

**RECEIVED**

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

AUG 31 2020

**SC Court of Appeals**

Appeal from Greenville County  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Case No. 2019-CP-23-00473

The Estate of Patricia Royston, by and through  
the appointed personal representative, Marianne McCoig,  
individually and on behalf of the statutory beneficiaries,

Respondent,

v.

Hunt Valley Holdings, LLC,  
a/k/a Fundamental Long Term Care Holdings, LLC;  
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**

POLIAKOFF & ASSOCIATES, PA  
Gary W. Poliakoff  
Raymond P. Mullman, Jr.  
215 Magnolia Street  
Spartanburg, South Carolina 29306  
(864) 582-5472

*and*

CHRISTIAN & CHRISTIAN, LLC  
Matthew W. Christian  
1007 E. Washington Street  
Greenville, South Carolina 29691  
(864) 232-7363

*and (continued on next page)*

YOUNG CLEMENT RIVERS, LLP  
Stephen L. Brown  
D. Jay Davis, Jr.  
Russell G. Hines  
Kate C. Mettler  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488

*Attorneys for Appellants*

MCGOWAN, HOOD & FELDER, LLC

Jordan C. Calloway

1539 Health Care Drive

Rock Hill, South Carolina 29732

(803) 327-7800

*Attorneys for Respondent*

## **INDEX**

**Page**

### **Orders, Judgments, Decrees, or Decisions**

|                                                                                                                        |   |
|------------------------------------------------------------------------------------------------------------------------|---|
| Order Denying Defendants' Motion to Dismiss, Compel Arbitration and Stay Court Proceedings, filed October 9, 2019..... | 1 |
| Order Denying Defendants' Motion to Alter, Amend, and/or Reconsider, filed October 23, 2019.....                       | 9 |

### **Pleadings**

|                                                                                                                                                         |     |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Notice of Intent to File Suit, filed September 21, 2018 .....                                                                                           | 11  |
| Summons and Complaint, filed January 31, 2019 .....                                                                                                     | 14  |
| THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a Magnolia Place-Greenville's Answer to Plaintiff's Complaint, filed March 6, 2019..... | 75  |
| Fundamental Administrative Services, LLC's Answer to Plaintiff's Complaint, filed March 6, 2019 .....                                                   | 98  |
| Fundamental Clinical and Operational Services, LLC's Answer to Plaintiff's Complaint, filed March 6, 2019 .....                                         | 118 |
| Hunt Valley Holdings, LLC, a/k/a Fundamental Long Term Care Holdings, LLC's Answer to Plaintiff's Complaint, filed March 6, 2019 .....                  | 138 |

### **Transcripts**

|                                                  |     |
|--------------------------------------------------|-----|
| Motion Hearing Transcript, August 29, 2019 ..... | 156 |
|--------------------------------------------------|-----|

### **Other Material or Documents**

#### ***Motions and Memoranda***

|                                                                                                                                                                                                          |     |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| Plaintiff's Motion to Compel to Appellant HVH, filed May 20, 2019.....                                                                                                                                   | 192 |
| Exhibit 1 – Plaintiffs' First Interrogatories and Requests to Produce to Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville, dated May 1, 2019 ..... | 197 |
| Exhibit 2 – Hunt Valley Holdings, LLC's Answers to Plaintiff's Request to Admit, dated March 21, 2019.....                                                                                               | 215 |

|                                                                                                                                                                                                                                                                                                |           |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Plaintiff's Motion to Compel to Facility, filed June 19, 2019.....                                                                                                                                                                                                                             | 220       |
| THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a<br>Magnolia Place-Greenville's Motion to Dismiss, Compel Arbitration,<br>and Stay Court Proceedings, filed July 26, 2019 .....                                                                                               | 225       |
| Exhibit A – Arbitration Agreement.....                                                                                                                                                                                                                                                         | 228       |
| Fundamental Administrative Services, LLC's Motion to Stay, filed<br>August 7, 2019 .....                                                                                                                                                                                                       | 229       |
| Fundamental Clinical and Operational Services, LLC's Motion to<br>Stay, filed August 7, 2019.....                                                                                                                                                                                              | 231       |
| Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care<br>Holdings, LLC's Motion to Stay, filed August 7, 2019 .....                                                                                                                                                                       | 233       |
| THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a<br>Magnolia Place-Greenville's Memorandum in Support of Motion to<br>Dismiss, Compel Arbitration, and Stay Court Proceedings and Motion<br>in Reply to Plaintiff's Memorandum in Opposition, filed August 28,<br>2019.....   | 235       |
| Exhibit A – Informed Consent for Influenza Vaccine .....                                                                                                                                                                                                                                       | 264       |
| Exhibit B – Admission Agreement.....                                                                                                                                                                                                                                                           | 270       |
| Exhibit C – Arbitration Agreement.....                                                                                                                                                                                                                                                         | (see 228) |
| Exhibit D – PASARR Screening Form .....                                                                                                                                                                                                                                                        | 282       |
| Exhibit E – THI of South Carolina at Magnolia Place at<br>Greenville, LLC d/b/a Magnolia Place-Greenville's Answer to<br>Plaintiff's Complaint .....                                                                                                                                           | 284       |
| Exhibit F – Defendant THI of South Carolina at Magnolia Place at<br>Greenville, LLC d/b/a Magnolia Place-Greenville's Motion for<br>Protective Order.....                                                                                                                                      | 307       |
| Exhibit G – Order Granting Defendant THI of South Carolina,<br>LLC d/b/a Riverside Health and Rehab's Motion to Compel<br>Arbitration and Denying Plaintiff's Motion to Compel Discovery<br>as Moot, Jenkins v. THI of South Carolina at Charleston, LLC, et<br>al., dated June 20, 2018 ..... | 310       |



|                                                                                                                                                                                                                                     |           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Exhibit H – Order, Abrams v. Fundamental Long-Term Care Holdings, LLC d/b/a Magnolia Manor-Inman, et al., dated June 22, 2012 .....                                                                                                 | 320       |
| Exhibit I – Order, Campsen v. Fundamental Long-Term Care Holdings, LLC, et al., dated June 22, 2012 .....                                                                                                                           | 337       |
| Exhibit J – Order Granting Defendant THI of South Carolina at Magnolia Manor-Inman, LLC’s Motion to Dismiss and Compel Arbitration, Price v. THI of South Carolina at Magnolia Manor Inman, LLC, et al., dated August 7, 2018 ..... | 355       |
| Fundamental Administrative Services, LLC’s Memorandum in Support of its Motion to Stay, dated August 28, 2019 .....                                                                                                                 | 372       |
| Exhibit 1 – Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville’s Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings, filed July 26, 2019.....                      | 377       |
| Exhibit A – Arbitration Agreement .....                                                                                                                                                                                             | (see 228) |
| Fundamental Clinical and Operational Services, LLC’s Memorandum in Support of its Motion to Stay, dated August 28, 2019 .....                                                                                                       | 381       |
| Exhibit 1 – Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville’s Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings, filed July 26, 2019.....                    | 386       |
| Exhibit A – Arbitration Agreement .....                                                                                                                                                                                             | (see 228) |
| Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC’s Memorandum in Support of its Motion to Stay, dated August 28, 2019.....                                                                                  | 390       |
| Exhibit 1 – Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville’s Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings, filed July 26, 2019.....                    | 395       |
| Exhibit A – Arbitration Agreement .....                                                                                                                                                                                             | (see 228) |
| Plaintiff’s Memorandum in Opposition to Motion to Compel Arbitration, filed August 27, 2019.....                                                                                                                                    | 399       |

|                                                                                                                                                                         |           |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| Exhibit 1 – Admission Agreement .....                                                                                                                                   | (see 270) |
| Exhibit 2 – Arbitration Agreement.....                                                                                                                                  | (see 228) |
| Motion to Alter, Amend, and/or Reconsider Order Denying<br>Defendants’ Motion to Dismiss, Compel Arbitration and Stay Court<br>Proceedings, filed October 21, 2019..... | 432       |
| Exhibit 1 – Letter from Judge Stilwell to all counsel, dated<br>September 24, 2019 .....                                                                                | 443       |
| <b><i>Other Documents</i></b>                                                                                                                                           |           |
| Affidavit of Audrey Rabon Holmes, RN, BSN, dated September 17,<br>2018.....                                                                                             | 444       |
| Notice of Appeal, including Proof of Service, filed with lower court,<br>dated November 20, 2019 .....                                                                  | 446       |
| <b><u>Certificate of Counsel</u></b> .....                                                                                                                              | 451       |

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS  
C.A. No.: 2019-CP-23-00473

Estate of Patricia Royston, by and through the  
appointed Personal Representative, Marianne  
McCoig, Individually, and on behalf of the  
statutory beneficiaries,

Plaintiffs,

**ORDER DENYING DEFENDANTS'  
MOTION TO DISMISS, COMPEL  
ARBITRATION AND STAY COURT  
PROCEEDINGS**

vs.

Hunt Valley Holdings, LLC a/k/a  
Fundamental Long Term Care Holdings,  
LLC; 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.

This matter came before the Court on Defendants' Motion to Dismiss and Compel Arbitration. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Royston and Defendants because: (1) the Arbitration Agreement is not signed by both parties and was produced, unsigned, by the Plaintiff during discovery, and (2) the parties on the Arbitration Agreement are not those parties specifically listed in the lawsuit. Accordingly, the Defendants' motion is **DENIED**.

### **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 alleged wrongful death of Patricia Royston.

Magnolia Place-Greenville ("Facility") is owned and operated by 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, Fundamental Administrative Services, LLC, and Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC, these latter three entities being hereinafter referred to as the "Corporate Defendants."

Marianne McCoig was Patricia's daughter and now serves as the personal representative of Patricia's estate. Patricia was admitted as a short-term resident into the Facility on December 19, 2016. The Arbitration Agreement was allegedly provided to Patricia, but the facility claims they are not in possession of it, and the copy Plaintiffs produced was not signed by the facility. There is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to Defendants. Defendants acknowledge the copy at issue was not signed by any Facility representative.

Ms. McCoig initiated the current action on January 31, 2019. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to monitor and supervise Patricia's safety and well-being while at the Facility. On July 26, 2019, Defendants filed a Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings.

### **LEGAL STANDARD**

In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. 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). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., 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.

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 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").<sup>1</sup> The FAA looks to state law to decide the threshold questions of contract formation.<sup>2</sup> Therefore, arbitration agreements guided

---

<sup>1</sup> See also 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).

<sup>2</sup> 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.'").

by the FAA are subject to the same defenses applicable to all other contracts.<sup>3</sup> 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.<sup>4</sup>

### **LEGAL ANALYSIS**

The Facility's motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. The Court finds the Facility had no such contract with Ms. Royston. The "Arbitration Agreement" on which the Facility's motion relies is invalid because it is not signed by both parties, and the parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit.

#### **A. The Arbitration Agreement is not a valid and enforceable agreement because it was not signed by the party seeking its enforcement.**

The Arbitration Agreement is a separate document from the Admission Agreement with the Facility. At the bottom of the Arbitration Agreement there were lines provided for the resident and an agent of Facility to sign, date, and print their names. While not dated, Ms. Royston allegedly signed at the signature line reserved for "Resident/Representative Signature". A signature line existed for Facility to execute the agreement as well. A blank was provided for the facility to sign as "Authorized Agent of Facility", and a separate blank for the agent to print his/her

---

<sup>3</sup> 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.").

<sup>4</sup> See Sydnor v. Conesco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

name and title. At no time did anyone from Facility ever sign and execute the agreement on behalf of Facility. It is also interesting to note that the only agreement in the record, or known to exist, was found in her personal effects and produced by the Plaintiff in discovery. The Defendant did not have a copy in its possession. That leaves outstanding the question of whether the Plaintiff ever delivered to the Defendant her signed copy. As previously noted, the Facility bears the burden of proving that a valid arbitration agreement exists and was executed.

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. See Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917-18 (2017) (quoting Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009) (noting South Carolina law requires court to consider only “objective manifestations of the parties’ assent at the time the contract was made”)). The alleged agreement by its express terms, **“THE PARTIES CONFIRM THAT EACH OF THEM UNDERSTANDS THAT EACH HAS WAIVED THE RIGHT TO TRIAL BEFORE A JUDGE OR JURY AND THAT EACH CONSENTS TO ALL OF THE TERMS OF THE VOLUNTARY AGREEMENT.”** requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The Arbitration Agreement itself references the parties’ intention to select arbitration, however, there is no party signature on behalf of Facility and its affiliates. The fact that there is a signature line for “Authorized Agent of Facility” and that it is left blank further indicates that there was no mutual assent. See Baier v. Darden Restaurants, 420 S.W.3d 733, 739 (Mo. Ct. App. 2014).

**B. The parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit.**

All Defendants are all related entities<sup>5</sup> 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 its revenue.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of the Corporate Defendants 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 Patricia and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable *by each of the defendants.*” Hawthorne v. Fundamental et al., No. 2:12cv1826 (2013).

Furthermore, Plaintiff’s claims against Defendants are based on a theory of unified operation and control. Each is alleged 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 (3d Cir. 1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)). Plaintiff alleges each Corporate Defendant 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 the Corporate Defendant and, in turn, each can rely on the principles of agency law and the broad scope of the FAA to compel and participate in the Arbitration Agreement. Id. (“Where the parties to such a clause unmistakably intend to arbitrate all controversies, which might arise

---

<sup>5</sup> Related entity is an industry term that means the entities are have common ownership, management, and control.



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.”).

It is also worth noting that at the beginning of the Arbitration Agreement in question where the parties are identified the Facility has listed itself as “Magnolia Place *of* Greenville.” (Emphasis added). In actuality the Facility’s correct title would be Magnolia Place – Greenville which is the name THI of South Carolina at Magnolia Place at Greenville, LLC is doing business as. It is up to the drafter of the Arbitration Agreement to be able to sufficiently and correctly identify themselves as a party of the Arbitration Agreement. Failure to do so must be construed against the drafting the party.

#### **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



Greenville Common Pleas

**Case Caption:** Patricia Royston , plaintiff, et al vs. Hunt Valley Holdings LLC ,  
defendant, et al  
**Case Number:** 2019CP2300473  
**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-10-09 10:23:56 page 8 of 8

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
THE ESTATE OF PATRICIA ROYSTON, )  
by and through the appointed Personal )  
Representative, MARIANNE MCCOIG, )  
individually and on behalf of the statutory )  
beneficiaries, )  
  
PLAINTIFF, )  
  
vs. )  
  
HUNT VALLEY HOLDINGS, LLC, a/k/a )  
FUNDAMENTAL LONG TERM CARE )  
HOLDINGS, LLC; 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  
THIRTEENTH JUDICIAL CIRCUIT

**ORDER DENYING DEFENDANTS'  
MOTION TO ALTER, AMEND,  
AND/OR RECONSIDER ORDER**

C. A. No.: 2019-CP-23-00473

This matter comes before the Court pursuant to the October 21, 2019, Rule 59(e) Motion of the Defendants to Alter, Amend, and/or Reconsider the Court's Order entered on or about October 9, 2019. After having had the opportunity to carefully review the same, this Court respectfully denies the Motion.

**AND IT IS SO ORDERED.**

\_\_\_\_\_  
ROBIN B. STILWELL

October \_\_\_\_, 2019  
Greenville, South Carolina



Greenville Common Pleas

**Case Caption:** Patricia Royston , plaintiff, et al vs. Hunt Valley Holdings LLC ,  
defendant, et al  
**Case Number:** 2019CP2300473  
**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-10-23 14:15:29 page 2 of 2

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

C.A. No.: 2018-CP-23-

Jury Trial Requested

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, and on behalf of the  
statutory beneficiaries,

Plaintiffs,

**NOTICE OF INTENT TO FILE SUIT**

vs.

Hunt Valley Holdings, LLC a/k/a  
Fundamental Long Term Care Holdings, LLC;  
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.

You are hereby notified that, pursuant to S.C. Code § 15-79-125, the Plaintiffs, by and through their undersigned attorneys, intend to file suit against the Defendants named above for corporate negligence, negligence, nursing malpractice, and custodial neglect. If Defendants contend that an enforceable arbitration clause applies to this case, and wish to assert the enforceability of that arbitration agreement, please provide the alleged arbitration agreement immediately. Plaintiffs are prejudiced by Defendants' failure or refusal to assert arbitration as soon as the issue arises. Plaintiffs are prejudiced by any delay in Defendants' failure or refusal to assert arbitration immediately. Plaintiffs will be prejudiced in wasting time and money including participating in the mandatory pre-suit mediation if Defendants intend to assert arbitration to this

claim. If Defendants do not raise arbitration in a timely fashion, Plaintiffs will assume no arbitration clause exists or Defendants have abandoned any alleged claim to arbitration.

**Statement of Facts Entitling Plaintiff to Relief**

Defendants have been acting in a joint enterprise to operate and manage the facility in order to provide care and treatment to vulnerable adults including Patricia Royston. Patricia was a resident of Defendants' facility in Greenville, South Carolina from December 19, 2016 until her death on December 31, 2016. Prior to her admission, she was living independently.

Numerous failures, deficiencies, omissions, and breaches of the standard of care have been committed by the Defendants with respect to Patricia Royston. These include, but are not limited to: neglect; corporate negligence and mismanagement; failure to provide timely and comprehensive monitoring of the resident's condition and any changes thereto; failing to timely evaluate and assess Ms. Royston's risk factors with which she presented in order to design an appropriate plan of care; failing to implement and follow an appropriate plan of care and act on changes in condition; failing to properly care plan, properly monitor, and properly intervene in a patient at risk for falls causing decline and injury; 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 Patricia Royston pain and suffering, falls with injuries, and medication side effects. These failures led to the traumatic and painful decline and death of Patricia Royston. See Affidavit of Audrey Rabon Holmes, RN, BSN.

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 . . ." Plaintiffs are ready and willing to

schedule such mediation immediately unless Defendants intend to assert that an enforceable arbitration agreement exists that applies to this claim. If mediation proves unsuccessful, Plaintiffs 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, Plaintiffs do not waive Plaintiff's right to object to the constitutionality of the code section. Plaintiffs contend that S.C. Code § 15-79-125 violates the equal protection clause of the United States and South Carolina Constitutions.

RESPECTFULLY SUBMITTED,

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

*Attorneys for Plaintiffs*

215 Magnolia Street

Spartanburg, SC 29306

(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*

September 21, 2018

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a Fundamental  
Long Term Care Holdings, LLC; 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: 2019-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](mailto:mchristian@christiananddavis.com)  
Christian & Davis, LLC  
1007 E. Washington St.  
Greenville, SC 29601

Attorneys for Plaintiffs

Date: January 30, 2019.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a Fundamental  
Long Term Care Holdings, LLC; 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: 2019-CP-23-

**COMPLAINT**

(Wrongful Death/Survival Action)

Plaintiffs, the Estate of Patricia Royston and her statutory beneficiaries, through her  
Personal Representative, Marianne McCoig, do hereby respectfully allege as follows:

**PARTIES & JURISDICTION**

1. That Plaintiff Patricia Royston was a resident of Defendants' facility THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place - Greenville ("Magnolia Place – Greenville") in Greenville, S.C. from December 19, 2016 through December 31, 2016. Plaintiff brings this action for damages recoverable pursuant to §15-5-90, Code of Laws of South Carolina (1976).
2. That Plaintiff Marianne McCoig was Patricia's daughter and has been appointed as the Personal Representative of the Estate of Patricia Royston to represent Patricia's statutory

beneficiaries. This Plaintiff brings this action for damages recoverable pursuant to §15-51-20, Code of Laws of South Carolina (1976).

3. That, upon information and belief, Defendant Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, LLC, (hereinafter "Hunt Valley") is a Delaware limited liability corporation operating within the State of South Carolina, but has no registered agent in the State of South Carolina.
4. The Centers for Medicare & Medicaid Services (CMS) has a website called Nursing Home Compare that publishes ownership information on all nursing homes that receive Medicare and Medicaid payments based on information provided by the nursing homes. In 2016, CMS' Nursing Home Compare disclosed Hunt Valley as the indirect owner of Magnolia Place - Greenville.
5. Hunt Valley is the ultimate owner/operator and principal for the Defendants; all Defendants are related entities with common ownership and common control who participate in a joint venture to own, operate, and manage the other Defendants deriving a substantial benefit from the business and activities conducted at Magnolia Place - Greenville in Greenville, South Carolina.
6. At all times relevant herein, Hunt Valley is and was a business which owns and controls related entities, including the Defendants, pursuant to 42 CFR § 413.17 as part of the "Fundamental family of companies", a national for-profit nursing home chain with revenues exceeding \$1 billion dollars per year.
7. That, upon information and belief, Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place - Greenville ("Magnolia Place - Greenville") is a

South Carolina limited liability corporation operating within the State of South Carolina, and has a registered agent in the State of South Carolina.

8. That, upon information and belief, Defendant Fundamental Administrative Services, LLC, LLC, (hereinafter "FAS") is a Delaware limited liability corporation operating within the State of South Carolina, but has no registered agent in the State of South Carolina. FAS is the agent of Hunt Valley and manages, controls, and operates the financial and business administration of the nursing home on behalf of Hunt Valley.
9. That, upon information and belief, Defendant Fundamental Clinical and Operational Services, LLC, (hereinafter "FCOS") is a Delaware limited liability corporation operating within the State of South Carolina, but has no registered agent in the State of South Carolina. FCOS is the agent of Hunt Valley and manages, operates and controls the clinical policies, procedures, and training at the nursing home on behalf of Hunt Valley.
10. Upon information and belief, the "Fundamental family of companies," through its individual actions and acts of their agents, and in concert with the other Defendants, owns and operates a chain of nursing homes in multiple states including Magnolia Place - Greenville and derives substantial revenue therefrom.
11. That through its individual actions and the acts of its agents, and in concert with the other Defendants, Hunt Valley engaged in oversight, management, direction, and operation of nursing home facilities in South Carolina, deriving substantial revenue therefrom.
12. 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

FCOS, FAS, and Magnolia Place - Greenville is a mere instrumentality, agent, conduit or adjunct of Hunt Valley.

13. That through Agreements among the Defendants, Hunt Valley has the right and authority to choose the management companies and Home Offices for the facilities including Magnolia Place - Greenville.
14. That Hunt Valley created agents FCOS and FAS to manage and operate the facilities on its behalf and act as the Home Office pursuant to the Medicaid Home Office Cost Reports.
15. That Hunt Valley's Operating Agreement states that its business purpose is the business of managing and operating long-term care facilities, including skilled nursing facilities.
16. That Hunt Valley's Operating Agreement states that all management powers over the business and affairs of Hunt Valley and its related companies shall be rested in managers designated by the Members of Hunt Valley which is, upon information and belief, Murray Forman.
17. That Hunt Valley's Operating Agreement lists further powers of the Managers including, but not limited to, the following:
  - a. authorizing, executing, delivering, and performing services relating to the business of managing and operating long-term care facilities including skilled nursing facilities, including approving a management agreement with related entities;
  - b. incurring and refinancing the debts of Hunt Valley and its subsidiaries including revolving credit agreements;
  - c. controlling the purchase of insurance for Hunt Valley and any litigation involving the company;
  - d. hiring and firing of employees, agents, and contractors including affiliates or persons affiliated with Murray Forman;
  - e. establishing the duties, authority, and responsibilities of any employee in the company;
  - f. adopting and approving budgets, projections, forecasts, and financial reports; and

- g. executing and delivering the limited liability company operating agreements of any subsidiaries of Hunt Valley.
- 18. That Hunt Valley, through its officers and agents, entered into a Revolving Credit Agreement with a Lender to create a line of credit for the chain to use for operating costs.
- 19. The Revolving Credit Agreement was signed on behalf of the facility by agents of Hunt Valley's officers/owners and at the direction of Murray Forman.
- 20. The Revolving Credit Agreement also states that Hunt Valley and Hunt Valley's facilities including Magnolia Place-Greenville are jointly and severally liable for the debt.
- 21. That the Revolving Credit Agreement is evidence that Hunt Valley, through its officers and agents, exerts significant control by requiring each facility to maintain certain occupancy rates and profit margins thereby showing Hunt Valley's control of the facility.
- 22. That the Revolving Credit Agreement allowed Hunt Valley to control how the facility's revenue was used and stripped from the facility any right it may have had on its revenues.
- 23. That the facility's revenue is commingled by the means of the central cash management system controlled by Hunt Valley, and controlled exclusively at the corporate level.
- 24. That the Administrative Policies and Procedures of the chain found in the "Resource Manual for New Management" show that Hunt Valley's agents 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 or FCOS.
- 25. That Hunt Valley also filed a federal tax return showing the following:
  - a. each facility in the chain is treated as a disregarded entity for tax purposes;

- b. the product/service provided by Hunt Valley is "nursing services and personal care;" and
  - c. the annual gross revenue exceeds \$1 billion.
- 26. That during the residency period of December 19, 2016 through December 31, 2016, Defendants used the trademark 'Fundamental' which was used on the "www.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.
- 27. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the Defendants, FAS and FCOS engaged in the oversight, management, and operation of the Defendants' facility in Greenville County, South Carolina, on behalf of Hunt Valley deriving substantial revenue therefrom.
- 28. 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.
- 29. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the Defendants, FAS engaged in the oversight, management, direction, and operation of the Defendants' facility in Greenville, South Carolina, on behalf of Hunt Valley deriving substantial revenue therefrom.

