
d. The safety or health of individuals in the Facility is endangered.
e. Resident and/or his/her legal representative has failed to pay for his/her stay.
f. Facility ceases to operate or is no longer able to provide services to Resident.
g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

V. MEDICAID BENEFICIARIES

1. Eligibility. Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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

3. Non-Covered Services.

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

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

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

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

6. Application/ Appeals. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VI. MEDICARE BENEFICIARIES

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

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

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

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

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

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

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

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

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.

2. **Ancillary Services.** Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

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

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

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

_____

_____

_____

_____

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

_____

_____

_____

_____

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

IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

XVIII. ENTIRE AGREEMENT

I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties.

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident — Date

Printed Name of Resident

Resident Social Security Number

Witness Signature — Date

Printed Name of Witness

OR

Signature of Representative, if any — Date 8-30-13

Printed Name of Representative

Witness Signature — Date

CLINT RICHEY
Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official

Printed Name of Facility Official & Title

8/30/13
Date

Original: Business File • Photocopy: Resident/Representative

PRIVACY ACT STATEMENT FOR DISCLOSURES
TO THE CENTERS FOR MEDICARE AND MEDICAID ("CMS")

THIS FORM IS NOT A CONSENT FORM TO RELEASE OR USE HEALTH CARE INFORMATION PERTAINING TO YOU; RATHER, IT IS A REQUIREMENT OF THE PRIVACY ACT OF 1974.

Pursuant to the Privacy Act of 1974, this long-term care facility is required to submit certain personal information, including some of your medical information, to the Centers for Medicare and Medicaid ("CMS"). The submission of this information will facilitate tracking of changes in your health and functional status over time for purposes of evaluating and assuring the quality of care provided by nursing homes that participate in the Medicare or Medicaid programs. The gathering of such data is mandated by Sections 1819(f), 1919(f), 1819(b)(3)(A), 1919(b)(3)(A), and 1864 of the Social Security Act.

The information will also aid in the administration of the survey and certification of Medicare/Medicaid long-term care facilities and help to study the effectiveness and quality of care given in those facilities. This system will further support regulatory, reimbursement, policy, and research functions. Please note that it will collect the minimum amount of personal data needed to accomplish its stated purpose.

The information collected will be entered into the Long Term Care Minimum Data Set (LTCMDS) system of records, System No. 09-70-1517. Information from this system may be disclosed, under specific circumstances, to: (1) a congressional office from the record of an individual in response to an inquiry from the congressional made at the request of that individual; (2) the Bureau of Census; (3) the Department of Justice; (4) an individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease of disability, or the restoration of health; (5) contractors working for CMS to carry out Medicare/Medicaid functions, collating or analyzing data, or to detect fraud or abuse; (6) an agency of a State government for purposes of determining, evaluating and/or assessing overall or aggregate cost, effectiveness, and/or quality of health care services provided in the State; (7) another Federal agency to fulfill a requirement of a Federal statute that implements a health benefits program funded in whole or in part with Federal funds or to detect fraud or abuse; (8) Peer Review Organizations to perform Title XI or Title XVIII functions, (9) another entity that makes payment for or oversees administration of health care services for preventing fraud or abuse under specific conditions.

For nursing home residents residing in a certified Medicare/Medicaid nursing facility, the requested information is mandatory for the reasons stated above. Refusal to allow use of this information as explained in this Notice, may result in the loss of Medicare/Medicaid benefits provided by the nursing home.

Your signature merely acknowledges that you have been advised of the foregoing. A copy of this form will be furnished to you.

By signing below, I acknowledge that I have been notified of the requirements set forth in the Privacy Act of 1974 pertaining to my medical information.

Resident or Legal Representative | Date: 8-20-13 | Printed Name/Relationship to Resident: Charlie E. Pinkerton

Witness Signature | Date | Printed Name of Witness

Original: Business File • Photocopy: Resident/Representative

Acknowledgement

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

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

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

Resident Signature	Date	Printed Name of Resident	
Legal Representative Signature, if any	Date	Printed Name of Representative	
Witness Signature	Date	Printed Name of Witness	
Facility Representative Signature	8/30/13 Date	CLINT RICHEY, ADMISSIONS Printed Name and Title	

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

AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

Treatment/Health Care Professionals:

Authorization for Treatment

☐ _____ (initial) I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

Medical Treatment

☐ _____ (initial) It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility in not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

General Duty Nursing

☐ _____ (initial) Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

Independent Status of Health Care Providers and their Agents/Designees

☐ _____ (initial) Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

Selection of Medical Professionals:

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

PHYSICIAN:

Name: _____

Address: _____

Phone: _____

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

ASSIGNMENT AGREEMENT

THIS ASSIGNMENT AGREEMENT ("Agreement"), made and entered into as of this 30th day of AUGUST 2013, by and between MAGNOLIA PLACE GREENVILLE ("Facility") AND MOZANA CLINKSCALES ("Resident") AND/OR ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party," hereinafter collectively "Representative"), who together shall be referred to as "Resident" within this agreement;

NOW, THEREFORE, intending to be bound and as consideration for admission to the Facility, the Parties hereto agree as follows:

1. **Obligations of Resident.** Resident agrees to make full and complete disclosure to the local Medicaid Program Office regarding all financial resources and income during the application process, including all transfers of assets and/or financial resources having taken place within the preceding five years of the date of application for admission to Facility. Failure to identify all resources, income, and transfers or the submission of false information may result in the termination of this Agreement and financial liability. Resident is obligated to notify Facility when only $2000, or the value thereof, exists to satisfy financial obligations under this Agreement and/or the *Admissions Agreement*. Resident agrees to apply for Medicaid benefits at such time as his/her resources will no longer be sufficient to pay all Facility charges for Resident's care and stay.

