STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG Armando J. Acevedo, through his Attorney-In-Fact, Marianne Acevedo, Plaintiffs, v. Hunt Valley Holdings, LLC; THI of South Carolina, LLC; THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post-Acute Care; Defendants.	IN THE COURT OF COMMON PLEAS C.A. No: 2018-CP-42-03421 **ORDER DATED JUNE 29, 2020** RECEIVED AUG 17 2020 SC Court of Appeals

This matter came before the Court on Defendants' Motion to Alter or Amend the Order entered October 21, 2019. THI of South Carolina at Camp Care, LLC filed their Motion to Compel Arbitration on November 8, 2019. Hunt Valley Holdings, LLC filed their Motion to Dismiss on November 8, 2018. THI of South Carolina filed their Motion to Stay on November 12, 2018. The first hearing on all of Defendants' Motions was conducted on February 1, 2019. The Court issued its Order on October, 21 2019. Defendants filed the Motion to Reconsider on October 31, 2019. A hearing was held on Defendants' Motion to Reconsider on January 22, 2020. A Form 4 Order granting Defendants' Motion to Clarify the October 31, 2019 Order was issued on June 9, 2020.

Having listened to oral arguments from counsel and reviewed the parties' legal memoranda and exhibits, and for the reasons more fully set forth below, the Court hereby denies THI of South Carolina at Camp Care, LLC's Motion to Compel Arbitration; Hunt Valley Holdings, LLC's Motion to Dismiss for Lack of Personal Jurisdiction; and THI of South Carolina, LLC's Motion to Stay. The Order of October 21, 2019 has been modified to clarify Defendants' concerns. The Order is replaced with the Ruling below.

I. BACKGROUND

This matter arises out of allegations of nursing home neglect and corporate negligence resulting in the injuries to Armando Acevedo. Marianne Acevedo is Armando's wife and holds power of attorney. The claims are brought against the nursing home facility THI of South Carolina at Camp Care, LLC, as well as Hunt Valley Holdings, LLC (HVH).

Decedent was admitted into THI of South Carolina at Camp Care, LLC ("Facility") on July 12, 2017 according to the Admission Agreement. The Admission Agreement governed the type of care Decedent would receive at the Facility and Armando's financial obligation to pay for those services. No mention of arbitration is contained in this Agreement.

A separate contract called "Arbitration Agreement" was also signed during the admission process but was expressly not a condition of admission. It was a separate contract that did not merge with the Admission Agreement. The alleged Arbitration Agreement, purportedly a contract between the Facility and Armando, does not contain the legal name of the Defendant but provides a name of a nonexistent entity, not registered with the South Carolina Secretary of State, called "Lake Emory Post-Acute Care". That agreement provides for alternative dispute resolution to any claim a party may bring against another arising out of Armando's care at the Facility.

The party seeking to force arbitration has the burden of establishing the existence of a valid arbitration agreement.[1] When faced with a motion to compel arbitration that is 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.[2] "A party seeking judicial enforcement of a contract bears the burden of persuasion."[3] Pro-arbitration policy does not

[1] 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).
[2] See Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd., 636 F.2d 51, 54 (3d Cir. 1980).
[3] THI of N.M. at Vida Encantada, LLC v. Archuleta (D. N.M., 2013)

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.[4] In Chassereau v. Global Sun Pools, Inc.[5], 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 there is a presumption in favor of arbitration agreements, this presumption only applies *after* the court finds there is a valid enforceable arbitration agreement.[6] The FAA applies to the arbitration agreement. In enacting the FAA, Congress did not intend to force parties to arbitrate in the absence of a valid and enforceable agreement, and therefore the "existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked."[7] When the parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration disappears.[8] The FAA requires that state courts enforce arbitration agreements unless the agreement is otherwise revocable under existing legal or equitable principles. See 9 U.S.C. § 2. The Federal Arbitration Act ("FAA") provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*
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> 9 U.S.C. § 2 (emphasis added).