28. Upon information and belief, FCOS and FAS employ an officer to act as a member of the governing body of Magnolia Place - Greenville.
29. 42 C.F.R. § 483.70(d)(1) states: 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.
30. 42 C.F.R. §483.75(d)(2) states: The governing body appoints the administrator who is—
  - (i) Licensed by the State, where licensing is required; and
  - (ii) Responsible for management of the facility.
31. That, upon information and belief, Hunt Valley owns, 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. Upon information and belief, all or most of the following factors exist between Hunt Valley 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.
32. That, upon information and belief, Defendants deliver nursing home care for a profit and executed the delivery of nursing home care to Plaintiff Patricia Royston during her residency at Magnolia Place - Greenville.



33. That, upon information and belief, Defendants were involved in a joint venture to own, operate, and manage nursing homes for profit including Magnolia Place - Greenville where Patricia Royston resided.
34. That, upon information and belief, Defendant Hunt Valley through its agents FCOS and FAS and other related entities were directly 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.
35. Defendants implemented a business plan for Magnolia Place - Greenville that sought to maximize profits at the expense of patient care.
36. Defendants controlled all aspects of Magnolia Place - Greenville, including but not limited to, receiving and controlling all revenues generated by Magnolia Place - Greenville, preparing the budget, and establishing inadequate staffing levels.
37. 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 Magnolia Place - Greenville residents from foreseeable harm.
38. 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 §483.70), Defendants withheld resources from Magnolia Place - Greenville to the physical, mental, and psychosocial detriment of its residents.

39. Funds which were required by law to be used for the protection of Magnolia Place - Greenville residents were instead intentionally diverted to increase the profits of Defendants.
40. 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. 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 to accommodate the level of care these residents required, particularly registered nurses, which put all residents of Magnolia Place - Greenville at even greater risk of harm.
41. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Hunt Valley, including but not limited to, FCOS, FAS, and Magnolia Place - Greenville acted on behalf of Hunt Valley's managers/owners.
42. That, upon information and belief, Hunt Valley at all times relevant hereto totally dominated and controlled the other Defendants through loans, leases, and contracts. Defendants were 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 Hunt Valley who is therefore liable and responsible for the acts and delicts of all Defendants.
43. That, upon information and belief, all Defendants or their agents have engaged in substantial business activities in South Carolina, including the management, operation, control and/or ownership of Magnolia Place - Greenville at various times, and derived substantial revenue from services provided in South Carolina.

44. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Hunt Valley including agents FCOS, FAS, and Magnolia Place - Greenville acted on behalf of themselves and on behalf of Hunt Valley.
45. That, upon information and belief, at all times relevant herein, Hunt Valley including agents FCOS, FAS, and Magnolia Place - Greenville 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 Patricia Royston received as a resident at Magnolia Place - Greenville.
46. That, upon information and belief, at all times relevant herein, Hunt Valley, FCOS, FAS, and Magnolia Place - Greenville 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.
47. That the Court has jurisdiction over the parties and subject matter.
48. 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**

49. Relevant and consistent allegations contained in paragraphs 1-48 are incorporated by reference as if written verbatim herein.
50. That while residing at Magnolia Place - Greenville, Patricia Royston was damaged and injured, and eventually died as a result of abuse, neglect, negligence and violations of regulations, industry standards, and best practices for the administration, management, and

operation of a nursing home and the provision of nursing and custodial care.

51. That Patricia Royston was a resident of Defendants' facility from December 19, 2016 through December 31, 2016 because of temporary mental health issues, and did not have the capacity or competency to understand or enter into a contract with Defendants.
52. That while a resident at Defendants' facility, Patricia Royston was overmedicated by the Defendants which led to her untimely and wrongful death.
53. That Defendants failed to properly monitor and care for Patricia Royston by prescribing too much medication, administering too much medication, and failing to recognize Patricia's change in condition, and failing to properly assess her condition, failing to communicate, and failing to provide emergency care when necessary.
54. 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.
55. That during Patricia Royston's residency at Magnolia Place - Greenville, the acts and delicts of Defendants caused, and were the proximate causes of Patricia Royston's conscious pain and suffering, mental distress, medical bills, disability, loss of dignity, and loss of quality of life and ultimately her premature, untimely, and wrongful death.
56. Pursuant to S.C. Code § 15-5-90, said causes of action survive the death of Patricia Royston and are properly brought by the Personal Representative on behalf of Patricia Royston's estate.
57. These deviations from the standard of care were the proximate causes of conscious pain and suffering, mental distress, medical bills, and loss of dignity.

58. Upon information and belief, Defendants failed to provide adequate and proper medical services to Patricia Royston. Further, that the Defendants, directly or indirectly, received federal and state funds as reimbursement for the care of residents including Patricia Royston.
59. That while residing at Defendants' facility, Patricia Royston was damaged and injured as a result of neglect, negligence, recklessness, and violations of the standard of care for nursing and custodial care.
60. 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. See 42 CFR 483.10 et seq.
61. 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.
62. 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 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.

63. That the Defendants were liable and responsible for the acts and delicts of their employees, agents, and servants under the principle of respondent superior, and actual and apparent agency.
64. That the Defendants held Magnolia Place - Greenville out to the State of South Carolina, the South Carolina Department of Health and Environmental Control, the public at large, and to Patricia Royston 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.
65. That the Defendants held Magnolia Place - Greenville out to the United States of America, the Centers for Medicare and Medicaid Services, the public at large, and Patricia Royston and her family, specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.
66. 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. 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.

67. 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.
68. OBRA regulations go to great lengths to ensure nursing home patients will be "in an environment that promotes maintenance or enhancement of [resident's] quality of life." 42 C.F.R. 483.10.
69. 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.
70. The OBRA regulations require that each nursing home has sufficient staff to provide the necessary care and services for the residents. 42 C.F.R. 483.35(a).
71. The facility must provide services by sufficient numbers on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans.
72. Defendants specifically violated the applicable standard for the administration of a nursing home found at §483.70 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."
73. Defendants must submit "cost reports" to both state and federal agencies which include 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).).
74. 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.

75. 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 § 483.70.
76. By siphoning profits to related entities in non-arms' length transactions, Defendants deny the Facility sufficient resources to care for its residents.
77. 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.
78. This is an integral part of Plaintiffs' corporate negligence claim which include allegations that Defendants siphoned profits away from resident care to related parties.
79. This is a concept noted in the federal regulations and seen in nursing home operations across the country.

. . .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).

80. Part of determining an economically and efficiently operated facility includes disclosure



of “related organizations.” “Federal Regulations, 42 CFR 447.284, requires the nursing home to identify related organizations and to summarize costs incurred in transactions between the NH 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 NH.) Cost Report Manual.

81. Defendants are also required to report “related organizations” under 42 CFR §420.206.
82. The cost reports mentioned supra include information regarding transactions with what are referred to as “related parties”. 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).
83. The cost reports provide information about the number of patients, acuity or illness levels of patients, and the staffing of the facility to meet the patients' needs. Additionally, there are reporting mandates to the entity for information such as staffing and expenditures. 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).
84. 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.
85. 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).

86. 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).
87. Because of their joint venture, Defendants had a joint obligation to sufficiently fund Magnolia Place - Greenville 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.
88. This joint obligation required Defendants to sufficiently fund Magnolia Place - Greenville so that there would be enough staff and resources in order to meet the needs of their residents.
89. Magnolia Place - Greenville was totally dependent on Defendants' generosity in their decision-making process as to whether they would allow them to keep the money they were earning.
90. 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% or 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).

91. By definition, FCOS and FAS, are among a group of corporations that would be considered “related parties” of Hunt Valley.
92. “Cost Reports” submitted by or on behalf of Magnolia Place - Greenville show overpayments to related parties by Defendants in 2016.
93. Plaintiffs allege that while holding Magnolia Place - Greenville out to Patricia Royston and other members of the public as providing excellent care, Defendants and their related parties extracted considerable profits through the management and operation of Magnolia Place - Greenville 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 Patricia Royston.
94. Plaintiffs allege that these overpayments to related parties left Magnolia Place - Greenville with insufficient cash to provide sufficient and qualified staff to meet the individual needs of the residents in their facility during Patricia Royston’s period of residency therein.
95. Plaintiffs allege that throughout 2016, 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 Patricia Royston.

96. In other words, Defendants' actions in 2016 resulted in an underfunded nursing home during Patricia Royston's residency.
97. 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 Patricia Royston that she needed in order to prevent her from being over medicated and providing emergency services.
98. 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.
99. 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).
100. 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 improved functional status, better mortality rates, and fewer 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).

101. 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).
102. 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 such as 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).
103. 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).
104. 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 in the Largest For-Profit Nursing Home Chains and Chains Owned by Private Equity Companies. DOI: 10.1111/j.1475-6773.2011.01311.x
105. 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).

106. 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.
107. 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, 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 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.

108. 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.
109. 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).
110. The information that must be made available includes specific staffing information – which is reported by the facilities themselves.
111. This information on “Nursing Home Compare” is compiled into what is commonly called a “Star Rating.”
112. A portion of the CMS Star rating formulation includes a calculation of the differential between reported and expected staffing levels for a facility.
113. 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.
114. 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.
115. 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.”

116. 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.

117. 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.
118. 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 hospitalizations, and UTIs; less weight loss, catheterization, and deterioration in the ability to perform ADLs; and greater use of oral standard medical nutritional supplements.
119. Defendants knew or should have known adequate fluid intake can be achieved by simple interventions such as offering residents preferred liquids systematically and by having an



adequate number of supervised staff help them to drink while properly positioned.

120. Because of their joint venture, Defendants have a joint obligation to sufficiently staff 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 the resident's comprehensive assessment and plan of care.
121. 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 Magnolia Place - Greenville 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.
122. 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.
123. The term used by caregivers and health science literature to describe the intensity of nursing care required by a resident is "acuity level".
124. Acuity levels are reflected in the resident's "Resource Utilization Group" classification or "RUGs".
125. 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.

126. RUGs are assigned to residents based on data derived from an assessment tool referred to as a "Minimum Data Set" (MDS").
127. An MDS is prepared for each resident of a nursing facility regardless of who is paying for their stay in the nursing facility.
128. MDSs are required to be prepared when a resident initially arrives at the facility and periodically thereafter depending on the course of the resident's medical profession.
129. At a minimum, an MDS is to be prepared for every resident in a nursing facility on a quarterly basis.
130. 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.
131. 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.
132. 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.
133. The information contained in an MDS is used to slot the resident into a RUG. 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.
134. 70% of RUG reimbursement rate is attributable to the labor requirements associated with the RUG score.
135. Defendants knew or should have known that CMS publishes quarterly the facility's

- expected HPPD for direct care caregivers at CMS.gov.
136. 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.
137. 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."
138. 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.
139. 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 facilities' average RUG scores.
140. That labor is the biggest component of the nursing home budget.
141. That nursing labor is the biggest component of the labor budget.
142. That RNs are the highest paid employees among the nursing staff.
143. That experienced, more senior, RNs cost more on an hourly basis than less experienced, less senior RNs.

144. 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).
145. 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 483.35(a).
146. Providing adequate and appropriate staffing, resources and financial solvency to a facility is crucial to meeting the needs of the residents.
147. 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 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.
- 42 USCS § 1395i-3.
148. Residents who will need the greatest amount of resources are assigned to higher groups in

- the RUG hierarchy.
149. 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.
  150. Residents in higher RUGs place higher demands for care and services on the nursing facility and its staff.
  151. Providing care to residents in higher RUGs is more costly and is, therefore, reimbursed at a higher level.
  152. The RUG assigned to a resident can be found in section Z of each resident's MDS.
  153. The only way to determine the total acuity level and corresponding RUG of each of the residents at Magnolia Place - Greenville on any given day is by examining section Z of *every* MDS in effect on that day.
  154. The Centers for Medicare and Medicaid Services ("CMS") is the federal agency that is tasked with regulating all nursing facilities in this country.
  155. 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.
  156. Because of these studies, CMS is able to set a number of hours of direct care that they 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".
  157. 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.

158. CMS is also able to adjust the HPPD per facility on a quarterly basis based on the updated MDSs that are provided to them.
159. Nursing facilities are required to submit an annual “Medicare Cost Report” to CMS known as “CMS Form 2540-10”.
160. The cost report is a financial report that identifies the cost and charges related to healthcare treatment activities in a particular nursing facility.
161. 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.
162. 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.
163. By dividing the paid hours by the resident census it is possible to determine how many hours the nursing 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”.
164. The reported HPPD is actually an inflated number due to the fact that hours paid includes sick pay and vacation pay.
165. By removing the sick pay and vacation pay from the hours paid the resulting HPPD would be closer to the actual HPPD provided by caregivers to residents in nursing facilities.
166. 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.
167. 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.

168. This information can reveal the actual HPPD for any period of time including a year, a quarter, a month, or even a day.
169. Defendants are required to report their staffing levels for RNs, LPNs and aides, the combination of which is commonly called “direct-care providers.”
170. The understaffing was particularly egregious as to RN staffing levels.
171. 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.
172. By failing to provide adequate RN and other staffing, Defendants put their residents, including Patricia Royston, at greater risk.
173. Indeed, Patricia Royston’s injuries and death are directly attributable to a lack of assessment and care planning because of the lack of RN staffing.
174. According to CMS published expectations, in 2016, Defendants failed to provide the level of staffing necessary to meet the needs of their residents including Patricia Royston.

| Fourth Quarter 2016 RN, LPN & CNA Time |            |                  |                   |                        |
|----------------------------------------|------------|------------------|-------------------|------------------------|
| Reported Hours Per Resident Per Day    |            |                  |                   |                        |
| Aides                                  | LPNs       | RNs              | Total Nursing     |                        |
| 1.98905                                | .93048     | .68714           | 1.61762           |                        |
| 1 hour 59 minutes                      | 56 minutes | 41 minutes       | 1 hour 37 minutes |                        |
| Expected Hours Per Resident Per Day    |            |                  |                   |                        |
| Aides                                  | LPNs       | RNs              | Total Nursing     |                        |
| 2.46107                                | .65775     | 1.08477          | 1.74252           |                        |
| 2 hours 28 minutes                     | 39 minutes | 1 hour 5 minutes | 1 hour 44 minutes |                        |
| Difference in RN Time                  |            |                  |                   |                        |
| Data Set--2016                         | Reported   | Expected         | Difference        | % Below/Above Expected |

|                | Time       | Time             |            |         |
|----------------|------------|------------------|------------|---------|
| Fourth Quarter | 41 minutes | 1 hour 5 minutes | 24 minutes | -36.87% |

175. The staffing at the facility was significantly 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. 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.
176. Based on the CMS cost reports, the facility's understaffing allowed them to profit from the short-staffing.
177. 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.
178. Plaintiffs allege that Defendants jointly exercised control over the operation and management of Magnolia Place - Greenville prior to and during Patricia Royston'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.
179. Plaintiffs allege that each of these managerial and operational functions had a direct impact on the amount and quality of care delivered to Patricia Royston while she resided at



Magnolia Place - Greenville and were taken in furtherance of operational and managerial objectives.

180. Plaintiffs allege that Defendants engaged in a systematic process of ensuring Magnolia Place - Greenville staff to meet the individual needs of their residents during Patricia Royston's period of residency therein.
181. 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.
182. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for their own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death.
183. 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 their 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 physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

184. Plaintiff decedent was a resident of Magnolia Place - Greenville and was therefore a vulnerable adult under the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11).
185. 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]"
186. 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.
187. 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 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."
188. 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."

189. 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.
190. 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."
191. 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 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.
192. 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."

193. 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.

194. 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.

195. 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.
196. S.C. Code 40-33-20 (48) states the scope of practice of registered nursing includes, but is not limited to:
- 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.

197. 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.
198. 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.
199. 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.
200. 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.
201. 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.

202. 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.
203. 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.
204. 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;"
205. 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;"
206. 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;"
207. 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;"
208. 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;"

209. 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 . . . ;"
210. 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;"
211. 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. . . ;"
212. 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"
213. 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 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.

214. 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.
215. According to Defendants' Nursing Policies and Procedures regarding physician communication and changes of condition, the facility is required to documents all assessments and changes in condition:
216. According to §483.21 applicable to nursing homes related to Comprehensive Care Plans states: The facility must develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care.
217. The baseline care plan must:
- (i) Be developed within 48 hours of a resident's admission.
  - (ii) Include the minimum healthcare information necessary to properly care for a resident including, but not limited to—
    - (A) Initial goals based on admission orders.

- (B) Physician orders.
- (C) Dietary orders.
- (D) Therapy services.
- (E) Social services.
- (F) PASARR recommendation, if applicable.

218. Defendants' facility had a duty to properly assess, care plan, and attempt interventions to prevent fatal medication errors, and other preventable injuries.
219. 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.
220. According to §483.25(d) 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.
221. 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.
222. 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 facility shall retain all serious accident and incident records for six (6) years after the resident stops receiving services."

223. 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 her 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;
- 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 her 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.

224. The federal regulation at §483.70(i)(1) related to documentation in the clinical records requires: "In accordance with accepted professional standards and practices, the facility must maintain medical records on each resident that are—
- (i) Complete;
  - (ii) Accurately documented;
  - (iii) Readily accessible; and
  - (iv) Systematically organized"
225. Defendants' facility had a duty to document the respective interventions and incidents adequately in the nurses' notes.
226. 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;
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."

227. 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.

228. 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

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."

229. 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."
230. 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.
231. S.C. Regulations applicable to nursing homes found in 61-17 Section 602 requires that "each facility shall have a full-time licensed Administrator".
232. 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;

- (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.
233. The federal regulation at §483.45(d) states that: "Each resident's drug regimen must be free from unnecessary drugs."
234. 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.
235. 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.
236. The federal regulation at §483.25(g)(2) requires that: "The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.
237. The federal regulation at §483.50(a)(1) requires that: "The facility must provide or obtain laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services."
238. The intent of this regulation is to assure that laboratory services are accurate and timely so that the utility of laboratory testing for diagnosis, treatment, prevention or assessment is

maximized. The facility is responsible for quality and timely laboratory services whether or not services are provided by the facility or an outside agency.

239. The federal regulation at §483.30(a) 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.”
240. The intent of this regulation is to ensure the medical supervision of the care of nursing home residents by a personal physician.
241. The federal regulation at §483.50(b)(1) 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.”
242. That while at Fundamental facility, Patricia Royston suffered overmedication that caused mental anguish, pain and suffering, and wrongful death.
243. That the facility failed to keep Patricia Royston safe from overmedication.
244. That the facility failed to utilize safety devices with Patricia Royston.
245. That the facility failed to monitor Patricia Royston for changes in condition.
246. Defendants’ facility had a duty to ensure that proper preventative measures were in place to keep the resident safe and free from avoidable overmedication.
247. Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Patricia Royston.
248. 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.



- 249. 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.
- 250. 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.
- 251. That treatment and prevention of infection in the nursing home should be part of an interdisciplinary approach.
- 252. That several types of personnel have essential roles in the assessment, care planning, prevention, and treatment of infection.
- 253. That evaluation, multi-disciplinary documentation of treatment, and detailed individual care plans must be developed and implemented.
- 254. That the acts and delicts of Defendants caused, and were the proximate causes of Patricia Royston's overmedication, loss of dignity, hospitalization, conscious pain and suffering, mental distress, medical bills and disability.
- 255. That the Plaintiffs institute this action in order to recover for Patricia Royston's injuries and wrongful death, and for damages to the statutory heirs of Patricia Royston, deceased, pursuant to and under the authority of S.C. Code § 15-51-10 et seq.
- 256. 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 Patricia Royston's children: Marianne McCoig (Claimant #2) and Jeanette Jones (Claimant #3).

257. As a result of the death of Patricia Royston, the wrongful death beneficiaries have suffered grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of the Patricia's society. These damages were the proximate result of the acts and delicts of Defendants.
258. That the Defendants were jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants.
259. 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.
260. That the Defendants were under a duty to provide reasonable, appropriate and adequate care to Patricia Royston pursuant to state and federal laws, rules, regulations, guidelines, and existing industry standards.
  - a. Defendants failed to provide the highest practicable level of care, training, competency.
  - b. Defendants repeatedly failed to maintain nursing and other staffing at levels necessary to meet the needs of Patricia Royston.
  - c. Defendants failed to provide proper and timely assessments, and provide a appropriate monitoring throughout Patricia Royston's stay.
  - d. Defendants repeatedly failed to follow proper skilled nursing care standards to maximize the health, safety, and well-being of Patricia Royston.
  - e. Defendants repeatedly failed to ensure that Patricia Royston was safe, free from abuse, neglect, and accorded the dignity and respect owed.
261. Defendants failed to follow, implement, and adhere to all physician's orders.
262. Defendants failed to establish and implement a resident care plan for Patricia Royston based upon her needs.

263. That at all times pertinent hereto, Patricia Royston 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.
264. That the Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Patricia Royston.
265. That, upon information and belief, at all times prior to and during Patricia Royston'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.
266. That, upon information and belief, Defendants Hunt Valley through their agents FCOS, FAS, and Magnolia Place - Greenville, and were involved in the budget and staffing decisions of the facility, and were more concerned about profits and siphoning funds to Hunt Valley than creating a budget that provided adequate staffing and quality care to the residents.
267. That, upon information and belief, at all times prior to and during Patricia Royston'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 Patricia Royston's.
268. That, upon information and belief, Defendants Hunt Valley through their agents FCOS, FAS, and Magnolia Place - Greenville 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.

269. Plaintiffs allege that Defendants were engaged in a joint venture in the operation of Magnolia Place - Greenville.
270. Defendants' joint venture in the operation of Magnolia Place - Greenville 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.
271. Because of the joint venture, Defendants owed a joint duty to Patricia Royston to provide the same level of care and treatment as any other reasonable, prudent, similar business that owns, operate, manages, and/or controls a nursing facility would have provided under the same or similar circumstances taking into consideration Patricia Royston's known medical condition.

**FIRST CAUSE OF ACTION**  
**(Negligence/Recklessness)**

272. Relevant and consistent allegations contained in paragraphs 1-271 are incorporated by reference as if written verbatim herein.
273. That Defendants Hunt Valley through agents FCOS, FAS, and Magnolia Place - Greenville 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 harm.
274. 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 Patricia Royston. 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 Patricia Royston, 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, Patricia Royston;
- d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Patricia Royston;
- 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 properly monitor Patricia Royston;
- l. failing to appropriately assess Patricia Royston's condition;
- m. failing to update the written plan of care to include necessary interventions to promote safety;
- n. failing to prevent Patricia Royston from suffering a preventable overmedication;
- o. failing to prevent Patricia Royston's multiple hospitalizations;
- p. failing to monitor and assess Patricia Royston adequately for pain and discomfort;
- q. failing to treat Patricia Royston 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.