2. **Patient Pay Amount.** For residents approved for Medicaid benefits, Facility will accept payment from Medicaid and, if applicable, the Resident's Patient Liability Amount as determined by Medicaid as payment in full only for those services covered by the Medicaid Program. During the period of time that the application for Medicaid benefits is pending, Resident shall pay such monthly Patient Liability Amount (less any qualified medical expense deductions) as estimated by the Facility and the Medicaid Program at the time of application for Medicaid benefits.

3. **Determination of Medicaid Eligibility.** Resident is obligated to cooperate fully in any Medicaid eligibility determination or redetermination process. In the event that Resident's eligibility for Medicaid benefits is denied, interrupted or terminated due to his/her failure to cooperate in the Medicaid application process, redetermination or appeal process, Resident shall be liable for the applicable daily room rate plus charges for ancillary services and supplies, during any period of nonpayment.

4. **Eligibility for Third-Party Payments.** Resident may be or may become eligible to receive financial assistance, reimbursement, or other benefits from third parties, such as private insurance, employee benefit plans, benefits under the Medicaid Program, Medicare benefits, managed care coverage, supplementary medical or other health insurance, supplemental security income insurance, or old-age survivors' or disability insurance. It is Resident's responsibility to apply for these benefits. If Resident is or becomes eligible to receive payments from any third parties for Resident's stay and care, the Facility reserves the right to collect such payments directly from the third-party source. Resident shall at all times cooperate fully with Facility and each third-party payor to secure payment. Cooperation includes providing information, signing and delivering documents, and assigning to Facility (to the extent permitted by law) any payments from Federal Social Security benefits, from any other federal or state governmental assistance programs, reimbursement or benefits of any third party payor to the extent of all amounts due the Facility. Resident agrees to reimburse Facility for any and all costs incurred by Facility to collect such payments directly from the third-party source.

5. **Assignment of Payments**. Although it is Resident's responsibility to secure payment from third-party resources, including but not limited to Medicaid benefits, Resident authorizes Facility to make such claims and to take such actions as it deems necessary to secure for the Facility receipt of third-party payments to reimburse Facility for its charges associated with Resident's stay and care. This assignment includes, but is not limited to, filing an application for Medicaid benefits and pursuing any and all appeals in the event the application is denied. To the fullest extent permitted by law, as security for payment of charges, Resident hereby assigns to Facility all of his/her rights to any third-party payments now or subsequently payable to the extent of all charges due under this Agreement and/or the Admission Agreement. To the extent permitted by law, Resident shall promptly endorse and turn over to Facility any payments received from third parties to the extent necessary to satisfy the charges under this Agreement and/or the Admission Agreement.

By way of this assignment, Resident hereby authorizes and directs any financial institution, governmental agency, entity or person having or possessing information in whatever form that is requested or needed to determine Resident's eligibility for third-party payments, including, but not limited to Medicaid, to turn over or produce the information to the Facility upon written demand.

Signature of Resident — Date

Printed Name of Resident

Resident Social Security Number

Witness Signature — Date

Printed Name of Witness

OR

Signature of Representative, if any — Date: 8-30-13

Printed Name of Representative

Witness Signature — Date

Printed Name of Witness

Signature of Facility Official

8/30/13
Date

CLINT RICHEY, ADMISSIONS
Printed Name of Facility Official & Title

Original: Business File • Photocopy: Resident/Representative

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

This Agreement is made between MAGNOLIA PLACE GREENVILLE ("Facility"), its agents, employees and servants, and MOZANA CLINKSCALES ("Resident") or CHARLIE CLINKSCALES ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative"). It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving their claims through or on behalf of Resident.

It is understood by Resident/Representative that he/she is not required to use the aforesaid Facility for Resident's healthcare needs and that there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident.

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively "Disputes"), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules.

The parties shall select an arbitrator from a panel having experience and knowledge of the health care industry. If the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The arbitrator shall hear and decide the controversy, and the decision shall be binding on all parties, and may be enforced by a court of competent jurisdiction.

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

I understand and agree that I am giving up and waiving my right to a jury trial.

This Agreement shall remain in effect for all care rendered at Facility and shall survive any termination or breach of this Agreement or the Admission Agreement. By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative.

X _____ _____ _____
Resident/Representative Signature Date Printed Name of Resident/Representative

_____ 8/30/13 CLINT RICHEY, ADMISSIONS
Authorized Agent of Facility Date Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

Network Geriatrics

PATIENT CONSENT TO TREAT
AUTHORIZATION RELEASE OF INFORMATION
ASSIGNMENT OF BENEFITS/FINANCIAL AGREEMENT

The following are the conditions for services provided by Network Geriatric Services, P.A. and its physicians for the patient whose name appears at the bottom of this page.

CONSENT FOR MEDICAL TREATMENT

I, whether signing as patient, patient's guardian or legally authorized representative, voluntarily consent to medical treatment, diagnostic procedures and testing, including, but not limited to, infectious diseases and drug testing if deemed advisable by my physician, provided by Network Geriatric Services, P.A. and its associated physicians, nurse practitioners, clinicians and other personnel while a resident of this nursing home. I am aware that the practice of medicine and surgery is not an exact science and I acknowledge that no guarantees have been made as to the result of treatments or examinations.

Initials

AUTHORIZATION FOR RELEASE OF INFORMATION

Network Geriatric Services, P.A. and attending physicians are authorized to release my medical information required in the processing of applications or submission of information for financial coverage, discharge planning and further medical treatment for services provided while I am a resident of this nursing home. I, whether signing as patient, patient's guardian or legally authorized representative, also agree to the release of medical or other information about patient to federal or state government regulatory agencies as required by law.

Initials

ASSIGNMENT OF INSURANCE BENEFITS

I, whether signing as patient, patient's guardian or legally authorized representative, assign all rights in any insurance benefits or other funding for applicable medical treatment to the physician and Network Geriatric Services, P.A.