Not all arbitration clauses are enforceable per se. Arbitration agreements may thus be invalidated by generally applicable contract defenses, such as vagueness, indefiniteness, lack of

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[4] 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.")
[5] 644 S.E.2d 718 (S.C. 2007)
[6] 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).
[7] Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1286 (10th Cir. 1997).
[8] Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002).

consideration, fraud, duress, or unconscionability.[9] Courts rely on state law to decide the threshold questions of contract formation.[10] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[11] The FAA is intended to promote inexpensive, fair, and reasonable arbitration alternatives to litigation. It is not a license for businesses to take advantage of consumers by the imposition of one-sided, unfair, and legally unconscionable arbitration schemes. We will not allow our courts to be used to enforce unconscionable arbitration clauses any more than we will allow them to be used to enforce any other unconscionable contract in South Carolina. The judicial inquiry includes 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.[12] 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.[13]

Consideration is a prerequisite to the legal formation of a valid contract. To be legally enforceable, a contract must have an offer, acceptance, consideration, and mutual assent. Consideration is essential to the enforcement of a promise. 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

[9] Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2776 (2010).
[10] 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.'").
[11] 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.").
[12] Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).
[13] Avedon Engineering, Inc. v. Seatex, 126 F.3d 1279, 1283 (10th Cir. 1997).

Agreement was not part of the Admission Contract. The Arbitration Agreement was a separate document, and thus, separate consideration was required.[14]

There was no consideration given to Armando Acevedo to sign the Arbitration Agreement, because Armando had already been admitted. The mutuality requirement is satisfied if each party has given sufficient consideration for the other's promise. Valuable consideration for a contract consists of some right, interest, profit or benefit accruing to one party or undertaken by the other.

Unconscionability, on the other hand, is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party.[15] Plaintiffs also allege that the Court should consider that the existing federal regulations still prohibit pre-dispute mandatory arbitration agreements, irrespective of the level of enforcement. 42 CFR 483.70(n) applies, which prohibits mandatory pre-dispute arbitration in nursing home cases. The regulation states:

> (n) *Binding arbitration agreements.*
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> (1) A facility must not enter into a pre-dispute agreement for binding arbitration with any resident or resident's representative nor require that a resident sign an arbitration agreement as a condition of admission to the LTC facility.

II. 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 necessary elements of a contract are an offer, acceptance, and valuable consideration.[16] It is well settled that to be valid and enforceable, a contract must be supported by valuable

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[14] Thompson v. THI of New Mexico at Casa Arena Blanca, LLC, , 2006 WL 4061187, at *12 (D.N.M. Sept. 12, 2006) THI of N.M. at Vida Encantada, LLC v. Archuleta (D. N.M., 2013).

[15] Figueroa v. Thi of New Mexico At Casa Arena Blanca LLC, 306 P.3d 480 (N.M. App., 2012)("Unconscionability is examined by the court where, in spite of adequate consideration to support a contract, the unfair terms of the contract do not warrant enforcement.").

[16] Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d161, 166 (2003) "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance,

consideration.[17] Where a contract lacks valuable consideration, the contract will be deemed unenforceable. No valuable consideration exists in this case. 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.[18] Here, the contract is 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 also exists a lack of mutuality that makes the Arbitration Agreement unenforceable. Defendants argue that the Agreement requires both sides to be bound by arbitration. Yet the problem is that the only party that is going to bring a "dispute over care" is the patient. It is virtually inconceivable that Defendants would sue their patient regarding a dispute over care. The mutual promise to arbitrate is illusory and of no benefit to Decedent or Plaintiff. Any such attempt to find a benefit would be 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."**[19]

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 requires Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. In sum, Defendants cannot meet their burden to prove merger, consideration, or any other benefit

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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)).

[17] Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984).

[18] 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)).

[19] 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

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. 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. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. The Plaintiff gained no right, interest, profit or benefit by agreeing to the Arbitration Agreement.[20] 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. Additionally, there was no bargain for exchange nor consideration to the Arbitration Agreement.

Federal regulations prohibit "additional consideration" to be accepted by the Facility. Federal regulations require Medicare and Medicaid certified facilities (including the Defendant Facility) to accept Medicare/Medicaid reimbursement rates as payment in full.[21] 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]

[20] Plantation, 386 S.C. at 206, 687 S.E.2d at 718.
[21] See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15.