275. 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 Patricia Royston and other patients at Magnolia Place - 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 Patricia Royston 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.

276. That as a result, Patricia Royston experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills.
277. That the aforesaid acts and delicts were the sole and proximate cause of Patricia Royston's damages, and injuries.

**SECOND CAUSE OF ACTION**  
**(Corporate Negligence)**

278. Relevant and consistent allegations contained in paragraphs 1-277 are incorporated by reference as if written verbatim herein.
279. 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.
280. That the Fundamental facility was negligently managed by Defendants Hunt Valley through agents FCOS, FAS, and Magnolia Place - Greenville who were working together to manage and operate the facility for the benefit of Murray Forman.
281. That the facility was negligently administrated in violation of 42 C.F.R. 483.75 by Defendants who were working jointly to govern, administer, control, manage and operate the facility.
282. 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 Patricia Royston, 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 Patricia Royston, 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, Patricia Royston;
- d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Patricia Royston;
- 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 properly monitor Patricia Royston;
- l. failing to appropriately assess Patricia Royston 's condition;
- m. failing to keep Patricia Roystons 's chart free of fraudulent documentation;
- n. failing to prevent Patricia Royston from suffering preventable overmedication;
- o. failing to prevent Patricia Royston from being hospitalized;
- p. failing to prevent Patricia Royston from overmedication;
- q. failing to treat Patricia Royston 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.

283. That as a result, Patricia Royston experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills.

284. That the aforesaid acts and delicts were the sole and proximate cause of Patricia Royston's injuries.

### **THIRD CAUSE OF ACTION** **(Joint Venture)**

285. Relevant and consistent allegations contained in paragraphs 1-284 are incorporated by reference as if written verbatim herein.

286. 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.

287. 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.

288. That a joint venture exists when there is:

- a. contribution of resources by both parties;
- 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.

289. That Defendants Hunt Valley and its agents FCOS, FAS, and Magnolia Place - Greenville were involved in a joint venture in the operation and management of the nursing home.

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

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

291. That, upon information and belief, FAS and FCOS were dominated and controlled by Defendant Hunt Valley and its agents before, during, and after Patricia Royston's residency.

292. That, upon information and belief, **Error! Reference source not found.** was dominated and controlled by Defendants FCOS and FAS on behalf of Hunt Valley and its agents before, during, and after Patricia Royston's residency.

293. Hunt Valley 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 and suffering, including that of Patricia Royston at Magnolia Place – Greenville.

**FIFTH CAUSE OF ACTION**  
**(Amalgamation of Interests)**

- 294. Relevant and consistent allegations contained in paragraphs 1-293 are incorporated by reference as if written verbatim herein.
- 295. That Defendants Hunt Valley through agents FCOS, FAS, and Magnolia Place - Greenville are and have been operating as an amalgamation of interest creating a blurred corporate identity through an integrated enterprise and/or joint venture.
- 296. That Defendants Hunt Valley through agents FCOS, FAS, and Magnolia Place - Greenville share a common internet website and intranet site.
- 297. That Defendants Hunt Valley and its agents 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.
- 298. That, upon information and belief, Defendants Hunt Valley and its agents FCOS, FAS, and Magnolia Place - Greenville share common executives and officers, attorneys, policies and procedures, and trademarks.
- 299. That Defendants Hunt Valley, THI and Magnolia Place - Greenville participate in the commingling of funds and revenue and file one tax return for all Fundamental chain entities.

**SIXTH CAUSE OF ACTION**  
**(Neglect of a Vulnerable Adult)**

300. Relevant and consistent allegations contained in paragraphs 1-299 are incorporated by reference as if written verbatim herein.
301. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Patricia Royston was considered a vulnerable adult.
302. 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.
303. That Defendants failed to provide care to Patricia Royston to keep her safe and to prevent injuries from a preventable overmedication.
304. That Defendants failed to recognize Patricia Royston's obvious changes of conditions which caused her to suffer the tragic consequences of a fatal medication error.
305. That Patricia Royston trusted in, confided in and relied upon Defendants to use their expertise and discretion for Plaintiff's safety, health, and well-being.
306. That Defendants Hunt Valley, FCOS, FAS, and Magnolia Place - Greenville accepted Patricia Royston's trust and reliance and so became responsible for Patricia Royston's health while residing at the nursing home facility.
307. That as a result of aforementioned reliance and trust upon Defendants Hunt Valley, FCOS, FAS, and Magnolia Place - Greenville, Patricia Royston's physical, mental and emotional

health was placed in the hands of Defendants Hunt Valley, FCOS, FAS, and Magnolia Place - Greenville.

308. That Defendants Hunt Valley and its agents FCOS, FAS, and Magnolia Place - Greenville received compensation for the care and treatment they were responsible for providing to Patricia Royston during her residency but did not provide that care and treatment.
309. 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 employees, Patricia Royston was severely injured in Magnolia Place - Greenville
310. That the sole and proximate cause of all the harms, losses, and injuries suffered by Patricia Royston was the combined and concurrent acts and delicts of all the Defendants and their agents acting in a joint venture and integrated enterprise.

**SEVENTH CAUSE OF ACTION**  
**(Wrongful Death)**

311. Relevant and consistent allegations contained in paragraphs 1-310 are incorporated by reference as if written verbatim herein.
312. 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 employees, Patricia was severely injured.
313. That the injuries so inflicted on Patricia were the cause of Patricia's wrongful death on December 31, 2016.
314. That the sole and proximate cause of all the harms, losses, injuries and death suffered by Magnolia Place - Greenville 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. In the event that one of more Defendants contend or believe that someone on behalf of Patricia Royston has entered into an agreement to arbitrate any issues related to her stay in Magnolia Place - Greenville, in reliance on 9 USC §4, Plaintiffs demand a trial by jury to resolve all fact issues of whatever nature related to claims that a binding Arbitration Agreement was entered into that would require the submission of the claims raised in this Petition to an arbitrator.

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: January 31, 2019.

|                                 |   |                                      |
|---------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS         |
|                                 | ) |                                      |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT          |
|                                 | ) |                                      |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473            |
| ROYSTON, BY AND THROUGH THE     | ) |                                      |
| APPOINTED PERSONAL              | ) |                                      |
| REPRESENTATIVE MARIANNE         | ) |                                      |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                      |
| STATUTORY BENEFICIARIES,        | ) |                                      |
|                                 | ) |                                      |
| PLAINTIFFS,                     | ) |                                      |
|                                 | ) |                                      |
| vs.                             | ) |                                      |
|                                 | ) |                                      |
| HUNT VALLEY HOLDINGS, LLC       | ) | <b>THI OF SOUTH CAROLINA AT</b>      |
| A/K/A FUNDAMENTAL LONG TERM     | ) | <b>MAGNOLIA PLACE AT GREENVILLE,</b> |
| CARE HOLDINGS, LLC;             | ) | <b>LLC D/B/A MAGNOLIA PLACE-</b>     |
| FUNDAMENTAL CLINICAL AND        | ) | <b>GREENVILLE'S ANSWER TO</b>        |
| OPERATIONAL SERVICES, LLC;      | ) | <b>PLAINTIFF'S COMPLAINT</b>         |
| FUNDAMENTAL ADMINISTRATIVE      | ) |                                      |
| SERVICES, LLC; AND THI OF SOUTH | ) |                                      |
| CAROLINA AT MAGNOLIA PLACE      | ) |                                      |
| AT GREENVILLE, LLC D/B/A        | ) |                                      |
| MAGNOLIA PLACE-GREENVILLE,      | ) |                                      |
|                                 | ) |                                      |
| DEFENDANTS.                     | ) |                                      |

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, ATTORNEY 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" or "the facility," *subject to and without waiving its right to compel this matter to arbitration*, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. In responding to the initial allegations set forth in Paragraph 1 of Plaintiff's Complaint, this Defendant admits that Ms. Royston was a resident of this Defendant's skilled nursing facility but would crave reference to the skilled nursing chart and admission and transfer records for the specific dates of her residency. This Defendant denies the remaining allegations set forth in the above Paragraph and demands strict proof thereof.

3. This Defendant is without sufficient information to form an opinion as to the truth of the allegations set forth in Paragraph 2 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

4. The allegations set forth in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

5. This Defendant is without sufficient information to form an opinion as to the truth of the allegations set forth in Paragraph 4 of Plaintiff's Complaint and therefore denies the same as stated and demands strict proof thereof.

6. This Defendant denies the allegations set forth in Paragraphs 5 and 6 of Plaintiff's Complaint as stated and demands strict proof thereof. Answering further, this Defendant denies that any other entity operates, manages or controls this Defendant's skilled nursing facility and further denies it is in a joint venture with the other Defendants.

7. In responding to the allegations set forth in Paragraph 7 of Plaintiff's Complaint, this Defendant asserts it is a Delaware limited liability company with a registered agent in South Carolina. To the extent the allegations in the above Paragraph are inconsistent with this response, they are denied.

8. This Defendant denies the allegations set forth in Paragraphs 8 and 9 of Plaintiff's Complaint as stated and demands strict proof thereof. Answering further, this Defendant denies that any other entity operates, manages or controls the skilled nursing care and treatment provided at the facility. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

9. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

10. The allegations set forth in Paragraph 11 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. Answering further, this Defendant denies that any other entity operates, manages or controls the skilled nursing care and treatment provided at the facility.

11. This Defendant denies the allegations set forth in Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof.

12. To the extent they are directed at this Defendant, the allegations set forth in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 of Plaintiff's Complaint are denied as stated and strict proof is demanded thereof. Answering further, this Defendant denies that any other entity operates, manages or controls the skilled nursing care and treatment provided at the facility. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required. Further responding and to the extent the allegations in the above Paragraphs call for pure legal conclusions, no response is required.

13. This Defendant denies the allegations in the paragraph erroneously numbered as the second paragraph "28" on page 9 of Plaintiff's Complaint and strict proof is demanded thereof.

14. Responding to the allegations set forth in the paragraph erroneously numbered as the second paragraph "29" on page 9 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

15. Responding to the allegations set forth in Paragraph 30<sup>1</sup> of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

16. This Defendant denies the allegations set forth in Paragraph 31 of Plaintiff's Complaint and demands strict proof thereof.

17. Responding to the allegations set forth in Paragraph 32 of Plaintiff's Complaint, this Defendant admits that as the licensee of the skilled nursing facility at issue, the Facility is the

---

<sup>1</sup> Hereinafter, these responses refer to the paragraph as numbered in Plaintiff's Complaint.



sole provider of skilled nursing care and treatment to its residents, including Ms. Royston, and a fee is provided for services related thereto. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. Any and all allegations inconsistent with this response are denied.

18. This Defendant denies the allegations set forth in Paragraphs 33 and 34 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

19. This Defendant denies the allegations set forth in Paragraphs 35, 36, 37, 38, 39, 40, 41, and 42 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required. To the extent the allegations in the above Paragraphs call for legal conclusions, no response is required.

20. Responding to Paragraph 43 of Plaintiff's Complaint, this Defendant affirmatively states that it is sole licensee and operator for the skilled nursing facility at issue located in Spartanburg County, South Carolina. Defendant also states that a fee is provided for services related thereto. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

21. This Defendant denies the allegations set forth in Paragraphs 44 and 45 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant and demands strict proof thereof. This Defendant asserts it is the sole entity that owed a duty to provide care and treatment to Plaintiff's decedent in compliance with the applicable standard of care, and further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the standard of care. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

22. This Defendant denies the allegations set forth in Paragraph 46 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations in the above Paragraph call for legal conclusions, no response is required.

23. The allegations set forth in Paragraph 47 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability and/or damages against this Defendant.

24. This Defendant denies the allegations set forth in Paragraph 48 of Plaintiff's Complaint and demands strict proof thereof.

25. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

26. This Defendant denies the allegations set forth in Paragraph 50 of Plaintiff's Complaint and demands strict proof thereof.

27. Responding to the initial allegations in Paragraph 51 of Plaintiff's Complaint, this Defendant admits that Ms. Royston was a resident at the Facility at times relevant to this action but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency status. The Defendant denies any and all remaining allegations in the above Paragraph. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the applicable standard of care.

28. This Defendant denies the allegations set forth in Paragraphs 52 and 53 of Plaintiff's Complaint and demands strict proof thereof.

29. Responding to the allegations set forth in Paragraph 54 of Plaintiff's Complaint, this Defendant affirmatively states that it had a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations inconsistent with this response are denied.

30. This Defendant denies the allegations in Paragraphs 55, 56, 57, 58, and 59 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

31. Responding to the allegations set forth in Paragraphs 60, 61, and 62 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

32. This Defendant denies the allegations set forth in Paragraphs 63 of Plaintiff's Complaint demands strict proof thereof.

33. Responding to the allegations set forth in the Paragraphs 64 and 65 of Plaintiff's Complaint, this Defendant affirmatively states that it solely represents it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant

further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

34. The allegations set forth in Paragraphs 66, 67, 68, 69, 70, and 71 of Plaintiff's Complaint of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

35. This Defendant denies the allegations set forth in Paragraph 72 of Plaintiff's Complaint and demands strict proof thereof.

36. Responding to the allegations set forth in Paragraphs 73 and 74 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations

contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

37. This Defendant denies the allegations set forth in Paragraphs 75, 76, 77, and 78 of Plaintiff's Complaint and strict proof is demanded thereof.

38. The allegations set forth in Paragraph 79 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

39. Responding to the allegations set forth in Paragraphs 80, 81, 82, 83, 84, 85, and 86 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

40. This Defendant denies the allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint as stated and demands strict proof thereof. Instead, this Defendant affirmatively asserts it has the sole duty to provide skilled nursing care at the facility in compliance with the standard of care in regards to the areas set forth in the above Paragraphs. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the governing

standard of care, specifically in regards to all areas set forth in the above Paragraphs. Answering further, this Defendant denies it is in a joint venture with the other Defendants.

41. This Defendant denies the allegations set forth in Paragraph 89 of Plaintiff's Complaint and demands strict proof thereof.

42. Responding to the allegations set forth in Paragraph 90 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

43. The allegations set forth in Paragraph 91 of Plaintiff's Complaint are pure legal conclusions and therefore no response is required. To the extent those allegations are directed at this Defendant and allege or imply liability as to this Defendant, they are denied.

44. This Defendant denies the allegations set forth in Paragraphs 92, 93, 94, 95, 96, and 97 of Plaintiff's Complaint and strict proof is demanded thereof. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

45. Responding to the "allegations" set forth in Paragraphs 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, and 119 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing

facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

46. This Defendant denies the allegations set forth in Paragraphs 120 and 121 of Plaintiff's Complaint as stated and demands strict proof thereof. Instead, this Defendant affirmatively asserts it has the sole duty to provide skilled nursing care at the facility in compliance with the standard of care in regards to the areas set forth in the above Paragraphs. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the governing standard of care, specifically in regards to all areas set forth in the above Paragraph.

47. Responding to the allegations set forth in Paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, and 169 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no

response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

48. This Defendant denies the allegations set forth in Paragraphs 170, 171, 172, 173, 174, 175, 176, and 177 of Plaintiff's Complaint and demands strict proof thereof.

49. This Defendant denies the allegations set forth in Paragraphs 178 and 179 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraphs are directed at parties other than this Defendant, they are denied.

50. The allegations set forth in Paragraph 180 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant can neither confirm nor deny those allegations. Nevertheless, this Defendant denies those allegations to the extent the allege liability or damages against this Defendant.

51. Responding to the allegations set forth in Paragraphs 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, and 214 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.



52. Responding to Paragraph 215 of Plaintiff's Complaint, this Defendant craves reference to the policy cited by Plaintiff for its contents. This Defendant denies any and all allegations inconsistent with those contents or intended to allege liability or damages against this Defendant.

53. Responding to the allegations set forth in Paragraphs 216 and 217 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

54. Responding to the allegations set forth in Paragraph 218 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

55. Responding to the allegations set forth in Paragraphs 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, and 241 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing

facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

56. This Defendant denies the allegations set forth in Paragraphs 242, 243, 244, and 245 of Plaintiff's Complaint and demands strict proof thereof. This Defendant further asserts that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the governing standard of care.

57. Responding to the allegations set forth in Paragraph 246 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

58. This Defendant denies the allegations set forth in Paragraphs 247 of Plaintiff's Complaint and demands strict proof thereof.

59. Responding to the allegations set forth in Paragraphs 248, 249, 250, 251, 252, and 253 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant

affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

60. This Defendant denies the allegations set forth in Paragraphs 254, 255, 256, 257, and 258 of Plaintiff's Complaint and demands strict proof thereof.

61. Responding the allegations in Paragraph 259 of Plaintiff's Complaint, this Defendant affirmatively states that it solely represents it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

62. Responding to the allegations set forth in Paragraph 260 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

63. This Defendant denies the allegations set forth in Paragraphs 261 and 262 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations in the above Paragraph are directed at other parties, no response is required.

64. Responding to the allegations set forth in Paragraph 263 of Plaintiff's Complaint, this Defendant admits Ms. Royston was under the skilled nursing care and treatment of the facility during her residency. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

65. This Defendant denies the allegations set forth in Paragraphs 264, 265, 266, 267, 268, 269, and 270 of Plaintiff's Complaint and demands strict proof thereof. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

66. Responding to the allegations set forth in Paragraph 271 of Plaintiff's Complaint, this Defendant admits it had the sole duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

67. Responding to Paragraph 272 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

68. Responding to the allegations set forth in Paragraph 273 of Plaintiff's Complaint, this Defendant admits it had the sole duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

69. This Defendant denies the allegations set forth in Paragraphs 274, 275, 276, and 277 of Plaintiff's Complaint, including all subparts, and strict proof is demanded thereof.

70. Responding to Paragraph 278 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

71. Responding to the allegations set forth in Paragraph 279 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

72. This Defendant denies the allegations set forth in Paragraphs 280, 281, 282, 283, and 284 of Plaintiff's Complaint, including all subparts, and strict proof is demanded thereof.

73. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

74. The allegations set forth in Paragraphs 286, 287, and 288 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations assert or imply liability as to this Defendant, they are denied.

75. This Defendant denies the allegations set forth in Paragraph 289 of Plaintiff's Complaint as stated and demands strict proof thereof.

76. Responding to Paragraph 290 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

77. To the extent they are directed at this Defendant, the allegations set forth in Paragraph 291 of Plaintiff's Complaint are denied and strict proof is demanded thereof.

78. The allegations set forth in Paragraph 292 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant cannot reasonably be required to formulate a response. Nevertheless, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

79. This Defendant denies the allegations set forth in Paragraph 293 of Plaintiff's Complaint and demands strict proof thereof.

80. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

81. This Defendant denies the allegations set forth in Paragraphs 295 and 296 of Plaintiff's Complaint and demands strict proof thereof.

82. The allegations set forth in Paragraph 297 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations indirectly assert or imply liability as to this Defendant, they are denied.

83. This Defendant denies the allegations set forth in Paragraphs 298 and 299 of Plaintiff's Complaint as stated and demands strict proof thereof.

84. Responding to Paragraph 300 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

85. The allegations set forth in Paragraphs 301 and 302 of Plaintiff's Complaint are pure legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

86. This Defendant denies the allegations set forth in Paragraphs 303, 304, 305, 306, 307, 308, 309, and 310 of Plaintiff's Complaint and demands strict proof thereof. Further, this Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was the sole responsibility of this Defendant, who was at all times operating in compliance with the applicable standard of care.

87. Responding to Paragraph 311 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

88. This Defendant denies the allegations set forth in Paragraphs 312, 313, and 314 of Plaintiff's Complaint and demands strict proof thereof.

89. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

90. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

91. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, *et seq.*

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

92. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

93. Plaintiff's right to a recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at SC Code §15-32-200 *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

94. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act,



Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 *et. seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

95. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

96. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

97. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

98. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

99. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be

proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

100. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

101. The care and treatment provided to Plaintiff provided by this Defendant was at all times in compliance with the governing standard of care.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

102. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on following page]

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; gdotterer@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: March 6, 2019

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

THE ESTATE OF PATRICIA ) CASE NO. 2019-CP-23-00473  
ROYSTON, BY AND THROUGH THE )  
APPOINTED PERSONAL )  
REPRESENTATIVE MARIANNE )  
MCCOIG, AND ON BEHALF OF THE )  
STATUTORY BENEFICIARIES, )

PLAINTIFFS, )

vs. )

HUNT VALLEY HOLDINGS, LLC )  
A/K/A FUNDAMENTAL LONG TERM )  
CARE HOLDINGS, LLC; )  
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. )

**DEFENDANT FUNDAMENTAL  
ADMINISTRATIVE SERVICES, LLC'S  
ANSWER TO PLAINTIFF'S COMPLAINT**

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

The Defendant, Fundamental Administrative Services, hereinafter referred to as "this Defendant," hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. This Defendant is without sufficient knowledge or information to respond to the allegations in Paragraphs 1 and 2 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

3. The allegations set forth in Paragraphs 3 and 4 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

4. This Defendant denies the allegations set forth in Paragraph 5 of Plaintiff's Complaint and demands strict proof thereof.

5. The allegations set forth in Paragraph 6 of Plaintiff's Complaint, are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

6. The allegations set forth in Paragraph 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

7. In responding to the allegations set forth in Paragraph 8 of Plaintiff's Complaint, this defendant admits only that it is a Delaware limited liability company. This Defendant denies any and all remaining allegations in the above Paragraph.

8. The allegations set forth in Paragraph 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

9. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant no response is required.

10. The allegations set forth in Paragraph 11 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

11. This Defendant denies the allegations set forth in Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations in the above Paragraph call for pure legal conclusions, no response is required. Further and to the extent those allegations are directed at parties other than this Defendant, no response is required.

12. The allegations set forth in Paragraph 13 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

13. This Defendant denies the allegations set forth in Paragraph 14 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraph call for pure legal conclusions, no response is required. Further and to the extent those allegations are directed at parties other than this Defendant, no response is required.

14. The allegations set forth in Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, and 23 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

15. This Defendant denies the allegations set forth in Paragraph 24 of Plaintiff's Complaint as stated and demands strict proof thereof.

16. The allegations set forth in Paragraphs 25 and 26 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

17. In responding to Paragraph 27 of Plaintiff's Complaint, this Defendant affirmatively asserts that it provides administrative support services to the facility pursuant to a contract and has never operated a skilled nursing facility or provided care to any person. The remainder of the allegations set forth in the above Paragraph is denied. Further responding, this Defendant denies it oversees, manages or operates Defendant Facility.

18. This Defendant denies the allegations set forth in Paragraphs 28 and 29 of Plaintiff's Complaint and demands strict proof thereof.

19. This Defendant denies the allegations within the paragraph erroneously numbered as the second paragraph "28" on page 9 of Plaintiff's Complaint.

20. The allegations in the paragraph erroneously numbered as the second paragraph "29" on page 9 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, the allegations are denied to the extent they allege liability or damages as to this Defendant.

21. The allegations set forth in Paragraph 30<sup>1</sup> of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, the

---

<sup>1</sup> Hereinafter, these responses refer to the paragraph as numbered in Plaintiff's Complaint.

allegations within those paragraphs are denied to the extent they allege liability or damages as to this Defendant.

22. The allegations set forth in Paragraph 31 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. Further, to the extent those allegations call for pure legal conclusions, no response is required.