Initials

FINANCIAL AGREEMENT

Patient is responsible for payment of any and all charges made for medical services on patient's behalf. In consideration of medical services to be rendered, I, the patient, understand I am responsible for any and all charges not covered by insurance [illegible] benefits and agree to pay physician and network [illegible] services. As the patient's guardian or legally authorized representative **I agree that to the extent patient has available funds,** I will pay from patient funds any and all charges for medical services, not covered by insurance benefits, made for or on behalf of the patient by Network Geriatric Services, P.A. All parties further understand Network Geriatric Services, P.A. can obtain patient's credit report for review in collection of this debt. In the event this debt is referred to a collection agency or attorney for collection, or collected through the S.C. Setoff Debt Collection Act, any and all reasonable attorney's fees and collection costs shall be paid by the patient from available patient funds.

Initials

8/30/13
Date

Witness

Print Patient's Name

Signature of Patient
(Patient's Guardian or Legally Authorized Representative)

SIGN HERE

This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (aka HIPAA), 42 USC § 1320d and 45 CFR 160-164.

Revised 3/2006
Revised 1/2008
Revised 5/2011

MatrixCare Release 2016 R1 - 2/14/2016 at 1:00 A.M. Central Time

Facility: Magnolia Place Greenville **Welcome,** Bridget Hudson BOM [Log off]

matrixcare eLearning | Help

Home Messages Resident Processes Bill Mgmt Reports Facility RAI Collections

Resident Census

Clinkscales, Mozana
Age: 89 years **Sex:** F
U/R/B Not Assigned
Admitted on: 10/12/2015 04:41 PM

DNR

Status: Discharged
Primary Physician: Kerry Wheeler DO
Primary Payer: Medicaid SNF
MR#: 300242-03
Emergency Contact: Clinkscales, Charlie

Census Records

Bed Swap | Add

Date/Time	Census Type	Level of Care	Payer	Unit/Room/Bed		
12/18/2015 05:19 PM	Discharge	NONE	Medicaid SNF *Medicaid (State)*		Edit	Delete
11/05/2015 05:46 PM	Information Change	NONE	Medicaid SNF *Medicaid (State)*	PINK WING / 213-1 *Semi-Private Bed*	Edit	Delete
10/12/2015 04:41 PM	Admission	NONE	Medicare A *Medicare Part A*	PINK WING / 213-1 *Semi-Private Bed*	Edit	Delete
10/08/2015 06:48 PM	Discharge	NONE	Medicaid *Medicaid (State)*		Edit	Delete
10/02/2015 10:30 PM	Hospital Leave	NONE	Medicaid *Medicaid (State)*	PINK WING / 213-1 Semi-Private Bed	Edit	Delete
02/18/2014 10:50 AM	Information Change	NONE	Medicaid *Medicaid (State)*	PINK WING / 213-1 *Semi-Private Bed*	Edit	Delete
02/07/2014 02:49 PM	Information Change	NONE	Medicaid *Medicaid (State)*	PINK WING / 213-2 *Semi-Private Bed*	Edit	Delete
11/07/2013 10:24 AM	Information Change	NONE	Medicaid *Medicaid (State)*	PINK WING / 213-1 *Semi-Private Bed*	Edit	Delete
08/30/2013 10:22 AM	Return	NONE	Medicare A *Medicare Part A*	PINK WING / 213-1 *Semi-Private Bed*	Edit	Delete
08/18/2013 03:59 PM	Discharge - Return Expected	NONE	Medicaid *Medicaid (State)*		Edit	Delete
08/08/2013 08:34 AM	Hospital Leave	NONE	Medicaid *Medicaid (State)*	PINK WING / 213-1 Semi-Private Bed	Edit	Delete
07/16/2013 05:01 PM	Information Change	NONE	Medicaid *Medicaid (State)*	PINK WING / 213-1 *Semi-Private Bed*	Edit	Delete
07/12/2013 12:25 PM	Information Change	NONE	Medicaid *Medicaid (State)*	PINK WING / 225-2 *Semi-Private Bed*	Edit	Delete
05/28/2013 05:03 PM	Information Change	NONE	Medicaid *Medicaid (State)*	BLUE WING / 109-2 *Semi-Private Bed*	Edit	Delete
04/10/2013 01:12 PM	Admission	NONE	Humana FFS *Like Medicare Part A*	BLUE WING / 109-2 *Semi-Private Bed*	Edit	Delete
03/25/2011 09:45 AM	Discharge	NONE	Advantage Medicare FFS *Like Medicare Part A*		Edit	Delete
01/21/2011 04:02 PM	Information Change	NONE	Advantage Medicare FFS *Like Medicare Part A*	BLUE WING / 104-1 *Private Bed*	Edit	Delete
01/15/2011 11:45 AM	Admission	NONE	Advantage Medicare FFS *Like Medicare Part A*	BLUE WING / 107-2 *Semi-Private Bed*	Edit	Delete

ELECTRONICALLY FILED - 2019 Feb 14 4:17 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,	)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,	)	**DEFENDANT THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC'S NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER AND/OR AMEND PURSUANT TO S.C.R.P. RULE 59(E)**
vs.	)	**HEARING REQUESTED**
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,	)	
DEFENDANTS.	)	

TO: RAYMOND P. MULLMAN, JR. and MATTHEW W. CHRISTIAN, ATTORNEYS FOR THE PLAINTIFF:

THE DEFENDANT, THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville (hereinafter referred to as "this Defendant"), by and through its undersigned counsel, hereby respectfully moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying Arbitration, which Order was dated and filed February 5, 2019. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is therefore timely made. The Defendant requests a hearing in accordance herewith.