It is undisputed that this Federal Medicare and State Medicaid law applies to the Defendants' nursing home in this case.

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 FAA 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.[22] An agreement which neglects material terms may be found unenforceable for indefiniteness.[23] "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 case, even if the Arbitration Agreement 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. The arbitration agreement does not allow for any pre-trial discovery. No rules for arbitration were included in the clause or attached to the contract or provided to the Plaintiff.

Contracts may be rescinded based upon **an omission of some material element affecting the subject matter** or terms and stipulations of the contract.[24] The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court.[25] There was no "meeting of the minds" as to who will arbitrate proposed disputes, which evidence rules would govern the proceedings, and whether discovery would be permitted. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate. Without a designated

[22] Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards, 265 S.C.529 (1975).
[23] Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).
[24] Truck South, Inc. v. Patel, 339 S.C. 40, 50, 528 S.E.2d 424, 429 (2000).
[25] 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.

arbitrator (or even a designated process for selecting one), the court would be forced to "fill in" the parties' alleged contract with an arbitrator selection clause – a task courts are loath to undertake.[26] "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."[27] 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 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 parties. No agreement or meeting of the minds to material terms exists. The agreement is silent as to these material and essential terms. Defendant demands that the Court fill in the omitted material terms. This the Court cannot do. The Court finds the Arbitration Agreement is unenforceable because essential and material terms are missing, vague, or indefinite. There has been no meeting of the minds as to material terms including the choice of arbitrator, rules of evidence, or allowance of discovery.

C. ***The Arbitration Agreement is both procedurally and substantively unconscionable.***

A contract is unconscionable if one of its parties lacked a meaningful choice due to one-sided contract provisions, and the contract's terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them.[28] If a court finds any provision of a contract was unconscionable when the contract was entered, the court may refuse to enforce.[29] In analyzing claims of unconscionability in the context of arbitration contracts, the Fourth Circuit

[26] Ebert v. Ebert, 320 S.C. 331, 339, 465 S.E.2d 121, 126 (Ct. App. 1995).
[27] Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).
[28] Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004).
[29] Simpson, 373 S.C. at 24-25, 644 S.E.2d at 668.

has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.[30]

Absence of meaningful choice generally speaks to the fundamental fairness of the bargaining process.[31] Courts should take into account: 1) the nature of the injuries suffered by the plaintiff; 2) whether the plaintiff is a substantial business concern; 3) the relative disparity in the parties' bargaining power; 4) the parties' relative sophistication; 5) whether there is an element of surprise in the inclusion of the challenged clause; and 6) the conspicuousness of the clause.[32]

A family's choice to place their loved one in 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.[33] The decision must be made quickly[34], and nursing home admissions are often unplanned with little time to investigate options or to wait for an opening at a nursing home of choice.[35] Time pressure significantly impairs the ability to seek and carefully consider alternatives.[36] Many facilities lack a coherent admissions process, adding to the chaos surrounding

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[30] See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999).

[31] See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989).

[32] 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 17 A Am.Jur.2d Contracts§ 279 (2004))).

[33] *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).

[34] 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).

[35] Denise Ashbugh Vlosky, et al., "*Say-so*" as a *Predictor of Nursing Home Readiness*, 93 J. of Family & Consumer Science 59 (2001).

[36] 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.

admission.[37] Residents and their family members rarely 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.[38] It is not, therefore, likely to get much attention from the non-drafting party.[39] As is true in the present action, facilities 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.[40]

The following undisputed facts support the Court's decision on unconscionability:

1. Resident lacked a meaningful choice;
2. The terms in the Arbitration Agreement are vague, oppressive, and one-sided;
3. The Arbitration Agreement was an adhesion contract;
4. The Arbitration Agreement was presented on a take-it-or leave it basis;
5. Resident did not contribute to the drafting of the Arbitration Agreement;
6. Resident did not possess any bargaining power to negotiate the terms of the Arbitration Agreement;
7. An inherent disparity in bargaining power existed between the parties to the transaction;
8. The Arbitration Agreement was inconspicuous;
9. The Arbitration Agreement was not part of the Admission Contract;
10. 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.