23. This Defendant denies the allegations set forth in Paragraph 32 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided care to any person, including Ms. Royston. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

24. This Defendant denies the allegations set forth in Paragraphs 33, 34, 35, 36, 37, 38, 39, and 40 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

25. The allegations set forth in Paragraph 41 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant.

26. The allegations set forth in Paragraph 42 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.



27. This Defendant denies the allegations set forth in Paragraphs 43 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

28. The allegations set forth in Paragraph 44 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant. To the extent the above allegations are directed at parties other than this Defendant, no response is required.

29. This Defendant denies the allegations set forth in Paragraph 45 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. To the extent the allegations set forth in the above Paragraph calls for pure legal conclusions, no response is required.

30. This Defendant denies the allegations set forth in Paragraph 46 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

31. This Defendant denies the allegations set forth in Paragraphs 47 and 48 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are legal conclusions, no response is required.

32. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

33. This Defendant denies the allegations set forth in Paragraphs 50, 51, 52, 53, 54, and 55 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

34. This Defendant denies the allegations set forth in Paragraph 56 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations call for pure legal conclusions, no response is required.

35. This Defendant denies the allegations set forth in Paragraphs 57, 58, 59, 60, 61, 62, 63, 64, and 65 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required. Further and to the extent the allegations in the above Paragraphs call for pure legal conclusions, no response is required.

36. The allegations set forth in Paragraphs 66, 67, 68, 69, and 70 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant

37. The allegations set forth in Paragraph 71 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those

allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. To the extent the allegations in the above Paragraph call for pure legal conclusions, no response is required.

38. This Defendant denies the allegations set forth in Paragraphs 72, 73, 74, 75, 76, 77, and 78 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

39. The allegations set forth in Paragraphs 79 and 80 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

40. This Defendant denies the allegations set forth in Paragraph 81 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

41. The allegations set forth in Paragraphs 82, 83, and 84 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

42. This Defendant denies the allegations set forth in Paragraphs 85, 86, 87, 88, and 89 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

43. The allegations set forth in Paragraphs 90 and 91 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

44. This Defendant denies the allegations set forth in Paragraphs 92 and 93 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

45. This Defendant denies the allegations set forth in Paragraphs 94, 95, 96, and 97 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

46. This Defendant denies the allegations set forth in Paragraphs 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

47. The allegations set forth in Paragraphs 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

48. This Defendant denies the allegations set forth in Paragraphs 118 and 119 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction

or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

49. This Defendant denies the allegations set forth in Paragraphs 120 and 121 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

50. The allegations set forth in Paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, and 134 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

51. This Defendant denies the allegations set forth in Paragraph 135 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are not directed at this Defendant, they are denied.

52. The allegations set forth in Paragraphs 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, and 168 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

53. This Defendant denies the allegations set forth in Paragraphs 169, 170, 171, 172, 173, 174, 175, 176, and 177 of Plaintiff's Complaint to the extent those allegations are directed

as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

54. This Defendant denies the allegations set forth in Paragraphs 178, 179, and 180 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

55. The allegations set forth in Paragraphs 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

56. This Defendant denies the allegations set forth in Paragraphs 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, and 212 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

57. The allegations set forth in Paragraphs 213 and 214 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or

imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

58. This Defendant denies the allegations set forth in Paragraph 215 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

59. The allegations set forth in Paragraphs 216 and 217 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

60. This Defendant denies the allegations set forth in Paragraph 218 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

61. The allegations set forth in Paragraphs 219, 220, 221, 222, 223, and 224 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

62. This Defendant denies the allegations set forth in Paragraph 225 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

63. The allegations set forth in Paragraphs 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, and 241 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

64. This Defendant denies the allegations set forth in Paragraphs 242, 243, 244, 245, 246, 247, and 248 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

65. The allegations set forth in Paragraphs 249 and 250 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information to respond to those allegations but denies the same to the extent they allege liability or damages against this



Defendant. To the extent those allegations are directed at parties other than this Defendant, no response is required.

66. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 251, 252, and 253 of Plaintiff's Complaint and therefore denies the same to the extent the allege liability or damages against this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

67. This Defendant denies the allegations set forth in Paragraphs 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, and 271 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

68. Responding to Paragraph 272 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

69. This Defendant denies the allegations set forth in Paragraphs 273, 274, 275, 276, and 277 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those

allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

70. Responding to Paragraph 278 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

71. This Defendant denies the allegations set forth in Paragraphs 279, 280, 281, 282, 283, and 284 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

72. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

73. The allegations set forth in Paragraphs 286, 287, and 288 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

74. This Defendant denies the allegations set forth in Paragraph 289 of Plaintiff's Complaint as stated and demands strict proof thereof.

75. Responding to Paragraph 290 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

76. This Defendant denies the allegations set forth in Paragraph 291 of Plaintiff's Complaint and demands strict proof thereof.

77. The allegations set forth in Paragraph 292 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant cannot be reasonably required to formulate a response. Nevertheless, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

78. This Defendant denies the allegations set forth in Paragraph 293 of Plaintiff's Complaint and demands strict proof thereof.

79. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

80. This Defendant denies the allegations set forth in Paragraphs 295, 296, 297, 298, and 299 of Plaintiff's Complaint and demands strict proof thereof.

81. Responding to Paragraph 300 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

82. The allegations set forth in Paragraphs 301 and 302 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

83. This Defendant denies the allegations set forth in Paragraphs 303, 304, 305, 306, 307, 308, 309, and 310 of Plaintiff's Complaint and demand strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This

Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

84. Responding to Paragraph 311 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

85. This Defendant denies the allegations set forth in Paragraphs 312, 313, and 314 of Plaintiff's Complaint and demand strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

86. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

87. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

88. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, et. seq.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

89. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

90. Plaintiff's right to a recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at SC Code §15-32-200 et seq., which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

91. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

92. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

93. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

94. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

95. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

96. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

97. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

98. This Defendant would assert that it owes no duty of care to the Plaintiff or her decedent in either tort or contract. To the extent this Defendant did owe Plaintiff or Plaintiff's decedent a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

99. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice as this Court lacks personal jurisdiction over this Defendant, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

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: March 6, 2019

|                                 |   |                              |
|---------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS |
|                                 | ) |                              |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT  |
|                                 | ) |                              |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473    |
| ROYSTON, BY AND THROUGH THE     | ) |                              |
| APPOINTED PERSONAL              | ) |                              |
| REPRESENTATIVE MARIANNE         | ) |                              |
| MCCOIG, AND ON BEHALF OF THE    | ) |                              |
| STATUTORY BENEFICIARIES,        | ) |                              |
|                                 | ) |                              |
| PLAINTIFFS,                     | ) |                              |
|                                 | ) |                              |
| vs.                             | ) |                              |
|                                 | ) |                              |
| HUNT VALLEY HOLDINGS, LLC       | ) |                              |
| A/K/A FUNDAMENTAL LONG TERM     | ) |                              |
| CARE HOLDINGS, LLC;             | ) |                              |
| 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.                     | ) |                              |
|                                 | ) |                              |

**DEFENDANT FUNDAMENTAL  
CLINICAL AND OPERATIONAL  
SERVICES, LLC'S ANSWER TO  
PLAINTIFF'S COMPLAINT**

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

The Defendant, Fundamental Clinical and Operational Services, hereinafter referred to as "this Defendant," hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. This Defendant is without sufficient knowledge or information to respond to the allegations in Paragraphs 1 and 2 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.



3. The allegations set forth in Paragraphs 3 and 4 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

4. This Defendant denies the allegations set forth in Paragraphs 5 and 6 of Plaintiff's Complaint as stated and demands strict proof thereof.

5. The allegations set forth in Paragraph 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

6. The allegations set forth in Paragraph 8 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

7. In responding to the allegations set forth in Paragraph 9 of Plaintiff's Complaint, this defendant admits only that it is a Delaware limited liability company. This Defendant denies any and all remaining allegations in the above Paragraph.

8. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint as stated and demands strict proof thereof.

9. The allegations set forth in Paragraph 11 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

10. This Defendant denies the allegations set forth in Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof.

11. The allegations set forth in Paragraph 13 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

12. This Defendant denies the allegations set forth in Paragraph 14 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraph call for pure legal conclusions, no response is required. Further and to the extent those allegations are directed at parties other than this Defendant, no response is required.

13. The allegations set forth in Paragraphs 15, 16, 17, 18, 19, 20, 21, 22, and 23 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

14. This Defendant denies the allegations set forth in Paragraph 24 of Plaintiff's Complaint as stated and demands strict proof thereof.

15. The allegations set forth in Paragraphs 25 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

16. This Defendant denies the allegations set forth in Paragraph 26 of Plaintiff's Complaint as stated and demands strict proof thereof.

17. In responding to Paragraph 27 of Plaintiff's Complaint, this Defendant affirmatively asserts that it provides clinical and operational consulting services to the facility pursuant to a contract and has never operated a skilled nursing facility or provided care to any person. The remainder of the allegations set forth in the above Paragraph is denied.

18. This Defendant denies the allegations set forth in Paragraphs 28 and 29 of Plaintiff's Complaint and demands strict proof thereof.

19. This Defendant denies the allegations within the paragraph erroneously numbered as the second paragraph "28" on page 9 of Plaintiff's Complaint.

20. The allegations in the paragraph erroneously numbered as the second paragraph "29" on page 9 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, the allegations are denied to the extent they allege liability or damages as to this Defendant.

21. The allegations set forth in Paragraph 30<sup>1</sup> of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, the allegations within those paragraphs are denied to the extent they allege liability or damages as to this Defendant.

22. The allegations set forth in Paragraph 31 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. Further, to the extent those allegations call for pure legal conclusions, no response is required.

---

<sup>1</sup> Hereinafter, these responses refer to the paragraph as numbered in Plaintiff's Complaint.

23. This Defendant denies the allegations set forth in Paragraph 32 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided care to any person, including Ms. Royston. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

24. This Defendant denies the allegations set forth in Paragraphs 33, 34, 35, 36, 37, 38, 39, and 40 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

25. The allegations set forth in Paragraph 41 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant.

26. The allegations set forth in Paragraph 42 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

27. This Defendant denies the allegations set forth in Paragraphs 43 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

28. The allegations set forth in Paragraph 44 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant. To the extent the above allegations are directed at parties other than this Defendant, no response is required.

29. This Defendant denies the allegations set forth in Paragraph 45 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility, never provided resident care, and owed no duty of care to any resident including Ms. Royston. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required. To the extent the allegations set forth in the above Paragraph calls for pure legal conclusions, no response is required.

30. This Defendant denies the allegations set forth in Paragraph 46 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

31. This Defendant denies the allegations set forth in Paragraphs 47 and 48 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are legal conclusions, no response is required.

32. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

33. This Defendant denies the allegations set forth in Paragraphs 50, 51, 52, 53, 54, and 55 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

34. This Defendant denies the allegations set forth in Paragraph 56 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations call for pure legal conclusions, no response is required.

35. This Defendant denies the allegations set forth in Paragraphs 57, 58, 59, 60, 61, 62, 63, 64, and 65 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required. Further and to the extent the allegations in the above Paragraphs call for pure legal conclusions, no response is required.

36. The allegations set forth in Paragraphs 66, 67, 68, 69, and 70 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant

37. The allegations set forth in Paragraph 71 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. To the extent the allegations in the above Paragraph call for pure legal conclusions, no response is required.

38. This Defendant denies the allegations set forth in Paragraphs 72, 73, 74, 75, 76, 77, and 78 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or

treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

39. The allegations set forth in Paragraphs 79 and 80 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

40. This Defendant denies the allegations set forth in Paragraph 81 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

41. The allegations set forth in Paragraphs 82, 83, and 84 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

42. This Defendant denies the allegations set forth in Paragraphs 85, 86, 87, 88, and 89 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

43. The allegations set forth in Paragraphs 90 and 91 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

44. This Defendant denies the allegations set forth in Paragraphs 92 and 93 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

45. This Defendant denies the allegations set forth in Paragraphs 94, 95, 96, and 97 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

46. This Defendant denies the allegations set forth in Paragraphs 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

47. The allegations set forth in Paragraphs 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

48. This Defendant denies the allegations set forth in Paragraphs 118 and 119 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

49. This Defendant denies the allegations set forth in Paragraphs 120 and 121 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any



medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

50. The allegations set forth in Paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, and 134 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

51. This Defendant denies the allegations set forth in Paragraph 135 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are not directed at this Defendant, they are denied.

52. The allegations set forth in Paragraphs 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, and 168 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

53. This Defendant denies the allegations set forth in Paragraphs 169, 170, 171, 172, 173, 174, 175, 176, and 177 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

54. This Defendant denies the allegations set forth in Paragraphs 178, 179, and 180 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

55. The allegations set forth in Paragraphs 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

56. This Defendant denies the allegations set forth in Paragraphs 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, and 212 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

57. The allegations set forth in Paragraphs 213 and 214 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

58. This Defendant denies the allegations set forth in Paragraph 215 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

59. The allegations set forth in Paragraphs 216 and 217 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

60. This Defendant denies the allegations set forth in Paragraph 218 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

61. The allegations set forth in Paragraphs 219, 220, 221, 222, 223, and 224 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

62. This Defendant denies the allegations set forth in Paragraph 225 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

63. The allegations set forth in Paragraphs 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, and 241 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

64. This Defendant denies the allegations set forth in Paragraphs 242, 243, 244, 245, 246, 247, and 248 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

65. The allegations set forth in Paragraphs 249 and 250 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information to respond to those allegations but denies the same to the extent they allege liability or damages against this Defendant. To the extent those allegations are directed at parties other than this Defendant, no response is required.

66. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 251, 252, and 253 of Plaintiff's Complaint and therefore denies the same to the extent they allege liability or damages against this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and

never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

67. This Defendant denies the allegations set forth in Paragraph 254, 255, 256, and 257 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

68. This Defendant denies the allegations set forth in Paragraphs 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, and 271 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

69. Responding to Paragraph 272 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

70. This Defendant denies the allegations set forth in Paragraphs 273, 274, 275, 276, and 277 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those

allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

71. Responding to Paragraph 278 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

72. This Defendant denies the allegations set forth in Paragraphs 279, 280, 281, 282, 283, and 284 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

73. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

74. The allegations set forth in Paragraphs 286, 287, and 288 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

75. This Defendant denies the allegations set forth in Paragraph 289 of Plaintiff's Complaint as stated and demands strict proof thereof.

76. Responding to Paragraph 290 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

77. This Defendant denies the allegations set forth in Paragraphs 291 of Plaintiff's Complaint and demands strict proof thereof.

78. The allegations set forth in Paragraph 292 of Plaintiff Complaint are unintelligible as drafted and therefore this Defendant cannot be reasonably required to formulate a response. Nevertheless, those allegations are denied to the extent they allege liability or damages against this Defendant.

79. This Defendant denies the allegations set forth in Paragraphs 293 of Plaintiff's Complaint and demands strict proof thereof.

80. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

81. This Defendant denies the allegations set forth in Paragraphs 295, 296, 297, 298, and 299 of Plaintiff's Complaint and demands strict proof thereof.

82. Responding to Paragraph 300 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

83. The allegations set forth in Paragraphs 301 and 302 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

84. This Defendant denies the allegations set forth in Paragraphs 303, 304, 305, 306, 307, 308, 309, and 310 of Plaintiff's Complaint and demand strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This

Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

85. Responding to Paragraph 311 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

86. This Defendant denies the allegations set forth in Paragraphs 312, 313, and 314 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

87. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

88. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

89. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, et. seq.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**



90. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

91. Plaintiff's right to a recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at SC Code §15-32-200 et seq., which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

92. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

93. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

94. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

95. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

96. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

97. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

98. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

99. This Defendant would assert that it owes no duty of care to the Plaintiff or her decedent in either tort or contract. To the extent this Defendant did owe Plaintiff or Plaintiff's decedent a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

100. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice as this Court lacks personal jurisdiction over this Defendant, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

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: March 6, 2019

|                                 |   |                                  |
|---------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS     |
|                                 | ) |                                  |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT      |
|                                 | ) |                                  |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473        |
| ROYSTON, BY AND THROUGH THE     | ) |                                  |
| APPOINTED PERSONAL              | ) |                                  |
| REPRESENTATIVE MARIANNE         | ) |                                  |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                  |
| STATUTORY BENEFICIARIES,        | ) |                                  |
|                                 | ) |                                  |
| PLAINTIFFS,                     | ) |                                  |
|                                 | ) |                                  |
| vs.                             | ) |                                  |
|                                 | ) |                                  |
| HUNT VALLEY HOLDINGS, LLC       | ) |                                  |
| A/K/A FUNDAMENTAL LONG TERM     | ) |                                  |
| CARE HOLDINGS, LLC;             | ) | <b>DEFENDANT HUNT VALLEY</b>     |
| FUNDAMENTAL CLINICAL AND        | ) | <b>HOLDINGS, LLC'S ANSWER TO</b> |
| OPERATIONAL SERVICES, LLC;      | ) | <b>PLAINTIFF'S COMPLAINT</b>     |
| FUNDAMENTAL ADMINISTRATIVE      | ) |                                  |
| SERVICES, LLC; AND THI OF SOUTH | ) |                                  |
| CAROLINA AT MAGNOLIA PLACE      | ) |                                  |
| AT GREENVILLE, LLC D/B/A        | ) |                                  |
| MAGNOLIA PLACE-GREENVILLE,      | ) |                                  |
|                                 | ) |                                  |
| DEFENDANTS.                     | ) |                                  |

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

The Defendant, Hunt Valley Holdings, LLC, hereinafter referred to as "this Defendant," *subject to and without waiving all rights to move to dismiss this action for lack of personal jurisdiction*, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.

2. This Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraphs 1 and 2 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

3. In responding to the allegations set forth in Paragraph 3 of Plaintiff's Complaint, this Defendant affirmatively states it is a Delaware limited liability company with no registered agent in South Carolina. The remainder of the allegations in the above Paragraph are denied and strict proof is demanded thereof.

4. This Defendant denies the allegations in Paragraphs 4 and 5 as stated and demands strict proof thereof. Further answering, this Defendant denies that it directly or indirectly manages, controls or operates nursing homes.

5. This Defendant denies the allegations set forth in Paragraph 6 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraphs are directed at parties other than this Defendant no response is required.

6. The allegations set forth in Paragraphs 7, 8, and 9 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. Further answering, this Defendant denies that it directly or indirectly manages, controls or operates nursing homes.

7. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraphs are directed at parties other than this Defendant no response is required.

8. This Defendant denies the allegations set forth in Paragraphs 11 and 12 of Plaintiff's Complaint and demands strict proof thereof. Further answering, this Defendant denies that it directly or indirectly manages, controls or operates nursing homes.

9. This Defendant denies the allegations set forth in Paragraphs 13 and 14 of Plaintiff's Complaint and demands strict proof thereof.

10. This Defendant denies the allegations set forth in Paragraphs 15, 16, and 17 of Plaintiff's Complaint and demands strict proof thereof. Further responding, this Defendant would crave reference to the alleged agreement cited by Plaintiff for its contents to the extent it exists. This Defendant denies any allegations inconsistent with those contents or intended to allege liability or damages against this Defendant.

11. This Defendant denies the allegations set forth in Paragraphs 18, 19, 20, 21, and 22 of Plaintiff's Complaint and demands strict proof thereof. Further responding, this Defendant would crave reference to the alleged agreement cited by Plaintiff for its contents to the extent it exists. This Defendant denies any allegations inconsistent with those contents or intended to allege liability or damages against this Defendant.

12. This Defendant denies the allegations set forth in Paragraphs 23, 24, 25, 26, and 27 of Plaintiff's Complaint and demands strict proof thereof.

13. The allegations set forth in Paragraphs 28 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

14. This Defendant denies the allegations set forth in Paragraph 29 of Plaintiff's Complaint and demands strict proof thereof.

15. The allegations set forth within the paragraph erroneously numbered as the second paragraph “28” on page 9 of Plaintiff’s Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

16. The allegations in the paragraph erroneously numbered as paragraph “29” on page 9 of Plaintiff’s Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, the allegations within those paragraphs are denied to the extent they allege liability or damages as to this Defendant.

17. The allegations in Paragraph 30<sup>1</sup> of the Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, the allegations within those paragraphs are denied to the extent they allege liability or damages as to this Defendant.

18. This Defendant denies the allegations in Paragraphs 31, 32, and 33 of Plaintiff’s Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. Further, to the extent those allegations call for pure legal conclusions, no response is required.

19. This Defendant denies the allegations set forth in Paragraphs 34, 35, 36, 37, 38, 39, 40, 41 and 42 of Plaintiff’s Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

---

<sup>1</sup> Hereinafter, these responses refer to the paragraph as numbered in Plaintiff’s Complaint.

20. This Defendant denies the allegations set forth in Paragraphs 43 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

21. This Defendant denies the allegations set forth in Paragraph 44 of Plaintiff's Complaint as stated and demands strict proof thereof.

22. This Defendant denies the allegations set forth in Paragraph 45 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required. To the extent the allegations set forth in the above Paragraph calls for pure legal conclusions, no response is required.

23. This Defendant denies the allegations set forth in Paragraphs 46 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

24. This Defendant denies the allegations set forth in Paragraphs 47 and 48 of Plaintiff's Complaint and demands strict proof thereof.

25. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

26. This Defendant denies the allegations set forth in Paragraph 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, and 65 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has



never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

27. The allegations set forth in Paragraphs 66, 67, 68, 69, and 70 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability or damages as to this Defendant

28. The allegations set forth in Paragraph 71 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. To the extent the allegations in the above Paragraph call for pure legal conclusions, no response is required.

29. This Defendant denies the allegations set forth in Paragraphs 72, 73, 74, 75, 76, 77, and 78 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

30. The allegations set forth in Paragraph 79 and 80 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

31. This Defendant denies the allegations set forth in Paragraph 81 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

32. The allegations set forth in Paragraphs 82, 83, and 84 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

33. This Defendant denies the allegations set forth in Paragraphs 85, 86, 87, 88, and 89 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

34. The allegations set forth in Paragraphs 90 and 91 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

35. This Defendant denies the allegations set forth in Paragraphs 92 and 93 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

36. This Defendant denies the allegations set forth in Paragraphs 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, and 107 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

37. The allegations set forth in Paragraphs 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

38. This Defendant denies the allegations set forth in Paragraphs 118, 119, 120, and 121 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

39. The allegations set forth in Paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, and 134 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

40. This Defendant denies the allegations set forth in Paragraph 135 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are not directed at this Defendant, they are denied.

41. The allegations set forth in Paragraphs 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, and 168 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

42. This Defendant denies the allegations set forth in Paragraphs 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, and 180 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

43. The allegations set forth in Paragraphs 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, and 214 of Plaintiff's Complaint are legal or non-factual conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

44. This Defendant denies the allegations set forth in Paragraph 215 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person. Further answering, this Defendant has no "Nursing Policies and Procedures."

45. The allegations set forth in Paragraphs 216 and 217 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

46. This Defendant denies the allegations set forth in Paragraph 218 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

47. The allegations set forth in Paragraphs 219, 220, 221, 222, 223, and 224 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

48. This Defendant denies the allegations set forth in Paragraph 225 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

49. The allegations set forth in Paragraphs 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, and 241 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. Further responding, this Defendant would affirmatively assert it

has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff's decedent or any other person.

50. This Defendant denies the allegations set forth in Paragraphs 242, 243, 244, 245, 246, 247, and 248 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

51. The allegations set forth in Paragraphs 249 and 250 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, this Defendant is without sufficient knowledge or information to respond to those allegations but denies the same to the extent they allege liability or damages against this Defendant. To the extent those allegations are directed at parties other than this Defendant, no response is required.

52. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 251, 252, and 253 of Plaintiff's Complaint and therefore denies the same to the extent they allege liability or damages against this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

53. This Defendant denies the allegations set forth in Paragraphs 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, and 271 of Plaintiff's Complaint

to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

54. Responding to Paragraph 272 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

55. This Defendant denies the allegations set forth in Paragraphs 273, 274, 275, 276, and 277 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

56. Responding to Paragraph 278 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

57. This Defendant denies the allegations set forth in Paragraphs 279, 280, 281, 282, 283, and 284 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required. To the extent those allegations are directed at parties other than this Defendant, no response is required.

58. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

59. The allegations set forth in Paragraphs 286, 287, and 288 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

60. This Defendant denies the allegations set forth in Paragraph 289 of Plaintiff's Complaint and demands strict proof thereof.

61. Responding to Paragraph 290 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

62. This Defendant denies the allegations set forth in Paragraph 291 of Plaintiff's Complaint and demands strict proof thereof.

63. The allegations set forth in Paragraphs 292 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant cannot reasonably be required to form a response. Nevertheless, this Defendant denies those allegations to the extent they are intended to allege liability or damages against this Defendant.

64. This Defendant denies the allegations set forth in Paragraph 293 of Plaintiff's Complaint and demands strict proof thereof.

65. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

66. This Defendant denies the allegations set forth in Paragraphs 295, 296, 297, 298, and 299 of Plaintiff's Complaint and demands strict proof thereof.

67. Responding to Paragraph 300 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.



68. The allegations set forth in Paragraphs 301 and 302 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

69. This Defendant denies the allegations set forth in Paragraphs 303, 304, 305, 306, 307, 308, 309, and 310 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

70. Responding to Paragraph 311 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

71. This Defendant denies the allegations set forth in Paragraphs 312, 313, and 314 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

72. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

73. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

74. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, et. seq.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

75. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

76. Plaintiff's right to a recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at SC Code §15-32-200 et seq., which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

77. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

78. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

79. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

80. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

81. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

82. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

83. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

84. This Defendant would assert that it owes no duty of care to the Plaintiff or her decedent in either tort or contract. To the extent this Defendant did owe Plaintiff or Plaintiff's decedent a duty of care, which is denied, this Defendant was at all times compliant with the governing standard of care.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

85. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice as this Court lacks personal jurisdiction over this Defendant, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on following page]

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*  
*Hunt Valley Holdings, LLC*

Charleston, South Carolina

Dated: March 6, 2019

STATE OF SOUTH CAROLINA )  
 ) COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) 2019-CP-23-00473  
 )  
 )  
PATRICIA ROYSTON, ET AT )  
 ) PLAINTIFFS)  
vs. ) TRANSCRIPT OF RECORD  
 )  
HUNT VALLEY HOLDINGS, LLC, ET AL)  
 ) DEFENDANTS)

---

August 29, 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,

RUSSELL HINES, ESQ.  
Attorney for the Defendants

APRIL HERRON  
Official Court Reporter

1           There were no witnesses.

2           There were no exhibits.

3

4

» > o < «

5

Certificate of Reporter . . . . . 36

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: All right, gentlemen, how y'all  
2 doing today? I just looked at this and it looks to  
3 me like it's an issue that we have discussed before,  
4 am I right?

5 MR. POLIAKOFF: Yes, Your Honor, I believe so.

6 THE COURT: Okay.

7 MR. POLIAKOFF: There's some new wrinkles in  
8 this one that I don't know that we've addressed.

9 THE COURT: I can't imagine. Is it going to  
10 take you five minutes or less to tell me the wrinkles  
11 or is that just too much to ask?

12 MR. POLIAKOFF: I'm hoping.

13 THE COURT: Okay.

14 MR. POLIAKOFF: But I know to go first.

15 THE COURT: Okay. All right, so let's call to  
16 bar Patricia Royston vs. Hunt Valley Holdings, LLC  
17 and that is case No. 2019-CP-23-473. So, I note that  
18 there are six motions before the court but I think  
19 there are really three because they're identical. So  
20 I'll defer to you and I'll be happy to hear from you  
21 in whatever order y'all think is appropriate.

22 MR. HINES: Thank you, Your Honor, I suppose  
23 I'll lead off unless there's an objection to that.  
24 My name is Russ Hines. I'm not actually of record so  
25 far but I practice with Mr. Davis who is.



1 THE COURT: Sure.

2 MR. HINES: And here on behalf -- well I do have  
3 multiple motions but the one I intend to take up at  
4 this moment is the motion to compel arbitration.  
5 That's what I call the facility THI of South  
6 Carolina, Magnolia Place.

7 THE COURT: Yes, sir.

8 MR. HINES: Your Honor, I again am, Russ Hines,  
9 last spelling, H-I-N-E-S. I have a copy, if I may  
10 hand it up?

11 THE COURT: Sure, yes, sir.

12 MR. HINES: Hard copy of what we filed.

13 THE COURT: Yes, sir.

14 MR. HINES: May it please the Court?

15 THE COURT: Yes, sir.

16 MR. HINES: This argument, I already had my  
17 rolly cart taken note of by security personnel and  
18 opposing counsel on the way up here. Well, just put  
19 to the court at ease, I don't intend to spend as much  
20 time arguing this as it might make it look.

21 THE COURT: Okay. All right. I thought you  
22 meant you're going to put the court at ease, I have  
23 no weapons in here --

24 (WHEREUPON, there was an outburst of laughter.)

25 THE COURT: -- and I was going to say go for it.

1           MR. HINES: Well, I can also put the court at  
2 ease in that respect also, I suppose. This is, if  
3 anything, harmful to me but I don't think it would be  
4 harmful to anyone else. What's in here. But, Your  
5 Honor, you mentioned having some prior experience, at  
6 least with motions of this type. And as a result of  
7 that, I guess, well, I don't want to waste The  
8 Court's time on an analysis or getting into too many  
9 things that you might have already fairly squared  
10 away in your mind. So obviously, please stop me--

11           THE COURT: I tell you, the problem with this,  
12 no one has gotten it fairly squared away in their  
13 mind. We're waiting for direction from the Supreme  
14 Court in a lot of these instances.

15           MR. HINES: You know, Your Honor, I think that  
16 that's -- well that's a fair point. And on this one,  
17 I think -- at least explain how I've got it in my  
18 mind.

19           THE COURT: Sure.

20           MR. HINES: How I do believe, respectfully, it's  
21 a persuasive argument. And let me say also, what  
22 I've handed to you is -- it covers a lot of ground, I  
23 realize. And let me give a word of thanks to Kate  
24 Medlin in our office who, I think, did a really fine  
25 job of putting it together. And I say that at the

1       outset to say, I don't intend to go over every single  
2       point in that, it, obviously, speaks for itself and  
3       we stand upon that argument. I do intend to clarify  
4       and expound upon some of that and also to address  
5       anything else that might -- might be raised by  
6       opposing counsel.

7               THE COURT: Okay.

8               MR. HINES: Now, this is a nursing home case.  
9       And I think when you dealt with this before, I assume  
10      it's been in this context. You have a resident,  
11      Ms. Royston, she was admitted to our facility in  
12      December of 2016. At the time of her admission she  
13      signed an arbitration agreement. Now, there's a  
14      couple of different agreements that are relevant.  
15      She also signed an admission agreement. And this is  
16      the case we're not talking about a non-signatory  
17      where you have a relative, a daughter, a son, someone  
18      sign the admission paperwork on behalf of the  
19      resident. This one she signed herself.

20              Now, there are a number of different arguments  
21      that have been made. And I suppose I'll touch on  
22      some. I think some, as I see it, the argument that I  
23      think is, perhaps, the most interesting or worthy of  
24      discussion, and I'll go ahead and mention upfront, is  
25      that the document that we have, the arbitration

1       agreement, was not countersigned by the facility.  
2       And that's something that the Plaintiffs have pointed  
3       out in opposition to this motion.

4               And let me say this, I think if the document had  
5       been countersigned by the facility, I'm not asking  
6       for an answer to this question, I'm just wondering  
7       aloud. I'm wondering if I even need to be here for  
8       this motion. Because, I think, I suspect, at least,  
9       the Plaintiffs counsel would have to think pretty  
10      long and hard about whether they wanted to contest  
11      arbitration as to the facility. Because what we have  
12      is it was signed by the resident--

13             THE COURT: At least with respect to the  
14      wrongful death cause of action.

15             MR. HINES: I suppose I would say, at least with  
16      respect to the survivors cause of action. They would  
17      also -- you know, they -- they take issue with the  
18      arbitrability [verbatim] of wrongful death and I'll  
19      address that too. And the reason I say it in the way  
20      I just did, I think this problem -- the word that  
21      strikes me as sort of illusory, respectfully. The  
22      problem with not having a countersigned document.  
23      And we get into this in the memo, I want to try to  
24      sort of highlight things. Is that the agreement,  
25      it's a one-page agreement, it is not a precondition

1 of admission, just to point that out.

2 The agreement was presented to Ms. Royston. And  
3 that is in the form of an offer. An offer to accept  
4 these terms that she signed, that she accepted the  
5 terms without any changes. She didn't strike through  
6 anything and say no I agree in this respect on that  
7 one. I suppose if she had strike through and handed  
8 it back to us on some part of the language, maybe you  
9 can consider that to be a counteroffer. But this  
10 is -- one of the things, there's different parts of  
11 the memo in opposition to us where, I respectfully,  
12 the Plaintiffs sort of speak out of both sides of  
13 their mouth.

14 For instance, one of the things that they will  
15 tell you when they argue unconscionability, and I'll  
16 get to that, is that this is a contract of adhesion,  
17 it's their form document. For one, it's not quite a  
18 contract of adhesion, as I understand it. I think  
19 contracts of adhesion are really what you call take  
20 it or leave it. At least in terms of her admission  
21 to the facility. This wasn't take it or leave it.  
22 This wasn't either sign this agreement or move on.  
23 This was you can agree to this or not and you can  
24 still be admitted.

25 In any event, though, they do acknowledge that

1 by making that argument, that it is a contract. It's  
2 our verbiage, we presented it to her for signing.  
3 And she signed it. Now, I'm not aware of any  
4 argument regarding her capacity or anything like  
5 that. If one is raised we can talk about it. But  
6 what we have is a knowing and voluntary assent, in  
7 this case, by a party to be charged. And when I use  
8 that phraseology, it occurs to me that I ought to  
9 mention, so as to confuse the issue, that's sort of  
10 the language we think of when we think of the  
11 statutes of fraud, a party to be charged. This is  
12 not a contract, I believe, even falls within the  
13 statute of frauds.

14 With respect to -- we've cited the UCC in our  
15 brief. And let me update that because really I think  
16 that's -- well, clearly is not a contract of sale of  
17 goods -- but the statute that really -- and I'll  
18 amend or supplement our brief to say it's 32-3-10.  
19 Which is, you know, sort of more a general statute of  
20 frauds. And the main one we have to look at there  
21 would be as in a contract that cannot be performed  
22 within one year. And the way that cases -- the way  
23 our cases expound upon that or clarify that, that  
24 means that it applies if it's not possible to -- to  
25 perform it within that one year. It doesn't mean

1       that, you know, in this case, obviously, it's  
2       entirely possible to perform this within one year.

3               So, you know, to be giving an example, if you  
4       had a contract to do something within 18 months, well  
5       that would be subject to the statute of frauds.  
6       Because 18 months could not possibly fit within the  
7       year. But a dispute could arise, that is subject to  
8       arbitration within one year. My point is really to  
9       say, at least technically, we wouldn't even have to  
10      have a written agreement to arbitrate in my view  
11      because there's no statute of frauds requirement.

12             And that always leads me to another thought.  
13      Which is that it's very, very important to understand  
14      what the FAA and our Supreme Courts -- maybe I should  
15      say The Supreme Court of The United States  
16      interpretation of the FAA, what that means.  
17      Contracts to arbitrate have to stand on equal footing  
18      with any other contract. You know, they --  
19      otherwise, they're valid, irrevocable and enforceable  
20      in court. They can be -- they can be rescinded or,  
21      you know, the court can determine that no contract  
22      was made. And it has to do that in the same way that  
23      you would do that for any other contract.

24             And there's a lot of things, respectfully, in  
25      the memo to opposition that are antagonistic to that

1 point. I think that point is rock solid. You know,  
2 there's a lot of things in there about, well, gosh,  
3 there has to be some sort of extra scrutiny about  
4 this because the subject matter is waiver of  
5 Constitutional right. No. There is no -- that is  
6 absolutely inconsistent with what the FAA requires.  
7 And so, sort of broader proposition.

8 So -- and we've cited cases in our brief, Your  
9 Honor, forgive me, I can flip to it, but right now  
10 the name is escaping me but we cited a number of  
11 them. Anyways, I'll trust it's there and maybe in a  
12 moment I can cite--

13 THE COURT: If it will put you at ease, I'm not  
14 particularly persuaded by those arguments by the  
15 Plaintiff either. I've reviewed all of those in the  
16 past and I've made certain rulings but I've never  
17 been persuaded by the unconscionability and some of  
18 the other arguments that are propounded, not that  
19 those aren't well posed arguments, those are just not  
20 the arguments upon which I made my rulings. And I  
21 agree with you entirely. It's a contract. And it's  
22 construed as a contract.

23 MR. HINES: And so, Your Honor, I do appreciate  
24 that. Maybe that helps me -- well, at least speed to  
25 the point if not cut all the way to the chase.



1       There's a number of arguments they made,  
2       unconscionability, lack of consideration, illegality  
3       based upon an interpretation of whether or not an  
4       arbitration agreement, these circumstances violates  
5       federal regulations about benefits to be received by  
6       the facility for the admission. Of course, all those  
7       cases, by the way, are predicated on the idea -- that  
8       notion, I should say, is predicated on the idea that  
9       being mandatory arbitration agreement as a  
10      precondition to admittance. Which is not what we  
11      have here. So, I think it takes it out of that whole  
12      realm anyways.

13               Furthermore, really, if I follow the logic of  
14      that argument, it would place the regulation at odds  
15      with the FAA itself in saying that there's a  
16      different rule that would apply. Basically, had a  
17      regulation set up a scheme under which the contract  
18      would be invalidated and, essentially, take its  
19      meaning from the fact that it's a arbitration clause.  
20      Meaning that I think, even if you were to go down  
21      that road, you would -- it's a dead end, Your Honor,  
22      so.

23               THE COURT: So, what do you say about the issue  
24      of consideration? So, if I'm looking at this and  
25      it's a stand alone contract under your Tab C, and it

1       wasn't -- the consideration was not the assistance  
2       and the services provided in the facility, then what  
3       would be the consideration for that agreement?

4               MR. HINES: Well, under the question as posed,  
5       I'm going to answer that, Your Honor. But let me put  
6       just a real quick pin in this.

7               THE COURT: Sure.

8               MR. HINES: We're not giving up on the idea of  
9       merger. We argue merger in a number of other cases  
10      when we're dealing non-signator's, all of that still  
11      applies to this argument. It's just not as important  
12      to get into it because it's a more streamlined  
13      analytical approach. Because we're dealing with the  
14      actual signatory. But under the merger view then we  
15      would bring into the consideration the benefits of  
16      being admitted and receiving, giving treatment  
17      whatnot.

18              However, to answer your questions, looking  
19      strictly at this document, the benefit is  
20      arbitration. Mutual promises to arbitrate claims  
21      absolutely are without consideration. No question  
22      about that. Plaintiffs, and respectfully, Lord knows  
23      I would be casting the first stone to suggest that  
24      I'm not -- had -- I've never done this intentionally  
25      but I'm sure that someone could look at everything

1       that I've ever written and say, gosh, you know, I  
2       don't know if that case exactly says what you might  
3       think it says. That O'Neil case is from the Fourth  
4       Circuit. I mean, it's directly opposed to what the  
5       Plaintiffs suggests is the law and it just isn't.

6               Two things, the case law is, and we've cited in  
7       the brief, mutual promises to arbitrate are  
8       sufficient consideration to support a contract.  
9       Moreover, even if that wasn't South Carolina law, it  
10      would be preempted by the supremacy clause to the  
11      FAA, we couldn't say mutual promise to do other  
12      things can support a contract but not arbitration.  
13      That's clearly a rule that would undermine  
14      arbitration agreements. And it would be inconsistent  
15      and irreconcilable with the FAA. So there's that,  
16      Your Honor.

17             Oh goodness. I tell you what, Your Honor,  
18      perhaps it would be -- I realize I'm sort of rattling  
19      off quite a bit. And one of these things is both of  
20      us, both sides, cover so much ground in trying to  
21      flesh these arguments out and present to the court.  
22      And certainly, we have worthy advisories. I'm  
23      wondering now if it might be efficient for me to,  
24      perhaps, yield some time sort of see what issues we  
25      might focus on. But it seems to me that the major

1 point, the only thing is the question of does that  
2 absence of a countersignature, is that doom for us?  
3 And respectfully, it's not. We have the case law --  
4 this isn't a contract that's within the statute of  
5 frauds, for one. It's almost as if they are arguing  
6 standing would not be the accurate term but I'm  
7 saying it's a situation where -- it's almost like the  
8 wrong party to the contract is making the argument  
9 they're making. Meaning, I'm not--

10 THE COURT: I understand.

11 MR. HINES: -- meaning, we're the ones that  
12 didn't sign it. And we're not complaining about it.  
13 It's almost like they're protecting us. Which  
14 respectfully, I'm sure not by design or, at least,  
15 not literally what's happening there. Furthermore, I  
16 don't see any reason why if it came to it, we  
17 couldn't sign it today. So, I think that argument  
18 has been a red herring, Your Honor. And really if it  
19 is, where it puts us is having a signed arbitration  
20 agreement by a person with capacity proper contract  
21 in South Carolina that has to be treated with equal  
22 dignity of any other contract. And I would say this  
23 is all against the backdrop of federal and state  
24 policy, which says we favor arbitration in this  
25 state.

1           I think there's one last point I'll make before  
2           I briefly suspend this monologue: Which is to say, I  
3           think, it has to be remembered, particularly, when we  
4           talk about things like unconscionability this and  
5           that. This is arbitration. It's a favored way of  
6           resolving disputes according to our Supreme Court of  
7           South Carolina and the legislature and the policies  
8           that underline the FAA. For the immediate appeal of  
9           the denial of these kinds of motions reflect the  
10          favored status.

11           So, it just doesn't seem to make sense to me on  
12          the one hand to say that's that mean, old  
13          unconscionable arbitration. I mean, the whole idea  
14          the agreement deems misplaced. The agreement which  
15          is simply saying this is considered to be a more  
16          efficient, streamline way of resolving disputes.  
17          It's favored in federal and state court. And I think  
18          it's really a nonstarter to suggest something  
19          untoward that is -- is reflected in the arbitration  
20          agreement. So thank you, Your Honor.

21           THE COURT: Thank you, Mr. Hines, I appreciate  
22          that, sir.

23           MR. MULLMAN: May it please the Court?

24           THE COURT: Yes, sir. Thank you, Your Honor,  
25          Ray Mullman and Matt Christian for Patricia Royston

1 and her family. I want to establish some undisputed  
2 facts first. As Russell says, the arbitration  
3 agreement was not a condition of admission. The  
4 arbitration agreement and the admission agreement are  
5 separate documents that do not merge under South  
6 Carolina law. The Coleman, Hodge and Thompson cases  
7 that you're very familiar with. There's no valuable  
8 consideration provided by this Defendant.

9 Now, let's talk a little bit about the actual  
10 four corners of the contract, Your Honor. It says  
11 that it's made between Magnolia Place of Greenville  
12 and Patricia Royston. However, the Defendant, in  
13 this case, is THI of South Carolina at Magnolia Place  
14 at Greenville, LLC. So recently, just this week,  
15 Judge Miller, if I may approach, issued an order in  
16 Joyner vs. NHC, where he said the whole arbitration  
17 agreement is not enforceable unless they have the  
18 right name on the contract. So, that's number one.

19 Number two, they don't have the original  
20 contract. In fact, they take the position that we  
21 gave them this contract. Therefore, there's no  
22 evidence they ever held or possessed this. For them  
23 to not sign the agreement, and there is case law that  
24 they cite, and I encourage The Court to read those  
25 cases. Because they don't say exactly what they need

1 under the facts and circumstances of this case, Your  
2 Honor. In those cases, somebody gave somebody a  
3 contract, the person signed the contract, dated the  
4 contract. This is not dated, the arbitration  
5 agreement. Handed the contract back. There's no  
6 evidence that this contract was handed back to The  
7 Defendant. We can't authenticate this signature  
8 because nobody has the original. So, we don't even  
9 know if this is authentic. We don't know what date  
10 it was signed.

11 For it to be enforceable, by the person who  
12 didn't sign it, they have to hold it, accept it,  
13 possess it and then act on it. In other words, if we  
14 entered into a contract and I say I'm going to mow  
15 your lawn for \$10. And you don't sign the contract  
16 and I mow your lawn, then you're stuck paying me the  
17 \$10. Okay, hopefully it's a short, small lawn. So,  
18 we don't think there was a validity contract. And we  
19 find it very telling that the name of the facility's  
20 incorrect. And that the facility never signed the  
21 contract.

22 Once again, Judge Miller just this week in King  
23 vs. Americare, signed an order saying, well, if the  
24 facility, and this is a nursing home case, did not  
25 sign the contract, they can't enforce it. My

1 colleague Matt Christian was involved in those cases  
2 so if you have any specific issues with the facts of  
3 that case, Mr. Christian will be happy to answer  
4 them, Your Honor. And we have provided those orders  
5 to opposing counsel.

6 No one from the facility signed it, they didn't  
7 rely on the contract. It's not a condition. It  
8 wasn't necessary to get the care and treatment. That  
9 was that for the admission. Which was also not  
10 signed by the facility. But we're not challenging  
11 the enforceability because they actually need  
12 something. They actually relied on it. They  
13 actually acted on that one by allowing her to be  
14 admitted and providing care and treatment to Patricia  
15 Royston. At least the minimum care for the 11, 12  
16 days she was there.

17 What we also find interesting, there's a memo  
18 mentions a social worker but there's no affidavit,  
19 there's no evidence that they're providing to the  
20 court today to support that any witness actually saw  
21 Patricia sign this and give it to somebody at the  
22 facility. Which would be necessary for them to  
23 enforce it. It has to be held by them, it has to be  
24 dated, that's one of the key factors in these cases.  
25 And it has to be relied upon. There's no witness,



1       there's no notary, there's no signature. They didn't  
2       even provide the name of the person who allegedly  
3       explained or negotiated this agreement with Patricia  
4       Royston.

5               They are correct, Under rare circumstances  
6       certain contracts may be enforceable without the  
7       signature of one of the contracting parties, but only  
8       when clear intention of mutual assent by acceptance,  
9       possession, reliance or acting upon it exists.

10              None of those exist here. They don't have  
11       possession of it. They didn't sign it, they didn't  
12       date it, they didn't rely on this arbitration. The  
13       case law that they cite, Jaffe/Bulwinkle, which is  
14       from 1887, Bishop and Laidlaw are distinguishable to  
15       the facts and circumstances in this case because they  
16       weren't dated, it wasn't held, possessed or acted  
17       upon.

18              The Defendant in their memo asserts several  
19       facts about the formation and the execution of this  
20       contract. But their argument is not evidence, Your  
21       Honor. They need to produce an affidavit of a social  
22       worker and admissions director that would explain  
23       about the formation and execution and why they can't  
24       find the original. And we asked in our complaint and  
25       we're asking again today, if there are factual

1        questions, we deserve under section four and we would  
2        request, respectfully, a jury trial on that issue.  
3        Which would allow to have a jury trial on any factual  
4        issues related to the formation or execution of the  
5        arbitration.

6            I think the other issues, unconscionability,  
7        meeting of the minds, vagueness, indefiniteness,  
8        wrongful death, I think the court is well aware of  
9        those. I'm not going to butcher them but I think  
10       both of our memos are excellent on detailing the back  
11       and forth on the law and decisions made by the court.  
12       The wrinkle really is the wrong name on the  
13       contracts, no signatory, it wasn't dated, no evidence  
14       to explain why they don't have the agreement. And  
15       the fact that they didn't rely on them. Thank you,  
16       Your Honor.