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The Defendant respectfully submits that the Court erred in its determination that the Arbitration Agreement is not valid and/or not applicable to Plaintiff's claims on the following grounds:

1. The Court's Order improperly ruled that the Arbitration Agreement at issue lacked valid, legal consideration, and, as a result, could not be enforced. The Court found that both parties' mutual promise to forfeit their respective rights to a jury trial was not sufficient consideration despite binding precedent in South Carolina as well as the Fourth Circuit. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997)(applying South Carolina law); *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999)(citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration under South Carolina law.); *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996). South Carolina law unequivocally does not require any "additional consideration" above and beyond these parties' mutual promises to arbitrate.

2. This Defendant respectfully submits that to require "additional consideration" for the Arbitration Agreement above and beyond the parties' mutual promises to arbitrate would violate United State Supreme Court precedent regarding enforcement of arbitration agreements under the Federal Arbitration Act ("FAA"). *Kindred Nursing Centers Ltd. P'ship v. Clark*, 581 U.S. --- 137 S. Ct. 1421, 197 L. Ed. 2d 806 (2017); *Marmet Health Care Ctr., Inc. v. Brown,* 565 U.S.530, 132 S.Ct. 1201, 182 L.Ed.2d 42 (2012); *AT & T Mobility LLC v. Concepcion*, 563

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U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011); *AT&T v. Concepcion*, *Marmet Healthcare*, *Kindred*.

3. The Court improperly found that this Defendant's promise to arbitrate was "illusory" because it was unlikely that this Defendant would commence claims ***against*** the Plaintiff that would require arbitration under the Arbitration Agreement. Defendant respectfully submits that the probability of realizing a promise alone does not render a promise illusory, and, even if it did, there are a multitude of offensive claims that would require arbitration by this Defendant including, but not limited to, disputes concerning the payment of services for care rendered. Additionally, this Defendant waived its right to a jury trial for claims ***against it*** as well, and the Court's Order ignores the forbearance of that right as valuable consideration. "A forbearance to exercise a legal right is valuable consideration." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App. 1998).

4. The Court found that this Defendant's arguments failed because they "conflated" the Arbitration Agreement and the Admissions Agreement which the Court ruled did not merge by operation of law. This Defendant never asserted, neither in its brief nor at the hearing on this matter, that the Admissions Agreement and the Arbitration Agreement should merge, and this Defendant never relied on any consideration pertaining to any Admissions Agreement (or any admission itself) to support the validity of the Arbitration Agreement. As a result, the Court's citation to and reliance on *Coleman v. Mariner Health Care, Inc.* 407 S.C. 346, 755 S.E.2d 450, 452 (2014), *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d

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679 (Ct. App. 2016), and *Hodge v. Unihealth Post-Acute Care of Bamberg, LLC* 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) is misplaced. The doctrine of merger is not relevant to the instant dispute as Mr. Clinkscales held a valid Power of Attorney over his mother at the time the Arbitration Agreement was executed.

5. To the extent that the Court ruled that the Arbitration Agreement lacked consideration because it was presented to Mr. Clinkscales during his mother's pre-existing, continuing residency at this Defendant's skilled nursing facility, the Court's Order must be amended because it fails to account for Ms. Clinkscales' hospitalization and re-admission to this Defendant's skilled nursing facility during which new and distinct admissions paperwork was completed by Mr. Clinkscales on behalf of his mother. The Court's Order appears to find that the Arbitration Agreement was presented during an uninterrupted residency at this Defendant's skilled nursing facility. However, Counsel for this Defendant submitted supporting materials and exhibits to the Court prior to its decision. *See* **Exhibits A and B.**

6. The Court's Order improperly found that this Defendant failed to demonstrate the element of consideration because it did not prove a "benefit" to Ms. Clinkscales by her son executing the Arbitration Agreement. No demonstration of a "benefit" must be made as this Defendant is not asserting any estoppel arguments. "A forbearance to exercise a legal right is valuable consideration." *Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App. 1998).

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7. The Court improperly found the Arbitration Agreement to be a "contract[] of adhesion" even though it did not rule that the Arbitration Agreement was unconscionable. This Defendant respectfully submits that this finding is not supported by the record before the Court, and the Order should be amended accordingly.

8. The Court's Order found that the Arbitration Agreement is unenforceable because it constitutes "other consideration" in violation of pertinent Medicare and Medicaid regulations. Specifically, the Court's Order appears to find that the Arbitration Agreement violated 42 U.S.C. §1396r(c)(5)(A), which prohibits Medicare and Medicaid certified facilities from receiving other consideration "in addition to any amount otherwise required to be paid under the State's Medicaid plan... as a precondition of admitting (or expediting the admission of) the individual to the facility..." However, as the Court's Order itself found, the Plaintiff was not required to sign the arbitration agreement as a precondition of Ms. Clinkscales's admission to the Facility, so 42. U.S.C. §1396r(c)(5)(A) cannot be found to have been violated. In addition, this "additional consideration" argument has been dispensed by seemingly every single court who has ever addressed it. *See Benson v. THI of South Carolina at Magnolia Place at Spartanburg,* LLC, No. CA 7:11-2613- HMH (D.S.C. Nov. 3, 2011)(citing cases from Indiana, Alabama, Tennessee, Ohio, and Florida for the ruling that arbitration agreements do not violate 42 U.S.C. 1396r(c)(5)(A)(iii) or 42 C.F.R. §483.12(d)(3)). The Court's Order does not cite to any authority to the contrary to support its ruling.

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9. The Court's Order improperly ruled that the Arbitration Agreement did not apply to Plaintiff's wrongful death claims because "no one with legal authority" signed the agreement on behalf of the statutory beneficiaries and the Arbitration Agreement did not cover such claims. Under S.C. Code Ann. § 15-51-10, a personal representative is clearly bound to an Arbitration Agreement to the same extent as his or her decedent:

> "Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, ***if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof***, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured...."