The Arbitration Agreement's terms do have earmarks of unfairness. For example, the Arbitration Agreement does not allow for discovery. Because the Arbitration Agreement is silent on discovery, FAA provisions indicate that there will be **no** pre-hearing discovery. The lack of

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[37] Donna Ambrogi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 The Gerontologist 82, 83-88 (1988).

[38] 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.")

[39] 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).

[40] 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).

discovery alone makes the agreement unconscionable when Defendants possess all the material information about the operation of the nursing home and what happened to Armando at their facility.

The agreement also is silent as to any rules of evidence agreed upon by the parties for the arbitration, and the costs of the arbitration are not disclosed. Further, the cost of the arbitration must be paid by the parties including Armando who has no money or assets and is permanently disabled. Plaintiff states that Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees. The cost of arbitration far outweighs the cost of proceeding in Court adding support that the agreement is unconscionable. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff. The Court conclude there is reasonable evidence to support the finding of that in 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.

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. Therefore, THI of South Carolina, LLC's Motion to Stay is **DENIED** as moot.

DEFENDANT HUNT VALLEY HOLDINGS, LLC'S MOTION TO DISMISS

Defendant Hunt Valley Holdings, LLC's filed a Motion to Dismiss for Lack of Personal Jurisdiction under Rule 12(b)(2) of the South Carolina Rules of Civil Procedure. The question of personal jurisdiction over a nonresident defendant is one which must be resolved upon the facts of

each particular case.[41] A hearing was held on February 1, 2019, and both parties have submitted various filings in support of their positions. For the reasons stated below, this Court determines it may exercise personal jurisdiction over Defendant.

South Carolina case law is settled that at the pre-trial stage of the proceedings, the plaintiff need only make prima facie showing of personal jurisdiction.[42] "There is no 'other evidence' requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction."[43] Rather, "[t]he relevant question is whether [the plaintiff] made a sufficient prima facie showing."[44] To determine whether a plaintiff has satisfied this burden, the court must construe the facts in the light most favorable to the plaintiff, drawing all inferences and resolving all factual disputes in its favor, and assuming plaintiff's credibility.

Plaintiff contends that Mr. Acevedo's injuries resulted from his receipt of substandard care at a nursing home owned and operated by Hunt Valley Holdings L.L.C through its agents Fundamental Administrative Services and Fundamental Clinical and Operational Services. Plaintiffs contend that Mr. Acevedo's injuries were caused by a "systemic failure" that implicates all of Defendants' general operations, staffing levels, employee training, and budget allocations. In addition to pleading several causes of action related to nursing home neglect and direct corporate negligence, Plaintiff also asserts a claim based on the vicarious liability of Hunt Valley's agents that provide services to the facility in South Carolina.

Having carefully considered the record of this case in the light most favorable to the Plaintiff, the Court finds that the Plaintiff has made prima facie showing of personal jurisdiction

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[41] Cribb v. Spatholt, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009).
[42] Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 332, 426 S.E.2d 777, 779 (1993).
[43] Id *citing* Springmasters, Inc. v. D & M Mfg., 303 S.C. 528, 402 S.E.2d 192 (Ct.App.1991)).
[44] Id.

over HVH. The agency test is satisfied by a showing that the subsidiary functions as the parent corporation's representative in that it performs services that are "sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."[45] If a subsidiary performs functions that the parent would otherwise have to perform, the subsidiary then functions as merely the incorporated department of its parent, and due process safeguards allow jurisdiction over the parent. The allegations and evidence currently in the record are clearly sufficient to conclude that the Rule 12 motions should be denied. Additionally, the Court finds persuasive Plaintiffs' argument that discovery is needed to resolve factual disputes of material issues. Accordingly, Defendant Hunt Valley Holdings, LLC's Motion to Dismiss should be and therefore is **DENIED**.

IT IS SO ORDERED.

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[45] Chan v. Society Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994).

Spartanburg Common Pleas

Case Caption: Armando Acevedo , plaintiff, et al VS Hunt Valley Holdings, Llc , defendant, et al

Case Number: 2018CP4203421

Type: Order/Other

IT IS SO ORDERED!

s/J. Derham Cole 2053