17           THE COURT: Okay, thank you.

18           Mr. Hines, I'll let you respond, sir.

19           MR. HINES: Thank you, Your Honor. All right,  
20       first let me talk about this wrong name idea. As I  
21       understand it, the argument is it said it's made  
22       between the facility Magnolia Place of Greenville.  
23       And it doesn't say -- and Ms. Royston. And it  
24       doesn't say THI of South Carolina at Magnolia Place,  
25       at Greenville, LLC, d/b/a Magnolia Place Greenville.

1       Because again it says, Magnolia Place of Greenville,  
2       then d/b/a Magnolia Place-Greenville.

3               Your Honor, that's -- I'm not aware -- I mean,  
4       that is essentially sort of magic words analysis.  
5       And I would like to say also, just because a fellow  
6       circuit judge might have in a given case, and I have  
7       had the opportunity to briefly skim that order, but  
8       that's about all I've been able to do. So, as far as  
9       really sinking my teeth into it, I suppose I--

10              THE COURT: It's okay, Mr. Hines, Judge Miller  
11       is suffering from early onset cognitive dissonance,  
12       so the Supreme Court is probably going to vacate all  
13       of this before the end of the month. So, don't worry  
14       about that, okay?

15              MR. HINES: Thank you.

16              THE COURT: Please next time you see him tell  
17       him I said that.

18              MR. HINES: Well, I suppose -- that's certainly  
19       not what I would suggest. But I would take issue  
20       with what I understand to be his analysis there,  
21       respectfully. I think that the -- that issue is --  
22       well, Your Honor, I suppose I can get a little deeper  
23       into it. I mean, one of the general rules of  
24       contract construction would be that we interpret  
25       contracts, you know, in light of reasonableness.

1 THE COURT: Yes, sir.

2 MR. HINES: And, you know, that's an  
3 unreasonable view. And certainly a view that I can't  
4 help but believe has been infected or poisoned by an  
5 animosity toward -- maybe animosity too strong a word  
6 but a problem with arbitration agreements is  
7 inconsistent with the FAA requirement put on equal  
8 footing. I mean, if you imagine this was just  
9 another contract, the law -- contract, for instance,  
10 it's inconceivable to me that there would be some  
11 problem with its enforcement. If that's the case,  
12 then it can't be a problem enforcing it at  
13 arbitration. That and it's not dated, again, if  
14 there is law that suggests that's material, I'm  
15 unaware of it.

16 And the issue with it having not been signed,  
17 and I think Mr. Mullman -- just to be clear -- and,  
18 you know, it occurred to me, two dates to go on, I  
19 suppose either one of them is fine. But I think  
20 Mr. Mullman was referring to the Bulwinkle case as  
21 being from 1887 and not the Jaffe case from 1986.  
22 They're not both ancient. However, it's always  
23 occurred to me, when I'm in a situation like this and  
24 say Judge, it's been offered for over a hundred  
25 something years. So my point is an old case could

1 still be good is what I'm saying. Conversely, a new  
2 case, the Supreme Court just told us the answer to  
3 this. So either way, you know, I don't know how much  
4 stock you put into the age of the case. I think the  
5 question is whether it's good law. Whether it came  
6 about last week or last century, two centuries ago.

7 In both cases we've stated the law, the  
8 statement, this is a quote from Jaffe, it has long  
9 been a paradigm under South Carolina law that when a  
10 contract is signed by one party only, is accepted by  
11 the other, it becomes binding upon both just as if it  
12 were signed by both.

13 Admittedly, this was not signed by both.  
14 However, the question really wasn't with the  
15 signature we see here, is assent of the party. So,  
16 what we're having -- the argument has to be that  
17 Ms. Royston didn't express assent to this agreement,  
18 which she did.

19 Now, there has been a bit of a muddying,  
20 perhaps, of the waters, but not -- I don't even know  
21 if it goes that far. At least this notion of we  
22 don't even know if it's her signature. Your Honor,  
23 this is a document that was in the possession of The  
24 State and was provided to us from them. I mean, the  
25 idea it seems -- it seems -- well, it's hard to

1 believe that the document in their possession, which  
2 was produced, was not signed by Ms. Royston.

3 However, to the extent that there was some need to  
4 get into that, I suppose there could be all sorts of  
5 analysis and this and that. So, that certainly  
6 shouldn't trip us up in terms of authentication.

7 THE COURT: That's just curious to me. And I  
8 don't know that it's relevant to what I'm going to  
9 decide. But does The Defendant have a copy of that  
10 arbitration agreement as well?

11 MR. HINES: Your Honor, I'm not aware that The  
12 Defendant does. So, my only hesitancy in answering  
13 your question with a flat out no, is I don't know if  
14 somebody -- is it something that got misfiled or what  
15 the reason is. But as I stand here before you today,  
16 I don't have -- The Defendant, you know, it was -- it  
17 was news to The Defendant or I shouldn't say news, it  
18 was -- The Defendant didn't have -- however, there's  
19 a couple of things we know that have to be true. Had  
20 to be true that Ms. Royston got it from The  
21 Defendant, it's not her form. And it was at the time  
22 of her admission because I mean -- well, that's when  
23 she was involved with a process of documents related  
24 to her admission. And it bears a signature that it  
25 certainly has not be suggested -- it's not been

1       stated to not be hers.

2               We've heard that there's some sort of  
3       equivocation or hesitancy or they've not admitted but  
4       they haven't flat said there's no way that this is  
5       Ms. Royston's signature. Of course, I think the  
6       personal representative in the case is a child. And,  
7       you know, probably somewhat familiar with the  
8       mother's signature. I would imagine that if any of  
9       these lawyers -- they cover -- they do to a terrific  
10      job in their advocacy and if they had a ready  
11      argument to say this isn't her sig -- that we can  
12      definitively say that I suspect they've seen the  
13      affidavit saying so.

14             But again -- so really on the wrongful death  
15      point, let me just quickly mention that. To the  
16      extent -- I know we don't even really get to wrongful  
17      death and whether or not you can arbitrate that you  
18      have to first get over this hump on -- to arbitrate  
19      anything. But just as it jumps in my head, I've not  
20      been able to understand this argument. I can see how  
21      it's a cleaver point, but ultimately, I don't  
22      understand how it's gotten -- how it would get much  
23      traction.

24             Let's say on a statutory beneficiary wrongful  
25      death claim, I run down to the courthouse and I file

1 a lawsuit for wrongful death. Well, that's going to  
2 be dismissed immediately. Because I can't do that.  
3 I can't bring that claim. I'm a statutory  
4 beneficiary, that claim can brought by a particular  
5 person. The person representing the estate or I  
6 suppose a certain case you could have a special  
7 administrator. But the bottom line is, being a  
8 statutory beneficiary gives you no claim whatsoever.  
9 You have the benefit of any proceeds but you do not  
10 have a claim to make or even settle once it's been  
11 made.

12 So, the claim is not one -- it's sort of almost  
13 kind of glossed over the idea that since it's money  
14 they're pocketing in the statutory beneficiaries,  
15 that it's their claim, it's not. It's not their  
16 claim. The way the statute really works it basically  
17 makes them an heir-at-law. It treats them as if the  
18 decedent had died intestate. And so, you know,  
19 that's -- look at the scheme, you know, so you can  
20 have a decedent who died with a Will but the  
21 statutory beneficiaries, the way they work is the  
22 only exception to that is a parent who neglected the  
23 needs of child or something like that.

24 But then also you look the Dean case. Dean, it  
25 says that the court can't refuse to enforce an



1 arbitration clause just because a wrongful death  
2 claim is brought. And I understand the Plaintiffs to  
3 say well he said that but didn't go so far as to say  
4 you can arbitrate wrongful death claims. To me, I  
5 can't -- I mean, one of the things I certainly try to  
6 do and good lawyers do it to me all the time, is to  
7 say this is distinguishable. I can't find the  
8 breathing room between the proposition the state  
9 takes in Dean and the proposition it takes to argue  
10 this against wrongful death arbitrations. Because  
11 one, I can't find it on its face but two, I can't  
12 find it in reality. If the idea of what Dean says is  
13 that you can't refuse to -- refuse to enforce an  
14 arbitration agreement just because there was wrongful  
15 death involved. Well, what does that mean?

16 It's the idea that well, as long as wrongful  
17 death and the beneficiary signs the -- that's no  
18 problem. Well, that's never going to happen, ever.  
19 I mean, if the idea is that not a per se prohibition  
20 on it but de facto, that's one in a billion chance. I  
21 mean, I think, you know, the wrongful death  
22 unfortunately happens all the time on highways and  
23 all over the place. You know, who knows how many  
24 beneficiaries there are. If the idea is that you  
25 just have to have a contract signed by the

1 beneficiaries, the arbitration -- it's a de facto  
2 prohibition. And then even if that were in South  
3 Carolina then run into the FAA.

4 Because then it would be prohibition on the  
5 enforcement of arbitration agreements that takes it's  
6 only meaning from the fact that arbitration is  
7 involved. So again, I don't know what this Court  
8 thinks about it but I do think it's a major problem  
9 to -- you know, I just think it would be incorrect to  
10 say that wrongful death claim are unarbitrable  
11 [verbatim].

12 Another thing I'd mention on some of these  
13 issues -- well, there's an argument that we didn't  
14 act on this agreement, now it's absolutely true, as I  
15 mentioned earlier, that we don't have a copy of it,  
16 I'm not sure why. For all I know, you know, I got  
17 file cabinets at home sometimes stuff gets stuck in  
18 the ends. There's all kind of human reasons why a  
19 document like this could be -- could be mislaid.

20 But if -- we have a couple of things, we go back  
21 to general contract principles. We have to act as if  
22 this was a contract for mowing lawns. We have a  
23 covenant of good faith and fair dealing. The idea of  
24 sort of construing the situation so as to in any way,  
25 unduly deny the benefits of the agreement to the

1 facility, would be inconsistent with that. And so,  
2 anyways, in all respects, when the facility has --  
3 once the facility -- if the facility realized that  
4 there was indeed an arbitration agreement in this  
5 case -- where the dispute had risen, the facility  
6 immediately took action to demand that the agreement  
7 be followed. So, as far as acting on it, absolutely  
8 the facility acted on it.

9 If you think about it, what else would there be  
10 to act on an arbitration agreement but to wait until  
11 such time as the dispute arose and then act upon  
12 arbitration. There's no other way to act on it. I  
13 mean, ideally, they even act on the admission. I  
14 think Mr. Mullman said, we don't take issue with the  
15 admissions agreement because they did something  
16 responsibly. It wasn't different that that  
17 transaction is in a relationship that happens --  
18 there is of a different nature in terms of what  
19 acting on it means. What acting on arbitration  
20 agreement means, hey, when we got a problem, we  
21 operate in accordance with the arbitration agreement.

22 Which is exactly what we did as soon as we  
23 realized that we must be overlooking or had misplaced  
24 somehow. But the idea that we provided an  
25 arbitration agreement to this resident and did sign

1       it -- and by the way we shared this in our documents,  
2       made actually different elections where she said yes,  
3       she said no to certain things. I mean, this is a  
4       showing that this is somebody who is involved in  
5       thoughtfully considering, you know, what she's  
6       agreeing to and what she's not.

7       THE COURT: Couldn't it also, perhaps, mean that  
8       she signed it, reconsidered it and never delivered to  
9       the facility because she thought better of it?

10       MR. HINES: You know, Your Honor, the fact that  
11       the only thing she has is a copy of the agreement  
12       suggests otherwise. But I'll have to concede, the  
13       thought crossed my mind. And but -- and it's a  
14       worthy point for sure. But the idea of -- what we  
15       have is a copy of the document. What she took home  
16       and what was then provided to us is, essentially, a  
17       copy of a copy. The only inference that I can come  
18       up with, factually speaking, is that she didn't take  
19       home the original. And the original stayed with her  
20       [verbatim] and the original got lost.

21       I mean, what I'm imagining the situation is, you  
22       know, sort of the -- approach to this, is that the  
23       documents -- the only reason why this agreement would  
24       be important, in terms of going forward, is if she  
25       signs it. If she says no, then, you know, it's a

1 blank piece of paper that goes into the next person  
2 can agree or not. But -- so before she signed, it's  
3 not countersigned. Well, she signs it, she leaves  
4 the original there and it's to be signed and for one  
5 reason or another, we don't have it. That by the  
6 way, that's me -- that's a hypothesis. By no means  
7 am I suggesting to you--

8 THE COURT: Yeah, yeah, I know, I know.

9 MR. HINES: But to the extent we needed to get  
10 into that discovery wise, as was suggested, we can  
11 certainly do that if that is a hang up. But I would  
12 say I don't believe Mr. Mullman is correct in respect  
13 about the jury trial on this. I think that's a  
14 decision for the Court under the FAA. And, you know,  
15 I was looking for my copy of the FAA, I can find it,  
16 I think the good news there, it says what it says in  
17 there. And I think the FAA actually tells us, but  
18 I'm going on memory. But I think -- I know the FAA  
19 says--

20 THE COURT: Well, all I can tell you is the day  
21 Mr. Mullman gets a jury trial on that issue, is the  
22 day that the earth will stop spinning on its axis.  
23 He's got a very smug look on his face like, uh-huh.

24 MR. MULLMAN: I got case law that supports that.

25 THE COURT: I know you do. I know you do. I've

1       seen it. I've seen it.

2       MR. MULLMAN: Okay.

3       MR. HINES: I won't totally forget it, I'll put  
4       it lower on my list of concerns.

5       THE COURT: Okay.

6       MR. HINES: But let's see, Your Honor, I think  
7       that's covered what I intended to cover. I really  
8       appreciate your indulgence and your patience with  
9       this hearing. It occurred to me that these motions  
10      are a little more difficult -- even summary judgment  
11      motions with some complexity don't often have all the  
12      different aspects that these arbitration motions can.  
13      And it takes a while to try to work through it.

14      THE COURT: Well, the problem is is in all of  
15      these motions where we're talking about the  
16      arbitrability [verbatim] of these nursing home cases  
17      is -- we get into a fairly academic argument about  
18      jurisprudence and what ultimately public policy  
19      should be with respect to -- with respect to  
20      decedents and how heirs and or beneficiaries in a  
21      wrongful death suit may be bound by these agreements.  
22      So, it's kind of just like a gentleman's discussion  
23      among lawyers about this is what we think. And until  
24      the Supreme Court tells us whether what we think is  
25      right or wrong, we're really just kind of guessing.

1           I've seen -- you know, I've got these two --  
2           these two orders... You know, earlier this year in  
3           April I was in Lexington, I got several more orders.  
4           And every time I get one of these cases, there are  
5           more orders from the trial court that say this is  
6           what I think. And I've issued several of those  
7           orders that say this is what I think. Hopefully,  
8           it's going to percolate up the Supreme Court is going  
9           to tell us the answer to this. Because it's coming  
10          before the court way too much for the Supreme Court  
11          not no weigh in on it and give us guidance.

12                 So, what I'm going to do, y'all have given me a  
13                 lot to think about, given me a lot of documents.  
14                 Again, I'm fairly well versed in the issues. So, I'm  
15                 going to go back and I'm going to look at all the  
16                 submissions that you made and I'll send out a letter  
17                 and or email giving you direction. I presume that  
18                 once we make a determination as to whether the  
19                 arbitration agreement is binding or not binding, that  
20                 is dispositive as to all of the outstanding motions.  
21                 Motion to stay, compel discovery, all of that. Am I  
22                 right about that?

23                 MR. HINES: Your Honor, I believe it is.

24                 THE COURT: Okay. Okay.

25                 MR. MULLMAN: I believe that is, Your Honor.

1 THE COURT: Okay. All right, so I'll take a  
2 look at it, I'll take it under advisement. But I  
3 suspect that I hope that I'll have you something, at  
4 least, by early next week. Okay.

5 MR. MULLMAN: Thank you, Your Honor.

6 MR. HINES: Thank you, Your Honor.

7 THE COURT: Thank you, y'all have a great day.

8 (WHEREUPON, the proceedings were concluded.)  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



CERTIFICATE OF REPORTER

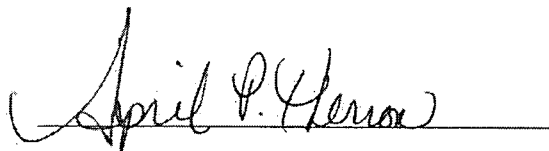
STATE OF SOUTH CAROLINA )

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 29th day of August, 2019.

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

February 4, 2020



APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a  
Fundamental Long Term Care Holdings, LLC;  
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: 2019-CP-23-00473

**PLAINTIFFS' MOTION TO COMPEL  
DISCOVERY RESPONSES FOR  
DEFENDANT HUNT VALLEY  
HOLDINGS, LLC A/K/A  
FUNDAMENTAL LONG TERM CARE  
HOLDINGS, LLC**

**TO: JAY DAVIS, ATTORNEY FOR DEFENDANT HUNT VALLEY HOLDINGS, LLC  
A/K/A FUNDAMENTAL LONG TERM CARE HOLDINGS, LLC:**

YOU ARE HEREBY NOTIFIED that Plaintiffs will move before this Court, at such time  
as the matter may be properly scheduled and heard, for an Order compelling Defendant to respond  
to outstanding discovery.

1. Plaintiffs filed a Notice of Intent on September 21, 2018.
2. Plaintiffs filed the Summons and Complaint on January 31, 2019.
3. Plaintiffs sent Requests for Production and Requests to Admit to Defendant Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC ("HVH") with the summons and complaint on February 1, 2019. (See Exhibit 1).
4. Defendant HVH's responses were due on March 21, 2019.
5. Defendants responded to the Requests to Admit on March 21, 2019. (See Exhibit 2).

6. At this time, Defendants have not responded (and did not assert objections) to the Requests for Production.

The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed. In re Anonymous Member of South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10, 18 (2001). The entire thrust of discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 217 (Ct. App. 1997). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." In re Anonymous Member of South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10, 18 (2001 ), *citing*, United States v. Procter & Gamble Co., 356 U.S. 677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed.2d 1077 (1958). See also Spencer Order (Exhibit 3).

Judge Joseph F. Anderson, Jr., the highly respected Chief United States District Judge for the District of South Carolina, recently lamented the increasing litigation and judicial resources unnecessarily consumed by disputes over discovery in our court system. Judge Anderson called upon all trial judges to effectively respond to the challenges presented by improper discovery practices, in order to tame what he termed the "discovery beast":

[T]his court has reluctantly concluded that changes to the rules of civil procedure and other well-intentioned reforms will have only a marginal impact in those cases where abusive and hardball discovery practices occur. It is the undersigned's sincere belief that contentious and expensive discovery battles will continue to present challenges to the judicial system, and that these challenges should be answered by trial judges, who occupy the best vantage point from which to resolve these controversies. *Network Computing Services Corp. v. Cisco Systems, Inc.* 223 F.R.D. 392 (D.S.C. 2004); See also *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10, 18 (2001) ("judges must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed

in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.”)

As of the date of this filing (90+ days after sending the initial discovery), Defendant HVH has not requested an extension; has not objected to the discovery; has not asked for clarification or limitations to the requests; has not sent any responses to the requests; and has not produced any documents. However, Defendant did respond to the Requests to Admit, indicating that they knew about the discovery and chose to simply ignore it. This flagrant disregard for the orderly progression of discovery violates the spirit and intent of the Rules of Civil Procedure related to discovery, prejudices the trial preparation of Plaintiff, and delays justice for the aggrieved family of Patricia Royston. Plaintiff is asking this Court for an Order compelling full and complete responses without objections to all Requests for Production.

In Kressler v Southern Homes, attached as **Exhibit 4**, Judge Maddox stated:

As an initial matter, this Court is troubled by what has become an all too often pattern of obfuscation in discovery responses leading to situations where, on the eve of trial, parties are being ambushed with new information requiring continuances at an alarming rate. This requires that this Court and others step in earlier in cases to ensure that they are adjudicated in a timely and efficient manner.

Plaintiffs contend Defendants’ refusal to respond or timely object is a violation of Rule 37 and a willful waiver of any objections. See White v. MFI Healthcare Order, attached (**Exhibit 5**), and Like v. Stonehedge Order, attached (**Exhibit 6**), for relevant legal authority regarding waiver and defendants’ objection. See also Goff v. Evans Delivery Company Order, attached (**Exhibit 7**), and Allen v. Family Dollar Order, attached (**Exhibit 8**) for relevant legal authority regarding the purpose and liberal thrust of discovery, timely response, and waiver of objection. The discovery process, like a lawsuit itself, “is not a children's game, but a serious effort on the part of adult human beings to administer justice.” Griffin v. Capital Cash, 310 S.C. 288,423 S.E.2d 143, 146

(Ct. App. 1992) (quoting United States v. A.H. Fischer Lumber Co., 102 F.2d 872 (4th Cir. 1947)).

A cursory search of litigation involving this facility with this defense counsel reveals that refusing to respond to discovery is not isolated but a pattern of behavior showing bad faith and willful misconduct. See Motions to Compel filed by other Plaintiffs in pending litigation attached as **Exhibits 9 and 10**. This is the exact situation wherein sanctions are necessary. (See **Exhibit 11 and 12**).

Plaintiffs contend that the Requests are reasonably calculated to lead to admissible evidence, and Defendant HVH's failure to respond constitutes a waiver of any potential objections. Plaintiffs request an Order compelling Defendant HVH to fully respond to the Requests for Production without objection.

Upon information and belief, based on prior and current conduct of this Defense counsel and this nursing home chain, Plaintiffs' counsel represents it would have been unproductive to attempt to resolve these discovery issues before filing this Motion to Compel.

***SIGNATURE BLOCK ON FOLLOWING PAGE***

RESPECTFULLY SUBMITTED

/s/ Gary W. Poliakoff

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

Matthew Christian, Esq. S.C. Bar # 70516

mchristian@christiananddavis.com

Christian & Davis, LLC

1007 E. Washington St.

Greenville, SC 29601

Attorneys for Plaintiffs

Date: May 20, 2019

Gary W. Poliakoff  
atty@gpoliakoff.com

Raymond P. Mullman, Jr.  
rmullmanjr@gmail.com



**POLIAKOFF**  
& ASSOCIATES

Bernard B. Poliakoff  
(1916-1955)

J. Manning Poliakoff  
(1923-1969)

Matthew Poliakoff  
(1919-1979)

May 1, 2019

D. Jay Davis, Jr.  
Young Clement Rivers, LLP  
P.O. Box 993  
Charleston, SC 29402

RE: The Estate of Patricia Royston, by and through the appointed Personal Representative Marianna McCoig, Individually and on behalf of the statutory beneficiaries v. Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC; 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  
C.A. No.: 2019-CP-23-00473

Dear Jay:

Enclosed and served upon you, please find Plaintiff's First Interrogatories and First Requests to Produce to Defendant THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville.

With best regards, I am,

Yours Truly,

Gary W. Poliakoff

Attorney

POLIAKOFF & ASSOCIATES, P.A.

GWP/maw  
Enclosures

Courthouse Square  
215 Magnolia Street, Spartanburg, South Carolina 29306  
Mailing Address: P.O. Box 1571, Spartanburg, South Carolina 29304  
Telephone: 864-582-5472 • Facsimile: 864-582-7280  
www.gpoliakoff.com

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a  
Fundamental Long Term Care Holdings, LLC;  
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: 2019-CP-23-00473

**PLAINTIFFS' FIRST  
INTERROGATORIES TO DEFENDANT  
THI OF SOUTH CAROLINA AT  
MAGNOLIA PLACE AT GREENVILLE,  
LLC D/B/A MAGNOLIA PLACE -  
GREENVILLE**

**TO: JAY DAVIS, ATTORNEY FOR DEFENDANT THI OF SOUTH CAROLINA AT  
MAGNOLIA PLACE AT GREENVILLE, LLC D/B/A MAGNOLIA PLACE -  
GREENVILLE:**

PLEASE TAKE NOTICE THAT the Plaintiffs, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, hereby requests that the Defendant answer all interrogatories below as set forth and to serve said answers upon the undersigned within the time provided in said rule:

These Interrogatories are continuing, and the Defendant is required to supplement their answers to conform to all available information, including such information as first becomes available to the Defendant after their answers hereto are served.