(emphasis added). Additionally, under S.C. Code Ann. § 62-3-703:

> "a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to his death."

Both of these statutes confirm that South Carolina's Wrongful Death Statute is a statute which requires, as a condition of any suit, that the decedent himself, had he lived, could have "maintain[ed] an action and recover[ed] damages." By definition, a suit under the Act in South Carolina is derivative of a decedent's rights. *See* 26 *S.C. Jur. Limitation of Actions* § 32 ("A wrongful death action is derivative in nature...."; *see also, Quattlebaum v. Carey Canada, Inc.*, 685 F. Supp. 939 (D.S.C. 1988). To further illustrate this point, if the statute of limitations has expired against the decedent for an injury that led to his death, then any wrongful death action is likewise barred, even though it may be

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commenced within the limitations period of the Wrongful Death Act. Plaintiff, as personal representative is bound to the same extent his decedent is bound.

10. The arbitrability of wrongful death claims was addressed by the South Carolina Supreme Court in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E. 727 (2014), and it held that "*courts may not refuse to compel arbitration simply because a wrongful death claim is involved.*" *Id.*, 408 S.C. 371 at 389, 759 S.E.2d 727 at 737, n.3 (emphasis added). Courts in South Carolina interpreting *Dean* have found that statutory beneficiaries are subject to arbitration to the same extent as the decedent. *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at *3 (D.S.C. Mar. 19, 2015) ("Additionally, the South Carolina Supreme Court made clear in Dean that, under South Carolina law, an arbitral agreement is still indeed binding on a decedent's estate for a claim in wrongful death")(citing *Dean,* 759 S.E.2d at 737 n. 3.) The majority of states concur with this approach including New Mexico, Mississippi, Florida, Texas, Michigan, Colorado, Pennsylvania, and Alabama[1].

[1] *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 532 Fed. Appx. 813 (10th Cir. 2013) *Trinity Mission of Clinton, LLC v. Barber,* 988 So.2d 910, 919 (Miss.Ct.App.2007); *see also*, *Laizure v. Avante at Leesburg, Inc.,* 109 So.3d 752, 761–62 (Fla.2013) ("[T]he nature of a wrongful death cause of action in Florida is derivative in the context of determining whether a decedent's estate and heirs are bound by the decedent's agreement to arbitrate. The estate and heirs stand in the shoes of the decedent for purposes of whether the defendant is liable and are bound by the decedent's actions and contracts with respect to defenses and releases."); *In re Labatt Food Serv., LP,* 279 S.W.3d 640, 646 (Tex.2009) ("[R]egardless of the fact that [decedent's] beneficiaries are seeking compensation for their own personal loss, they still stand in [decedent's] legal shoes and are bound by his agreement."); *Ballard v. Sw. Detroit Hosp.,* 119 Mich.App. 814, 327 N.W.2d 370, 371–72 (1982) ("[A]lthough the Michigan wrongful death act provides for additional damages benefitting the decedent's next of kin for loss of society and companionship, it does not create a separate cause of action independent of the underlying rights of the decedent. Rather, the cause of action is expressly made derivative of the decedent's rights."); *Allen v. Pacheco*, 71 P.3d 375, 379 (Colo.2003); *Peltz v. Sears, Roebuck & Co.* 367

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11. The Court Order's reliance on the Kentucky Supreme Court's decision *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581 (Ky. 2012) is misplaced. In *Ping*, the court ultimately ruled that the plaintiff, a patient's daughter who executed the arbitration agreement, lacked authority to do so. Because of this, the Court found that the document could not bind the statutory beneficiaries. There is no dispute over Mr. Clinkscales authority to bind his mother. This Defendant contends the Arbitration Agreement is valid and can be enforced against the statutory beneficiaries. Therefore, *Ping* is not authoritative on the issues before the Court. Further, Kentucky law regarding wrongful death actions differs drastically from South Carolina law. As noted above, wrongful death actions in South Carolina are derivative, even though the damages are awarded separately. Under Kentucky law, a wrongful death action accrues independently, and is not derivative.

12. Defendant also submits that *Long v. Silver*, 248 F.3d 309 (4th Cir.2001) supports the arbitrability of the wrongful death claims in the instant matter because such the statutory beneficiaries claims are "so closely intertwined" with those relating to the survival action, Plaintiff should be estopped from refusing to submit those claims to arbitration. *See also, Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir.1993) (holding that because claims against the non-signatory were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims (internal quotation marks omitted).

F.Supp.2d 711, 718 (E.D.Pa.2005); *Briarcliff Nursing Home, Inc. v. Turcotte* 894 So.2d 661, 665 (Ala. 2004)

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13. Charlie Clinkscales, now Personal Representative of his mother's estate, signed the agreement, not only on behalf of his mother and himself, but also on behalf of all "successors, assigns, heirs, personal representatives, guardians or other persons deriving their claims through or on behalf of the Resident." As a result, there is an explicit intent to bind third-parties including the statutory beneficiaries.

14. Even if additional wrongful death claims are found not to be arbitrable, Charlie Clinkscales' claims for wrongful death must nevertheless be submitted to arbitration because he personally signed the agreement in his individual capacity, thereby waiving his right to a jury trial irrespective of the derivative nature of the wrongful death claims.

15. Lastly, the Court's Order, although denying arbitration, improperly addresses issues of indispensable parties, proper defendants to a potential arbitration, and agency law which have no bearing on the issues before the Court.