**INSTRUCTIONS AND DEFINITIONS**

A. In answering these Interrogatories, furnish all information which is available to the Defendant, including information which is in the possession of the Defendant's attorneys, investigators for their attorneys, independent accountants, officers, employees or agents, and not merely information from the Defendant's own corporate files or records.

B. If the Defendant cannot answer any of the following Interrogatories in full, answer to the extent possible, specifying the reasons why they are unable to answer the remainder, and provide whatever information the Defendant has concerning the unanswered portions, including the source or sources from which further information may be obtained.



C. If the records or information are not reasonably available to the Defendant in precisely the form requested, or for the particular date or period specified, but could be supplied in a modified form and/or for a slightly different date or period, then the Defendant is requested to respond to that Interrogatory by stating the extent, if any, to which such records or information relate to the subject matter thereof, together with an estimate of the information which the Defendant is able to provide on the basis of available records or information. Estimates should be indicated to be such.

D. Whenever the Defendant response to an Interrogatory mentions a person, set forth with specificity the following information with respect to each such person.

- (1) Name and last known home address and telephone number;
- (2) Occupation and last known employment, business address and telephone number;
- (3) Business or other relationship of such person to the Defendant; and
- (4) Position and title that person presently has and the position and title held by that person at the time referred to in the Interrogatory.

E. If any document which the Defendant is asked to identify is no longer complete or has been altered, state in what respect the document is incomplete or altered and explain the reasons therefore. If any such document is no longer in existence or no longer in the Defendant's possession, custody or control, state the disposition which was made of the document, the reasons for such disposition, the date of the disposition, the identity of the person(s) ordering, authorizing and supervising such disposition and the person performing such disposition, the substance or contents of the document disposed of, and the identity of all persons having knowledge of the contents thereof.

F. After each response to each of the following Interrogatories, identify each person who participated in the preparation of, or was consulted about, the answer to the Interrogatory.

G. If any document or portion thereof is or will be withheld because of a claim of privilege or work product:

- (1) State the basis on which the privilege is or will be claimed;
- (2) State the author of the document;
- (3) Identify each person to whom the document indicates the original or a copy thereof was sent, and any others who at any time possessed the document; and,
- (4) State the general subject matter of the document or portion thereof for which the privilege is claimed.

H. The term "document" has the broadest meaning accorded to it by civil procedure and includes, but is not limited to, typed, recorded, transcribed, punched, taped or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated or made, in the actual or constructive possession, custody or control of the Defendant, including but not limited to, all writings, letters, minutes, bulletins, correspondence, telegrams, telexes, memoranda, notes, instructions, literature, work assignments, notebooks, diaries, calendars, records, agreements, contracts, notations of telephone or personal conversations or

conferences, messages, interoffice or intraoffice communications, microfilm, circulars, pamphlets, studies, notices, summaries, reports, books, checks, credit card vouchers, statements of account, receipts, invoices, graphs, photographs, drafts, data sheets, data compilations, computer data sheets, computer data compilations, worksheets, statistics, speeches or other writings, tape recordings, phonograph records, data compilations from which information can be obtained or can be translated through detection devices into reasonably usable form, or any other tangible thing which records information in any way.

The term "document" shall include the original and any copies which differ in any manner whatsoever from the original (whether different from the original because of notes made on such copy or otherwise), and any drafts thereof. For purposes of this definition, a document is within the possession or control of their attorneys, investigators for their attorneys, independent accountants, directors, trustees, officers, employees, or agents, or any person acting on behalf of or in concert with them or with any of these persons, or otherwise under their possession or control.

I. The term "identify" or "identity" when used with respect to an individual shall mean to state the name and present or last home and business address and phone numbers of each such person. When used with respect to a corporation, "identify" or "identity" shall mean to state the corporations full name, the address or principal place of business, and the state of incorporation. When used with respect to a person other than an individual or a corporation, "identify" means to state its official name or designation and the address of its principal place of business; identify all partners or members; and state the principal activities of such entity.

J. "Identify," with reference to documents, means to state:

- (1) the title of the document;
- (2) the date of the document or the date on which it was prepared;
- (3) the identity of the author or authors of the document;
- (4) the recipient(s) of the document;
- (5) the type of document; and
- (6) a description of the subject matter of the document.

If any document is not in the Defendant's possession or subject to their control, state what disposition was made of it, the date of such disposition, and identify the person or persons having knowledge of its contents. When in the following Interrogatories the Defendant is asked to identify a document, it will be a sufficient response to such Interrogatory, if so desired, for the Defendant to attach a copy of each document with an identification of the Interrogatory or Interrogatories, or subparagraphs thereof, to which it is submitted as being responsive.

K. "Person" means and includes, without limiting the generality of its meaning, any natural person; corporate or business entity; firm; partnership; association; group; governmental body, agency or subdivision; committee; commission; or other organization or entity.

L. The term "concerning," "relate to" and "relating to" include referring to, alluding to, responding to, relating to, connected with, commenting on, in respect of, about, regarding,

discussing, showing, describing, reflecting, analyzing, constituting, or in any way relevant to the specified subject within the meaning of rules of civil procedure.

M. "Communication" includes any written or oral communication.

N. "Facility" and "Nursing Home" refers to THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place - Greenville.

O. As used here, the singular form of a noun or pronoun shall be considered to include within its meaning the plural form of the noun or pronouns to be used, and vice versa. The use of any tense of any verb shall be considered to include also within its meaning all other tenses of the verb so used.

P. "And" and "or" shall be construed conjunctively or disjunctively as necessary to make the Interrogatory inclusive rather than exclusive.

Q. "Each," "any," and "all" are both singular and plural.

### **INTERROGATORIES**

#### **Interrogatory No. 1:**

Please provide the following information for each person that was working at the facility during the residency who provided and care to Patricia Royston:

- a) Name, current address, and telephone number;
- b) Indicate whether a written or recorded statement has been taken from the witness;
- c) Current employment information of witness;
- d) Indicate if the witness is represented by counsel. If witness is represented by counsel, please include counsel's name and address so Plaintiffs may schedule depositions;
- e) Set forth a summary sufficient to inform the other party of the important facts known or observed by such witness, and;
- f) Please indicate whether or not Defendant intends to call the witness to trial.

#### **Interrogatory No. 2:**

Please provide the following information for every person who made a written entry into the records or chart of Patricia Royston:

- a) Name, address and telephone number;
- b) The dates of employment of each person, including whether such person is a current employee of Defendant, and if no longer employed, the date of termination and reason for termination and current telephone number and address.

**Interrogatory No. 3:**

Please provide a list of employees who have been terminated in the last three years with name, title, shift, last known address, telephone number, date of termination, and reason for termination.

**Interrogatory No. 4:**

Identify each person assigned to Patricia Royston and their position (both current and at the time of the action in question) who received during their employment any type of warning, disciplinary action, additional training, or other type of reprimand (written or oral).

**Interrogatory No. 5:**

Please disclose the expected labor staffing for the facility during the residency of Patricia Royston as published on the CMS website and disclose the HPPD for direct care nursing staff during the residency.

**Interrogatory No. 6:**

List the Defendant's owners, officers, directors, members and managers from 2016 to the present. Please include name, occupation at time, and present employment.

**Interrogatory No. 7:**

Please provide the following information for any and all consultants (i.e. clinical consultants, medical director, pharmacist, physical therapist, occupational therapist, speech therapist, accounting, human resources, etc.) that were used by the Facility in 2016:

- a) name and address;
- b) name of the consultants' employer;
- c) who compensated the consultants for work done at/for the Facility;
- d) the amount of compensation;
- e) the name of reports exchanged between consultants and Defendant.

**Interrogatory No. 8:**

Please explain what involvement and/or services provided for the operation and management of the Facility, including but not limited to payroll services, accounting services, compliance with corporate formalities, Standards of Conduct compliance, human resources services, budgets, insurance coverage, advertising, creation of and updating of policies and procedures, administrative consulting, clinical consulting, and any purchased services during 2016.

Please include what documents, reports, and metrics are exchanged between the facility and Corporate Defendants to assist Corporate in supervising the operation and financial health of the Facility.

Please include any related entity that provides management, consulting, and/or administrative "back-office support" services to the facility in 2016.

**Interrogatory No. 9:**

Please disclose the daily, weekly, monthly, and annual HPPD for RNs, LPNs, and CNAs providing direct care during December 2016.

**Interrogatory No. 10:**

Please identify the individual (and the entity that employed that individual) acting in each job title below in 2016:

- a) Administrator;
- b) Director of Nursing;
- c) Clinical Nurse Consultant/Clinical Services Director;
- d) Business Office Manager;
- e) Pharmacy Consultant;
- f) Governing Body (pursuant to 42 CFR 483.75(d));
- g) Staffing Development Coordinator;
- h) Medical Director; and
- g) Regional Directors (Operations; Human Resources; etc)

RESPECTFULLY SUBMITTED



GARY W. POLIAKOFF S.C. Bar # 4488  
[atty@gpoliakoff.com](mailto:atty@gpoliakoff.com)

RAYMOND P. MULLMAN, JR. S.C. Bar #8662  
[rmullmanjr@gmail.com](mailto:rmullmanjr@gmail.com)

Poliakoff & Associates, P.A.  
 215 Magnolia Street  
 P. O. Box 1571  
 Spartanburg, SC 29304  
 (864) 582-5472

Matthew Christian, Esq. S.C. Bar # 70516  
[mchristian@christiananddavis.com](mailto:mchristian@christiananddavis.com)

Christian & Davis, LLC  
 1007 E. Washington St.  
 Greenville, SC 29601  
 Attorneys for Plaintiffs

**CERTIFICATE OF MAILING**

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 1 of May, 2019.



Date: May 1, 2019

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a Fundamental  
Long Term Care Holdings, LLC; 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: 2019-CP-23-00473

**PLAINTIFFS' FIRST REQUESTS TO  
PRODUCE TO DEFENDANT THI OF  
SOUTH CAROLINA AT MAGNOLIA  
PLACE AT GREENVILLE, LLC D/B/A  
MAGNOLIA PLACE - GREENVILLE**

**TO: JAY DAVIS, ATTORNEY FOR DEFENDANT THI OF SOUTH CAROLINA AT  
MAGNOLIA PLACE AT GREENVILLE, LLC D/B/A MAGNOLIA PLACE -  
GREENVILLE:**

PLEASE TAKE NOTICE THAT the Plaintiffs, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, hereby requests that the Defendant produce or permit the Plaintiffs to inspect and copy the following documents.

**INSTRUCTIONS**

As used herein, the term "document" shall mean the original, and if not available any copy of the original, of writings of every kind, including but not limited to any correspondence, drawings, changes to such correspondence and drawings, books, records, logs, reports, memoranda, abstracts, advertisements, agreements, appointment records, audio recordings, whether transcribed or not, balance sheets, bills, bills of lading, books of account, cablegrams, certificates, charters, communications, papers, transcripts of summaries of conversations, diaries, drafts, drafts of documents, electronic or mechanical recordation in whatever medium, films, financial analyses, financial statements, forms, telegrams, income statements, inter-office and intra-office communications, letters, meeting reports, minutes, notes, photocopies, photographs, press releases, prospectuses, publications, records, records of account, reports, resolutions, statements, statistical records, studios, summaries, evaluations, and any other electronic or mechanical records or transcripts or any other device or instrument from which information can be perceived or which is used to memorialize human thought, speech or action in the possession, custody, or control of the Defendant. The term "document" shall also include copies containing information in addition

to that contained in or on the original and all attachments, appendixes or enclosures. With respect to correspondence, this request also includes "blind" copies.

**If any documents are withheld from production, please identify and provide a privilege log with the name and title of the author, the recipients of the documents, the date of creation and the alleged privilege. See Rule 26(b)(5).**

These Production requests are continuous in nature and must be supplemented properly if Defendant obtains further or different information before trial of this action.

### **REQUESTS FOR PRODUCTION**

#### **Request for Production No. 1:**

Please produce a verified **color** copy of any and all documents relating to the care, treatment and/or services provided to Patricia Royston at the facility including but not limited to electronic health records, audit log and/or trail for electronic records, and metadata and summaries prepared and/or stored by any electronic documentation system.

This request includes but is not limited to the following documents:

- a) Audit Trail and Metadata for EHR;
- b) Medication Administration Record (MAR);
- c) Narcotic Count;
- d) Drug Destruction Log;
- e) Medication Reconciliation Form;
- f) Pharmacist's Orders;
- g) Physician's Orders including Telephone orders;
- h) Physician's Progress Notes;
- i) Medication log book;
- j) Standing orders from physicians applicable to Patricia Royston;
- k) All documents relating to the Intake and Admission (including but not limited to the intake form, assessments, transfer forms, admissions contract, consents for use of physical or chemical restraints, and the Patient's Bill of Rights).
- l) Entire financial and/or billing file (including but not limited to the billing records, account charges and payment for services;

This request includes, but is not limited to, all documents which are required to be created and maintained by this type of facility in accordance with all federal and state regulations. Further, any document created by the Defendant concerning Patricia Royston, whether or not such record is normally maintained as part of the "nursing home chart," is requested.

**Please provide a Privilege Log pursuant to SCRCP Rule 26(b)(5) for any document withheld from this request for any alleged privilege.**

#### **Request for Production No. 2:**

Please produce a graphic representation such as a blueprint, layout, floor plan, drawing or

illustration which accurately represents the floor plan of Defendant facility during Plaintiffs' residency, and which also correctly identifies the room numbers in the facility.

**Request for Production No. 3:**

All emails, reports, documents, facsimiles and other correspondence in 2016 pertaining to the administration, management, and/or operation of the facility sent and/or received by the following managers and supervisors:

- a) Jackie Hardison (Regional supervisor);
- b) Rusty Flathmann (Managing member of governing body);
- c) Kirk Broome (Administrator);
- d) Staffing Development Coordinator;
- e) Director of Human Resources;
- f) Director of Nursing;
- g) Business Office Manager;
- h) The regional vice-president/area manager for clinical services; and
- i) Any consultants employed/contracted by the Defendant to provide clinical services to the residents of the facility in 2016;

**Request for Production No. 4:**

Please produce any employment and/or consulting contracts between any outside entity that provided any clinical consulting, management, and/or administrative services to the facility in 2016. This includes but is not limited to medical directors, pharmacist, corporate consultants, and therapists pursuant to 42 CFR § 483.75(h).

**Request for Production No. 5:**

Please include any and all contracts, agreements, or other documents in effect during Plaintiff's residency relating to the consulting and/or management of the facility including, but not limited to, management agreements, administrative contracts, consulting agreements, subleases, and revolving credit agreements.

This request also includes documents required under CMS Manual 15-1 § 2135.5 "Documentation to Support Purchased Management and Administrative Support Services" which states:

Records must be available which will support the cost of purchased management and administrative support services. Such support could include some or all of the following, depending on the scope and type of contract:

- a) A copy of the contract(s) and any amendments;
- b) Periodic progress reports submitted by the management organization;
- c) An analysis showing the efforts of the provider to comply with the prudent buyer principle guidelines in assessing its needs, establishing the goals to be attained, evaluation of the available alternatives, and choosing the terms of the contract (see §2135.2);



- d) Board minutes or other documentation to show continued reassessment of the effectiveness of the services (see §2135.2);
- e) Detailed identification of the services actually received during the period (see §2135.2); and
- f) Any other documentation available such as visit or contact reports, minutes of committee meetings, evaluations, cost/benefit analyses, etc., which would support the receipt of services and substantiate the attainment of the goals and objectives which are desired and the reasonableness of the fees paid.

**Request for Production No. 6:**

Please produce any and all documents relating to prior complaints, investigations, or incidents where a resident or resident representative alleged abuse, neglect, understaffing, or inadequate care in 2016.

**Request for Production No. 7:**

If an in-house investigation was conducted by or on behalf of Defendant as required by federal and state regulations, subsequent to Patricia Royston's injuries and before Defendant received formal notice of this lawsuit, please provide any and all documentation relating to such investigations, including but not limited to:

- a) All documents, drawings, films, models or other items generated or obtained by or on behalf of Defendants, which are relevant or contain information relevant to the cause of the occurrence in question, the injuries allegedly sustained by the Plaintiff, and/or Defendants' affirmative defenses to Plaintiff's causes of action;
- b) All statements obtained by or on behalf of the Defendants;
- c) All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the Defendants from the scene of the occurrence in question;
- d) Any report, study, complaint or incident investigation, or investigation of the alleged care or abuse which in any way refers to or concerns Patricia Royston.

**Request for Production No. 8:**

Copies of any and all statements of possible witnesses, whether written, oral, summarized, or otherwise reproduced in any manner, relating to the accident which is the subject matter of this case. If you have in your possession any statements which you object to producing, for any reason whatsoever, please give the following information relative to those particular documents:

- a) A general description of the statement in question;
- b) The name and any relevant title or relationship of the party making or giving the statement;
- c) The name and any relevant title or relationship of the party taking or recording the statement;
- d) The date which the statement was made and/or taken;
- e) A general direction outline of the topics covered in the statement;
- f) The circumstances under which the statement was made and/or taken; and
- g) The legal and factual basis upon which you make your objection.

**Request for Production No. 9:**

Please produce all Minutes of Resident's Council Meetings generated for 2016. Please include any and all responses to problems documented in these minutes.

**Request for Production No. 10:**

Please produce any and all CASPER, PEPPER and OSCAR reports for the facility created, prepared, or in existence during Patricia Royston's residency.

**Request for Production No. 11:**

Please produce any and all patient satisfaction surveys, Customer Satisfaction and/or summaries of such surveys completed between 2016 to current related to Magnolia Place – Greenville. Plaintiff agrees to redaction of other residents' names.

**Request for Production No. 12:**

Please produce any and all Resident Grievance/Concern Forms for facility for 2016 to current. Plaintiff agrees that these may be redacted as to patient names only, unless it involves Plaintiff.

**Request for Production No. 13:**

Please provide the personnel records for any of Defendant's employees or agents that provided care and treatment to Plaintiff at Defendant's facility and any employees that supervised the care and treatment provided to Plaintiff including but not limited to the Administrator, Director of Nursing, Staff Development Coordinator, and the Business Office Manager.

This request includes reprimands, disciplinary actions, training received, criminal background checks, and employment application as required by federal and state regulations. See 61-17 Section 601(c).

This request includes any kind of written, typed, printed or recorded material whatsoever, including, but not limited to, resumes, applications for employment, verifications of credentials or qualifications, education and/or in-service training documentation, background checks, criminal record checks, current telephone numbers and addresses, forwarding addresses, evaluations, reprimands, disciplinary warning notices, disciplinary actions, and business records which are collected and maintained for the above identified employees in any file or computer database. Plaintiffs agree to review the documents in person with defense counsel and pick documents to be copied.

**Plaintiffs agree to keep this information confidential pursuant to a Confidentiality Agreement.**

**Request for Production No. 14:**

Please provide all documents which formed the job description and/or described the criteria to be used in evaluating the job performance for the following positions applicable from Patricia Royston's residency:

- a) Administrator;

- b) Director of Nursing;
- c) Assistant Director of Nursing;
- d) Staff Development Coordinator;
- e) Business Office Manager; and
- f) Any other person whose job included any responsibility relating to the operation or oversight of the nursing home.

**Request for Production No. 15:**

Please produce any and all documents evidencing the ratio of staff to patients (pursuant to South Carolina 61-17 §604) for the time period of Plaintiff's residency. Please include any and all documents that can be used to determine hours per patient day for Registered Nurses, Licensed Practical Nurses, and Certified Nursing Assistants. This includes all documents evidencing your compliance with the staffing requirements imposed by state and federal regulations as referenced in 61-17 § 601(E) and 42 CFR 483.30(h).

**Request for Production No. 16:**

Please produce the below documents for agency personnel used during the residency including, but not limited to:

- a) Invoiced for services rendered;
- b) Names, addresses, and telephone numbers of agency personnel who worked at the nursing home during the Plaintiff's residency;
- c) Schedules that reflect the use of agency staff; and
- d) Classification of nursing personnel utilized (i.e., RN, LPN, CNA).

**Request for Production No. 17:**

Please produce any and all PPD (patient per day) reports for the Facility generated during the time period of Patricia Royston's residency.

**Request for Production No. 18:**

All payroll documents/electronically stored information for all nursing and administrative personnel who worked at, with or for the facility during the Plaintiff's residency, including those documents or electronically stored information required to be created and maintained by 29 CFR § 516.5.

**Request for Production No. 19:**

Please produce all documents used by the Defendant to analyze the facility's staffing needs during the residency, including, but not limited to, labor distribution reports, payroll analysis reports, key management indicators, staff productivity reports, daily staffing/census reports, pool/temporary agency vendor invoices, Medicare sign-in sheets, independent auditor reports and OSCAR reports.

Please include the following documents for the time period of Plaintiff's residency:

- a) Daily Labor Hour Reports;
- b) Biweekly Payroll Reports;
- c) Monthly Labor Reports;

- d) Key Factor Reports;
- e) Budget Variance Reports and explanations for the variance;
- f) Monthly Master Nursing Schedules;
- g) Daily Nursing Department Schedules;
- h) Daily Nursing Department Sign-In Sheets;
- i) Labor Payroll Records;
- j) Staffing Ladder/Matrix used;
- k) Daily Staff Postings as required by 42 CFR § 483.30(e); and
- l) Hours per patient per day documents.

**Request for Production No. 20:**

Please produce color copies of all work schedules, employee sign-in sheets, and timecards, and/or times sheets showing the identity, number (quantity), and classification (e.g. LPN, RN, CNA, etc.) of any personnel who worked on each unit or wing in the nursing home during the entire residency at issue regardless of whether the resident resided on such unit or wing, as required by applicable laws and regulations.

**Request for Production No. 21:**

Please produce the "Facility Assessment Tool" as required by 42 CFR 483.70 for 2016 and 2017.

**Request for Production No. 22:**

Please produce all guidelines, procedures and documents utilized by Defendant or in the Defendant's possession, custody, or control, for determining whether Defendant has sufficient number of nursing personnel for Patricia Royston's residency which includes, but is not limited to, registered and licensed vocational nurses, nurse assistants, medication assistance, orderlies and other staff to provide 24 hour nursing services, meet the needs of residents who are admitted to and remain in the facility, and/or meet the total nursing needs of the patients or residents of Defendant. This is including, but not limited to the following:

- a) Medicare Staffing Sign-in Sheets;
- b) Corporate staffing guidelines;
- c) Facility staffing policies and procedures;
- d) On-call staffing sheets;
- e) Specific unit staffing guidelines;
- f) Monthly staffing sheets;
- g) Policies and procedures for handling call-ins;
- h) Sign in and out sheets;
- i) Call-in replacement staffing sheets; and,
- j) Time card punch sheets.

**Request for Production No. 23:**

All documents/electronically stored information showing the actual number of hours of available nursing personnel time (on a per shift, per day and per month basis), or the actual number (quantity) of nursing personnel on duty at any time during Patricia Royston's residency, including but not limited to all documents/electronically stored information which tracks, analyzes or examines the

hours of licensed nursing care provided per patient day and the hours of non-licensed nursing care provided per patient day.

**Request for Production No. 24:**

Please produce any and all documents including but not limited to correspondence, surveys, inspections, or complaint investigations conducted by any regulatory agency for the last five years. This request includes but is not limited to documents sent to South Carolina Ombudsman Office; Centers for Medicaid and Medicare Services; South Carolina Department of Health and Human Resources; South Carolina Adult Protective Services or Department of Social Services; law enforcement agencies, and South Carolina Department of Health and Environmental Control related to licensure, complaints, surveys, certificate of need, and change of ownership.