YOUNG CLEMENT RIVERS, LLP

By: *s/ Perry M. Buckner, IV*
Perry M. Buckner, IV
P.O. Box 993, Charleston, SC 29402
(843) 720-5415; pbuckner@ycrlaw.com
Attorneys for the Defendant THI of South Carolina at Magnolia Place at Greenville, LLC

Charleston, South Carolina

Dated: February 14, 2019

ELECTRONICALLY FILED - 2019 Feb 14 4:25 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,	)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,	)	
vs.	)	**DEFENDANT FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER AND/OR AMEND PURSUANT TO S.C.R.P. RULE 59(E)** **HEARING REQUESTED**
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,	)	
DEFENDANTS.	)	

TO: RAYMOND P. MULLMAN, JR. and MATTHEW W. CHRISTIAN, ATTORNEYS FOR THE PLAINTIFF:

THE DEFENDANT, Fundamental Clinical and Operational Services, LLC (hereinafter referred to as "this Defendant"), by and through its undersigned counsel, hereby respectfully moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying Arbitration, which Order was dated and filed February 5, 2019. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is therefore timely made. This Defendant requests a hearing in accordance herewith. This Defendant respectfully submits the instant Motion on the following grounds:

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1. That the Court's Order does not properly address its Motion to Stay as a non-signatory to the Arbitration Agreement at issue. The Court's Order made no direct findings or rulings with respect to this Defendant's Motion although Co-Defendant THI of South Carolina at Magnolia Place at Greenville, LLC's ("Facility") Motion was ultimately denied. Specifically, this Defendant seeks a stay under the provisions of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3 to stay all proceedings until the validity of the Arbitration Agreement, including all appellate proceedings related thereto, and the underlying arbitration, if any, are fully exhausted and completed.
2. That the Court's Order improperly ruled and/or found that, although denying Facility's Motion to Compel Arbitration, any arbitration award which might plausibly occur in the future against the Facility could be enforced against related entities, possibly including this Defendant. Although the Order does not identify what parties this putative award might potentially be enforced against, this Defendant respectfully submits that the Court's findings in this regard are improper because no motion before the Court addresses and/or concerns such issues. This Defendant contends that the enforceability of an arbitration award as to any party, much less a party such as this Defendant, who is not bound by the Arbitration Agreement and not seeking enforcement under its terms, is not properly before this Court. Notwithstanding the above, the record before the Court does not support such findings, and the Court Order relies solely on a 1993 Third Circuit Court of Appeals case which has not been adopted in South Carolina.
3. That the Court errantly found that this Defendant was an "intended beneficiar[y] of the Arbitration Agreement" and could "be included in the arbitration proceedings if

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the Court compels arbitration" despite the fact that the Court found the Arbitration Agreement invalid and incapable of be enforced. Again, this Defendant would respectfully submit that these issues were not properly before the Court and that the Court's findings are therefore advisory in nature. The sole issues before the Court are with regard to the validity of the Arbitration Agreement and this Defendant's right to stay of the proceedings pending the outcome of arbitration. Plaintiff denied the validity of the Arbitration Agreement and opposed this Defendant's right to stay. Plaintiff did not seek enforcement of the Arbitration Agreement against this Defendant or seek to join it to any arbitration proceedings. This Defendant would submit that the Court's Order must be amended to remove any such findings that this Defendant is an intended third party beneficiary of the Arbitration Agreement because no such relief has been formally sought.

YOUNG CLEMENT RIVERS, LLP

By: *s/ Perry M. Buckner, IV*
Perry M. Buckner, IV
P.O. Box 993, Charleston, SC 29402
(843) 720-5415; pbuckner@ycrlaw.com
Attorneys for the Defendant Fundamental Clinical and Operational Services, LLC

Charleston, South Carolina

Dated: February 14, 2019

ELECTRONICALLY FILED - 2019 Feb 14 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
ESTATE OF MOZANA CLINKSCALES, BY AND THROUGH THE APPOINTED PERSONAL REPRESENTATIVE CHARLIE E. CLINKSCALES, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES ,	)	CASE NO. 2018-CP-23-05088
PLAINTIFFS,	)	
vs.	)	**DEFENDANT FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S NOTICE OF MOTION AND MOTION TO RECONSIDER, ALTER AND/OR AMEND PURSUANT TO S.C.R.P. RULE 59(E) HEARING REQUESTED**
FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC, FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC; THI OF SOUTH CAROLINA AT MAGNOLIA PLACE AT GREENVILLE, LLC, D/B/A MAGNOLIA PLACE-GREENVILLE; AND RUSTY FLATHMANN ,	)	
DEFENDANTS.	)	

TO: RAYMOND P. MULLMAN, JR. and MATTHEW W. CHRISTIAN, ATTORNEYS FOR THE PLAINTIFF:

THE DEFENDANT, Fundamental Administrative Services, LLC (hereinafter referred to as "this Defendant"), by and through its undersigned counsel, hereby respectfully moves pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure and requests that this Honorable Court alter, amend, and/or reconsider and vacate the Order Denying Arbitration, which Order was dated and filed February 5, 2019. This Defendant received notice of the Court's entry of the Order the same day, and the present Motion is therefore timely made. This Defendant requests a hearing in accordance herewith. This Defendant respectfully submits the instant Motion on the following grounds:

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2. That the Court's Order improperly ruled and/or found that, although denying Facility's Motion to Compel Arbitration, any arbitration award which might plausibly occur in the future against the Facility could be enforced against related entities, possibly including this Defendant. Although the Order does not identify what parties this putative award might potentially be enforced against, this Defendant respectfully submits that the Court's findings in this regard are improper because no motion before the Court addresses and/or concerns such issues. This Defendant contends that the enforceability of an arbitration award as to any party, much less a party such as this Defendant, who is not bound by the Arbitration Agreement and not seeking enforcement under its terms, is not properly before this Court. Notwithstanding the above, the record before the Court does not support such findings, and the Court Order relies solely on a 1993 Third Circuit Court of Appeals case which has not been adopted in South Carolina.
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YOUNG CLEMENT RIVERS, LLP

By: *s/ Perry M. Buckner, IV*
Perry M. Buckner, IV
P.O. Box 993, Charleston, SC 29402
(843) 720-5415; pbuckner@ycrlaw.com
Attorneys for the Defendant Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: February 14, 2019

ELECTRONICALLY FILED - 2018 Jan 09 8:39 AM - GREENVILLE - COMMON PLEAS - CASE#2018NI230004
ELECTRONICALLY FILED - 2018 Oct 04 11:02 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)

1. My name is Paige Swatman. I have been a Registered Nurse in the Long-Term Care field for 24 years. My experience includes Director of Nursing, clinical Nurse Consultant, VP of Clinical Services and Long-Term Care Surveyor for The South Carolina Department of Health and Environmental Control.

2. I have reviewed the medical records of Mozana Clinkscales from Magnolia Place Greenville, Greenville Health System, and Greenville County EMS for the time period of 4/10/2013 through 12/18/2015.

3. Based on review of the medical records, it is my professional opinion that during the time period of 4/10/2013 and 10/02/15, Magnolia Place Greenville deviated from the standard of care for prevention of falls and Resident's rights to freedom from abuse.

4. Without limitation, my review of the records show the following:

These findings are evidenced by the review of the medical records as follows:

1. Ms. Clinkscales was admitted to Magnolia Place Greenville on 4/10/2013 with diagnoses that included Congestive Heart Failure, Hypothyroidism, Constipation, Acute kidney Failure, Lack of coordination, Anemia, Hypertension, positive TB test, and Glaucoma.

2. The medical record states throughout by all disciplines that Ms. Clinkscales was "Alert and Oriented".

3. A care plan dated 8/3/2015 states, "At risk for falls. Fell from wheelchair to floor on 3/2/15. No noted injury."

4. On 10/2/15 at 23:28 an EMS report regarding Ms. Clinkscales states, "Fell getting out of bed. Has a fractured hip."

5. Ms. Clinkscales was admitted to Greenville Hospital with a Left Femoral Neck Fracture and underwent surgery on 10/5/15.

6. Ms. Clinkscales developed complications during surgery and was under Hospice care until her condition improved.

7. Ms. Clinkscales was readmitted to Magnolia Place Greenville on 10/12/15. She was discharged to another nursing facility on 12/18/15.

ELECTRONICALLY FILED - 2018 Jan 09 8:39 AM - GREENVILLE - COMMON PLEAS - CASE#2018NI230004
ELECTRONICALLY FILED - 2018 Oct 04 11:02 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Concerns:

1. There is no evidence of a care plan dated at the time of the fall on 3/2/15.

2. There is no evidence of a nursing note documenting the circumstances or outcome of the fall on 3/2/15.

3. On 10/1/15 at 3:00 PM, the nurse's note states, "Nurse noted another resident in pt. room and on bed with several boxes of gloves. Pt stated, 'I'm scared of him'. Resident redirected out of pt. room with ease. Pt reassured by nurse."

4. There is no further documentation of interventions to provide privacy and safety for Ms. Clinkscales.

5. There is no nurse's note to indicate the circumstances of the fall on 10/2/15, an assessment for injury, the notification to the MD, the notification to the family, or the EMS arrival and transportation to the hospital. This is evidenced by the differing statements of two Physicians providing care to Ms. Clinkscales.

    - The GHS Surgeon documented, "Mrs. Clinkscales presented two days ago after a fall from standing in which she sustained a displaced left femoral neck fracture."

    - The Hospice Physician wrote, "Respiratory distress secondary to multiple pulmonary Emboli status post left hip fracture in an 88-year-old. Admitted 10/5/15 after a fall at her nursing facility where she rolled out of bed and fractured her left leg."

NOTE:

Federal Regulation for long term care, appendix PP, 483.12, F150 defines abuse as, "The willful infliction of injury, unreasonable confinement, intimidation, or punishment with result of physical harm, pain or mental anguish."

483.12 Freedom from abuse states the intent as, "Each resident has the right to be free from abuse, corporal punishment, and involuntary seclusion. Residents must not be subjected to abuse by anyone including, but not limited to, facility staff, other residents, consultants or volunteers, staff of other agencies serving the resident, family members, legal guardians, friends, or other individuals."

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ELECTRONICALLY FILED - 2018 Oct 04 11:02 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Summary:

The staff at Magnolia Place Greenville failed to protect the privacy and safety and prevent mental distress and physical harm for Mozana Clinkscales. The facility did not intervene to prevent another resident from intimidating, frightening and ultimately causing Ms. Clinkscales to fall resulting in traumatic injury. The facility also failed to document the circumstances of this, and previous falls resulting in inaccurate information provided to the Physicians caring for Ms. Clinkscales.

Conclusion:

It is my professional opinion that Magnolia Place Greenville contributed in a direct and proximate way to the traumatic injury with physical decline of Mozana Clinkscales.

Paige Swatman RN LNC

Paige Swatman, RN LNC

Sworn to and subscribed before me,
This 6 day of November, 2017.

Notary Public

BRYAN L PARTON NOTARY PUBLIC COM. EXP. 07-27-2021 SOUTH CAROLINA

ELECTRONICALLY FILED - 2018 Jan 09 8:39 AM - GREENVILLE - COMMON PLEAS - CASE#2018NI2300004

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS
Mozana Clinkscales, through her Attorney-In- Fact, Charlie E. Clinkscales, Plaintiffs, vs. Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a Magnolia Place – Greenville, Defendants.	)	**NOTICE OF INTENT** C. A No. 2018-NI-23

YOU WILL PLEASE TAKE NOTICE that Charlie E. Clinkscales as Attorney-In-Fact for Mozana Clinkscales, pursuant to §15-79-125 of the South Carolina Code of Laws hereby submits this Notice of Intent to file suit against the Defendants named above. If Defendants do not raise arbitration, Plaintiff will assume no arbitration clause exists or Defendants have abandoned any alleged claim to arbitration. This notice is being filed based on the following facts:

STATEMENT OF FACTS ENTITLING PLAINTIFF TO RELIEF

Mozana Clinkscales was a resident of Defendants' facility in Greenville, SC from April 10, 2013 through December 18, 2015. Defendants are and have been acting in a joint enterprise to operate and manage the facility in order to provide care and treatment to vulnerable adults including Mozana Clinkscales.

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Numerous failures, deficiencies, omissions, and breaches of the standard of care have been committed by the Defendants with respect to Mozana Clinkscales. These include, but are not limited to: neglect; corporate negligence and mismanagement; failure to exercise independent judgment as patient advocates; failure to ensure proper preventative measures were in place to keep resident safe; failure to properly assess resident; failure to properly train staff; failure to properly supervise; and failure to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities. The above deficiencies, neglect, and failures caused Mozana Clinkscales pain and suffering, a Left Femoral Neck Fracture, and medical bills. See Affidavit of Paige Swatman, RN, LNC.

Also, pursuant to S.C. Code §15-79-125(c), you are notified of the statutory requirement to participate in a mediation conference "within ninety days and no later than one hundred twenty days from the service of the Notice of Intent to File Suit..." Plaintiff is ready and willing to schedule such mediation immediately. If mediation proves unsuccessful, Plaintiff will file the Summons and Complaint, as provided in S.C. Code §15-79-125.

Additionally, by filing this Notice pursuant to S.C. Code §15-79-125, Plaintiff does not waive Plaintiff's right to object to the constitutionality of the code section. Plaintiff contends that S.C. Code §15-79-125 violates the equal protection clause of the United States and South Carolina Constitutions.

(SIGNATURE BLOCK BELOW)

ELECTRONICALLY FILED - 2018 Jan 09 8:39 AM - GREENVILLE - COMMON PLEAS - CASE#2018NI2300004

Dated: January 8, 2018
Spartanburg, SC

POLIAKOFF & ASSOCIATES, PA

s/Raymond P. Mullman, Jr.
Gary Poliakoff, Esq., S.C. Bar # 4488
atty@gpoliakoff.com
Ray Mullman, Esq., S.C. Bar# 8662
rmullmanjr@gmail.com
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472

Matthew Christian, Esq. S.C. Bar # 70516
mchristian@christiananddavis.com
Christian & Davis, LLC
1007 E. Washington St.
Greenville, SC 29601

Attorneys for Plaintiff

Paige Swatman, RN, LNC

148 Anchor Drive

Six Mile, SC 29682

864-633-6168

paigeswatman@yahoo.com

Objective:

My goal at this point in my life is to work with reputable attorneys to assist the elderly who have been neglected, abused, or harmed in any way while in a nursing home. I have personal experience with this, and will use my expertise gained from many years in the long term care industry.

Experience:

W. Andrew Arnold, Attorney at Law

2011-present

The Woodlands at Furman

Director of Nursing

2013-2015

Choice Health Management Services

Regional Clinical Director and Vice President of Clinical Services

2009-2012

UHS-Pruitt Corporation

Senior Nurse Consultant and Rapid Response Team Coordinator

2007-2009

Laurel Baye Healthcare

Executive Director of Nursing and Senior Field Nurse

2004-2007

IHS/Trans Health Management, Inc.

Corporate Clinical Services Director

2002-2004

Health Management Resources

Director of Nursing and Corporate Clinical Services Consultant

1996-2002

Education:

Associate Degree in Nursing 1993

RN multistate license R 00067686

ELECTRONICALLY FILED - 2019 May 28 1:27 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2018-CP-23-05088

Estate of Mozana Clinkscales, by and through the appointed Personal Representative Charlie E. Clinkscales, Individually, and on behalf of Statutory Beneficiaries,

Respondents,

v.

Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville,

Appellants.

NOTICE OF APPEAL

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Perry M. Buckner, IV (SC Bar No. 100031)
J. Joseph Owens (SC Bar No. 102794)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Other Counsel of Record:

Gary W. Poliakoff
Raymond P. Mullman, Jr.
POLIAKOFF & ASSOCIATES, PA
215 Magnolia Street
Spartanburg, South Carolina 29306
(864) 582-5472

and

Matthew W. Christian
CHRISTIAN & DAVIS, LLC
1007 E. Washington Street
Greenville, South Carolina 29601
(864) 408-8890

Attorneys for Respondents

ELECTRONICALLY FILED - 2019 May 28 1:27 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

ELECTRONICALLY FILED - 2019 May 28 1:27 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305088

Appellants, Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; and THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville, the defendants in this case, hereby appeal the following orders of the Honorable Robin B. Stilwell, Circuit Court Judge:

- His Honor's **Order Denying Motion to Compel Arbitration**, filed February 5, 2019,[1] and
- His Honor's **Form 4 Order filed May 13, 2019**, vacating and replacing the aforementioned Order Denying Motion to Compel Arbitration with the ruling set forth therein denying all Defendants/Appellants' motions to compel arbitration.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on May 13, 2019.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Perry M. Buckner, IV (SC Bar No. 100031)
J. Joseph Owens (SC Bar No. 102794)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Appellants

Charleston, South Carolina

Dated: 5/28/19

[1] This order was vacated by His Honor's Form 4 Order filed May 13, 2019. It is identified herein out of an abundance of caution.

Certificate of Counsel

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

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SC Court of Appeals

By: _____

Stephen L. Brown (SC Bar No. 66468)
D. Jay Davis, Jr. (SC Bar No. 12084)
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488
Attorneys for Appellants

Charleston, South Carolina

Dated: 6/1/20