Please also include the Medicare and Medicaid provider agreements with the State of South Carolina and/or the United States that allows Defendant to operate the facility.

Please also include any and all CMS 1513, Disclosure of Ownership and Control forms generated for the facility applicable to 2016 to current.

Please also include true and correct copies of all of the 2567's and state licensure surveys during the Plaintiff's residency, and 6 months following.

**Request for Production No. 25:**

Please produce a true, correct and complete copy of any and all written policies and procedure documents or electronically stored information containing clinical policies, procedures, manuals or guidelines which were in effect during Patricia Royston's residency that comply with SC Regulation 61-17 Section 501A and reflect the 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 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.

**Request for Production No. 26:**

Please produce any and all educational and/or training materials, teaching materials, in-service materials, certifications and tests administered pursuant to 42 CFR § 483.75 (e) (f) and (g) during Patricia Royston's residency, including but not limited to:

- a) Educational and/or training materials;
- b) Teaching materials;
- c) In-service materials;
- d) Certifications and tests administered;
- e) Films, videos, recordings, books and periodicals provided to the facility's staff;
- f) Documents referencing in-service training or other training made available to facility employees; and
- g) Attendance records from training/ in-service sessions.

This request also applies to any and all documents referencing in-service training or other training made available to the Facility's employees, whether at the facility or elsewhere.

**Request for Production No. 27:**

Please produce a full and complete copy of any and all annual budgets for 2016 including any and all correspondence and/or emails to or from any of the Defendants.

**Request for Production No. 28:**

Please produce the following financing documents applicable to the facility for 2016 to the present:

- a) All documents describing all loans, credit facilities, lines of credit, etc. made between Defendant and third parties;
- b) All documents describing the equity security interest of Defendant and its affiliates;
- c) All documents describing guarantees of payment between Defendant and other third parties;
- d) All documents describing security interests in Defendant entities or their assets;
- e) Copies of documentation, including but not limited to, amortization schedules reflecting all transfers of loans made by the Defendant and /or its affiliates;
- f) Copies of all documents provided to financial institutions by the Defendant or affiliates that transacted business with the Defendant.
- g) A list of all financial institutions where company information in above request was disclosed; and
- h) Any business valuation reports of Defendant.

**Request for Production No. 29:**

Please produce a full and complete copy of any and all financial records, including but not limited to, statements, balance sheets, and profit and loss statements for 2016. Please include any and all detailed income statements or detailed statement of operations generated for facility during 2016.

**Request for Production No. 30:**

Please produce complete, detailed Financial Statements related to facility for the years 2016 to the present (Income Statement, Statement of Cash Flows, Statement of Changes in Owner's Equity, and notes and disclosures, collectively the "Financial Statements"). This request is including but not limited to the following:

- a) All detail general ledgers and sub-ledgers;
- b) Schedule of all balances and transactions involving inter-company payables and receivables for the Defendant and its affiliates;
- c) All audit reports for the Defendant and its affiliates (including all disclosures and schedules attached);
- d) Copies of all capital expenditure schedules and/or depreciation/amortization schedules for the Defendant and its affiliates;
- e) Copies of all tax returns, including all schedules, exhibits, attachments, and work-papers thereto, for the Defendant and its affiliates;
- f) Consolidating Financial Statements or schedules for the Defendant and its affiliates;
- g) A list of all bank accounts for the Defendant and its affiliates for the past three

- years; and  
h) All budget or financial projections produced.

**Request for Production No. 31:**

Please produce any and all Quality Indicator Reports, Clinical Indicator reports or similarly named document generated during 2016 to current.

**Request for Production No. 32:**

Please produce any and all consultant reports or audits or similar documents created for any and all departments at the facility for the time period of Patricia Royston's residency. Please include any correspondence or emails related to the reports.

**Request for Production No. 33:**

Please produce copies of any and all documents which Defendant intends to use in any manner at the trial of this case and in any deposition in this case. This includes documents that Defendant may use in an attempt to impeach any witnesses.

**Request for Production No. 34:**

Please produce complete copies of any and all documents obtained by this Defendant or defense counsel pursuant to any Freedom of Information request or subpoena from any source in connection with this action.

**Request for Production No. 35:**

Please produce all marketing and promotional literature, brochures, and advertisements for Defendants' facilities. Please include all internet marketing and website development.

RESPECTFULLY SUBMITTED



GARY W. POLIAKOFF S.C. Bar # 4488

[atty@gpoliakoff.com](mailto:atty@gpoliakoff.com)

RAYMOND P. MULLMAN, JR. S.C. Bar #8662

[rmullmanjr@gmail.com](mailto:rmullmanjr@gmail.com)

Poliakoff & Associates, P.A.

215 Magnolia Street

P. O. Box 1571

Spartanburg, SC 29304

(864) 582-5472

Matthew Christian, Esq. S.C. Bar # 70516

[mchristian@christiananddavis.com](mailto:mchristian@christiananddavis.com)

Christian & Davis, LLC

1007 E. Washington St.

Greenville, SC 29601

Attorneys for Plaintiffs

Date: May 1, 2019

**CERTIFICATE OF MAILING**

I hereby certify that a copy of the  
foregoing pleading was mailed to all  
counsel of record in this proceeding  
this 1 of May, 2019.

Melanie Waddell



|                                 |   |                              |
|---------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS |
|                                 | ) |                              |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT  |
|                                 | ) |                              |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2018-CP-23-00473    |
| ROYSTON, BY AND THROUGH THE     | ) |                              |
| APPOINTED PERSONAL              | ) |                              |
| REPRESENTATIVE MARIANNE         | ) |                              |
| MCCOIG, AND ON BEHALF OF THE    | ) |                              |
| STATUTORY BENEFICIARIES,        | ) |                              |
|                                 | ) |                              |
| PLAINTIFFS,                     | ) |                              |
|                                 | ) |                              |
| vs.                             | ) |                              |
|                                 | ) |                              |
| HUNT VALLEY HOLDINGS, LLC       | ) |                              |
| A/K/A FUNDAMENTAL LONG TERM     | ) | HUNT VALLEY HOLDINGS, LLC'S  |
| CARE HOLDINGS, LLC;             | ) | ANSWERS TO PLAINTIFF'S       |
| FUNDAMENTAL CLINICAL AND        | ) | REQUEST TO ADMIT             |
| 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.                     | ) |                              |
|                                 | ) |                              |

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

In accordance with, and pursuant to, the South Carolina Rules of Civil Procedure, the Defendant, Hunt Valley Holdings, LLC, subject to and without waiving its objections to the jurisdiction of this Court, hereby responds to the Requests to Admit propounded by the Plaintiff as follows:

1. Please admit that Fundamental Clinical Operational Service provides services to the facility on behalf of Hunt Valley Holdings, LLC, formerly known as Fundamental Long-Term Care Holdings, LLC.

**Response: Denied.**

2. Please admit that Fundamental Administrative Services provides services to the Facility on behalf of Hunt Valley Holdings, LLC formerly known as Fundamental Long-Term Care Holdings, LLC.

**Response: Denied.**

3. Please admit Magnolia Place at Greenville, LLC (hereinafter "Magnolia Place-Greenville" or "the facility") is owned by THI of South Carolina, LLC.

**Response: Denied as stated. This Defendant admits that THI of South Carolina, LLC is the sole, non-managing member Defendant THI of South Carolina at Magnolia Place at Greenville, LLC.**

4. Please admit that THI of South Carolina, LLC is owned by THI of Baltimore, LLC.

**Response: Denied.**

5. Please admit that THI of Baltimore, LLC is owned by Hunt Valley Holdings, (f/k/a Fundamental Long-Term Care Holdings, LLC).

**Response: Denied.**

6. Please admit that Hunt Valley Holdings files one tax return on behalf of all the related entities, subsidiaries, and affiliated entities that are part of the Fundamental family of companies.

**Response: Denied as stated. This Defendant admits that it files a consolidated tax return on behalf of indirectly owned subsidiaries but denies that such entities compose a "family of companies" as asserted.**

7. Please admit that the facility is indirectly owned by Murray Forman through related entities and shell companies.

**Response: Denied.**

8. Please admit that Murray Forman was a signatory on a Revolving Credit Agreement that binds the facility to certain financial covenants.

**Response: Objection.** The instant request is not relevant under Rule 26 of the South Carolina Rules of Civil Procedure. Specifically, the instant request seeks to discover information about a non-party individual.

9. Please admit that Murray Forman was a signatory on a Revolving Credit Agreement that jointly binds the facility to the debt created by the line of credit by the lender.

**Response: Objection.** The instant request is not relevant under Rule 26 of the South Carolina Rules of Civil Procedure. Specifically, the instant request seeks to discover information about a non-party individual.

10. Please admit that Murray Forman derives a substantial benefit from the revenue created by the operation of the facility.

**Response: Objection.** The instant request is not relevant under Rule 26 of the South Carolina Rules of Civil Procedure. Specifically, the instant request seeks to discover information about a non-party individual's personal financial information.

11. Please admit that Patricia Royston suffered a medication error while a resident of the nursing home facility.

**Response: Defendant is without sufficient knowledge to either admit or deny the request.**

12. Please admit that the facility failed to properly respond to Patricia Royston's change of condition.

**Response: Defendant is without sufficient knowledge to either admit or deny the request.**

13. Please admit that Patricia Royston was hospitalized as a result of the medication error.

**Response: Defendant is without sufficient knowledge to either admit or deny the request.**

14. Please admit that this Defendant should participate in any arbitration related to the residency.

**Response: Denied.**

15. Please admit that this Defendant contends that it is not bound by any arbitration agreement.

**Response: Objection.** The instant request is not compliant with Rule 36 of the South Carolina Rules of Civil Procedure. More specifically, the request is not “a statement or opinion of fact” and therefore is improper for purposes of requests for admission. The request is inherently legal in nature, and as further grounds for objection, infringes upon the mental impressions and legal strategy of counsel, in violation of opinion work product doctrine. The instant request improperly seeks an admission or a denial regarding what legal position this Defendant intends to take in the case.

16. Please admit that this Defendant is a third-party beneficiary to the alleged arbitration agreement between Patricia Royston and the facility.

**Response: Objection.** The instant request is not compliant with Rule 36 of the South Carolina Rules of Civil Procedure. More specifically, the request is not “a statement or opinion of fact” and therefore is improper for purposes of requests for admission. The request is inherently legal in nature, and as further grounds for objection, infringes upon the mental impressions and legal strategy of counsel, in violation of opinion work product doctrine. The instant request improperly seeks an admission or a denial regarding what legal position this Defendant intends to take in the case.

YOUNG CLEMENT RIVERS, LLP

By: 

D. Jay Davis, Jr.

Perry M. Buckner, IV

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant

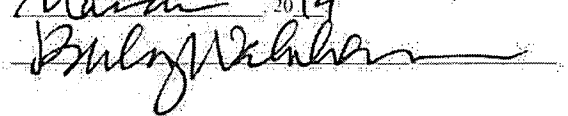
Hunt Valley Holdings, LLC

Charleston, South Carolina

Dated: 3-21-19

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 21 day of

March 20 19  


STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

C.A. No: 2019-CP-23-00473

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a Fundamental  
Long Term Care Holdings, LLC; 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.

**PLAINTIFFS' MOTION TO COMPEL  
DISCOVERY RESPONSES FOR  
DEFENDANT THI OF SOUTH  
CAROLINA AT MAGNOLIA PLACE  
AT GREENVILLE, LLC D/B/A  
MAGNOLIA PLACE - GREENVILLE**

**TO: JAY DAVIS, ATTORNEY FOR DEFENDANT THI OF SOUTH CAROLINA AT  
MAGNOLIA PLACE AT GREENVILLE, LLC D/B/A MAGNOLIA PLACE -  
GREENVILLE:**

YOU ARE HEREBY NOTIFIED that Plaintiffs will move before this Court, at such time  
as the matter may be properly scheduled and heard, for an Order compelling Defendant to respond  
to outstanding discovery.

1. Plaintiffs filed a Notice of Intent on **September 21, 2018**.
2. Plaintiffs filed the Summons and Complaint on **January 31, 2019**.
3. Plaintiffs sent Requests for Production and Interrogatories to Defendant THI of South  
Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place – Greenville  
("MPG") on **May 1, 2019**. (See **Exhibit 1**).
4. Defendant MPG's responses were due on or around **May 31, 2019**.

5. At this time, Defendants have not responded (and did not assert objections) to the Requests for Production or Interrogatories despite Plaintiff's attempts to contact on **June 13, 2019**. (See **Exhibit 2**).

The primary objective of discovery is to ensure that lawsuits are decided by what the facts reveal, not by what facts are concealed. In re Anonymous Member of South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10, 18 (2001). The entire thrust of discovery rules involves full and fair disclosure, to prevent a trial from becoming a guessing game or one of surprise for either party. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213, 217 (Ct. App. 1997). In this respect, the discovery process is designed to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." In re Anonymous Member of South Carolina Bar, 346 S.C. 177, 552 S.E.2d 10, 18 (2001 ), *citing*, United States v. Procter & Gamble Co., 356 U.S. 677, 682, 78 S.Ct. 983, 986-87, 2 L.Ed.2d 1077 (1958). See also Spencer Order (**Exhibit 3**).

Judge Joseph F. Anderson, Jr., the highly respected Chief United States District Judge for the District of South Carolina, recently lamented the increasing litigation and judicial resources unnecessarily consumed by disputes over discovery in our court system. Judge Anderson called upon all trial judges to effectively respond to the challenges presented by improper discovery practices, in order to tame what he termed the "discovery beast":

[T]his court has reluctantly concluded that changes to the rules of civil procedure and other well-intentioned reforms will have only a marginal impact in those cases where abusive and hardball discovery practices occur. It is the undersigned's sincere belief that contentious and expensive discovery battles will continue to present challenges to the judicial system, and that these challenges should be answered by trial judges, who occupy the best vantage point from which to resolve these controversies. *Network Computing Services Corp. v. Cisco Systems, Inc.* 223 F.R.D. 392 (D.S.C. 2004); See also *In re Anonymous Member of South Carolina Bar*, 346 S.C. 177, 552 S.E.2d 10, 18 (2001) ("judges

must use their authority to make sure that abusive deposition tactics and other forms of discovery abuse do not succeed in their ultimate goal: achieving success through abuse of the discovery rules rather than by the rule of law.”)

As of the date of this filing (50 days after sending the initial discovery), Defendant MPG has not requested an extension; has not objected to the discovery; has not asked for clarification or limitations to the requests; has not sent any responses to the requests; and has not produced any documents. This flagrant disregard for the orderly progression of discovery violates the spirit and intent of the Rules of Civil Procedure related to discovery, prejudices the trial preparation of Plaintiff, and delays justice for the aggrieved family of Patricia Royston. Plaintiff is asking this Court for an Order compelling full and complete responses without objections to all Requests for Production.

In Kressler v Southern Homes, attached as **Exhibit 4**, Judge Maddox stated:

As an initial matter, this Court is troubled by what has become an all too often pattern of obfuscation in discovery responses leading to situations where, on the eve of trial, parties are being ambushed with new information requiring continuances at an alarming rate. This requires that this Court and others step in earlier in cases to ensure that they are adjudicated in a timely and efficient manner.

Plaintiffs contend Defendants’ refusal to respond or timely object is a violation of Rule 37 and a willful waiver of any objections. See White v. MFI Healthcare Order, attached (**Exhibit 5**), and Like v. Stonehedge Order, attached (**Exhibit 6**), for relevant legal authority regarding waiver and defendants’ objection. See also Goff v. Evans Delivery Company Order, attached (**Exhibit 7**), and Allen v. Family Dollar Order, attached (**Exhibit 8**) for relevant legal authority regarding the purpose and liberal thrust of discovery, timely response, and waiver of objection. The discovery process, like a lawsuit itself, "is not a children's game, but a serious effort on the part of adult human beings to administer justice." Griffin v. Capital Cash, 310 S.C. 288,423 S.E.2d 143, 146



(Ct. App. 1992) (quoting United States v. A.H. Fischer Lumber Co., 102 F.2d 872 (4<sup>th</sup> Cir. 1947)). A cursory search of litigation involving this facility with this defense counsel reveals that refusing to respond to discovery is not isolated but a pattern of behavior showing bad faith and willful misconduct. This is the exact situation wherein sanctions are necessary. (See **Exhibits 9 and 10**). See also **Exhibit 11 - McFadden Order**.

Plaintiffs contend that the Requests are reasonably calculated to lead to admissible evidence, and Defendant MPG's failure to respond constitutes a waiver of any potential objections. Plaintiffs request an Order compelling Defendant MPG to fully respond to the Requests for Production without objection.

Plaintiffs' counsel certifies that he has complied with S.C.R.C.P. Rule 11, and has communicated with Defendants' counsel in an effort to obtain compliance with discovery unsuccessfully. Plaintiffs hope this can be heard at the already scheduled hearing on **June 28** at 10:30 AM.

***SIGNATURE BLOCK ON FOLLOWING PAGE***

RESPECTFULLY SUBMITTED

/s Gary W. Poliakoff

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

Matthew Christian, Esq. S.C. Bar # 70516

mchristian@christiananddavis.com

Christian & Davis, LLC

1007 E. Washington St.

Greenville, SC 29601

Attorneys for Plaintiffs

Date: June 19, 2019

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

THE ESTATE OF PATRICIA ) CASE NO. 2019-CP-23-00473  
ROYSTON, BY AND THROUGH THE )  
APPOINTED PERSONAL )  
REPRESENTATIVE MARIANNE )  
MCCOIG, AND ON BEHALF OF THE )  
STATUTORY BENEFICIARIES, )

PLAINTIFFS, )

vs. )

HUNT VALLEY HOLDINGS, LLC )  
A/K/A FUNDAMENTAL LONG TERM )  
CARE HOLDINGS, LLC; )  
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. )

**DEFENDANT THI OF SOUTH  
CAROLINA AT MAGNOLIA PLACE AT  
GREENVILLE, LLC D/B/A MAGNOLIA  
PLACE- GREENVILLE'S MOTION TO  
DISMISS, COMPEL ARBITRATION, AND  
STAY COURT PROCEEDINGS**

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, AND MATTHEW CHRISTIAN,  
ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Place at Greenville, LLC (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.

Plaintiff has sued this Defendant for wrongful death allegedly arising out of Plaintiff's decedent's residency at the Facility. Prior to being admitted to the Facility, Plaintiff's decedent 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 her 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]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

Gaillard T. Dotterer, III

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: July 26, 2019

## PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE  
ARBITRATION AGREEMENT

This Agreement is made between Magnolia Place of Greenville ("Facility"), its agents, employees and servants, and Patricia Royston ("Resident") or Patricia Royston ("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.

Patricia A. Royston  
Resident/Representative Signature Date

Patricia Royston  
Printed Name of Resident/Representative

\_\_\_\_\_  
Authorized Agent of Facility Date

\_\_\_\_\_  
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

|                                 |   |                                   |
|---------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS      |
|                                 | ) |                                   |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT       |
|                                 | ) |                                   |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473         |
| ROYSTON, BY AND THROUGH THE     | ) |                                   |
| APPOINTED PERSONAL              | ) |                                   |
| REPRESENTATIVE MARIANNE         | ) |                                   |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                   |
| STATUTORY BENEFICIARIES,        | ) |                                   |
|                                 | ) |                                   |
| PLAINTIFFS,                     | ) |                                   |
|                                 | ) |                                   |
| vs.                             | ) |                                   |
|                                 | ) |                                   |
| HUNT VALLEY HOLDINGS, LLC       | ) |                                   |
| A/K/A FUNDAMENTAL LONG TERM     | ) | <b>FUNDAMENTAL ADMINISTRATIVE</b> |
| CARE HOLDINGS, LLC;             | ) | <b>SERVICES, LLC'S</b>            |
| FUNDAMENTAL CLINICAL AND        | ) | <b>MOTION TO STAY</b>             |
| 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.                     | ) |                                   |

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.

Gaillard T. Dotterer, III

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: August 7, 2019



|                                 |   |                                    |
|---------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS       |
|                                 | ) |                                    |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT        |
|                                 | ) |                                    |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473          |
| ROYSTON, BY AND THROUGH THE     | ) |                                    |
| APPOINTED PERSONAL              | ) |                                    |
| REPRESENTATIVE MARIANNE         | ) |                                    |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                    |
| STATUTORY BENEFICIARIES,        | ) |                                    |
|                                 | ) |                                    |
| PLAINTIFFS,                     | ) |                                    |
|                                 | ) |                                    |
| vs.                             | ) |                                    |
|                                 | ) |                                    |
| HUNT VALLEY HOLDINGS, LLC       | ) |                                    |
| A/K/A FUNDAMENTAL LONG TERM     | ) |                                    |
| CARE HOLDINGS, LLC;             | ) | <b>FUNDAMENTAL CLINICAL AND</b>    |
| FUNDAMENTAL CLINICAL AND        | ) | <b>OPERATIONAL SERVICES, LLC'S</b> |
| OPERATIONAL SERVICES, LLC;      | ) | <b>MOTION TO STAY</b>              |
| FUNDAMENTAL ADMINISTRATIVE      | ) |                                    |
| SERVICES, LLC; AND THI OF SOUTH | ) |                                    |
| CAROLINA AT MAGNOLIA PLACE      | ) |                                    |
| AT GREENVILLE, LLC D/B/A        | ) |                                    |
| MAGNOLIA PLACE-GREENVILLE ,     | ) |                                    |
|                                 | ) |                                    |
| 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.

Gaillard T. Dotterer, III

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: August 7, 2019

|                                 |   |                                        |
|---------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS           |
|                                 | ) |                                        |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT            |
|                                 | ) |                                        |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473              |
| ROYSTON, BY AND THROUGH THE     | ) |                                        |
| APPOINTED PERSONAL              | ) |                                        |
| REPRESENTATIVE MARIANNE         | ) |                                        |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                        |
| STATUTORY BENEFICIARIES,        | ) |                                        |
|                                 | ) |                                        |
| PLAINTIFFS,                     | ) |                                        |
|                                 | ) |                                        |
| vs.                             | ) |                                        |
|                                 | ) |                                        |
| HUNT VALLEY HOLDINGS, LLC       | ) | <b>HUNT VALLEY HOLDINGS, LLC F/K/A</b> |
| A/K/A FUNDAMENTAL LONG TERM     | ) | <b>FUNDAMENTAL LONG TERM CARE</b>      |
| CARE HOLDINGS, LLC;             | ) | <b>HOLDINGS, LLC'S</b>                 |
| FUNDAMENTAL CLINICAL AND        | ) | <b>MOTION TO STAY</b>                  |
| 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.                     | ) |                                        |
|                                 | ) |                                        |

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

PLEASE TAKE NOTICE that Defendant Hunt Valley Holdings, LLC f/k/a Fundamental Long Term Care Holdings, LLC, hereinafter referred to as "this Defendant", by and through its undersigned attorneys, will move before this Honorable Court, subject to and *without waiving all rights to move to dismiss this action for lack of personal jurisdiction* 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.

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

Attorneys for the Defendant Hunt Valley Holdings,  
LLC f/k/a Fundamental Long Term Care Holdings,  
LLC

Charleston, South Carolina

Dated: August 7, 2019

|                                 |   |                                      |
|---------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS         |
|                                 | ) |                                      |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT          |
|                                 | ) |                                      |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473            |
| ROYSTON, BY AND THROUGH THE     | ) |                                      |
| APPOINTED PERSONAL              | ) |                                      |
| REPRESENTATIVE MARIANNE         | ) |                                      |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                      |
| STATUTORY BENEFICIARIES,        | ) |                                      |
|                                 | ) |                                      |
| PLAINTIFFS,                     | ) |                                      |
|                                 | ) |                                      |
| vs.                             | ) | <b>THI OF SOUTH CAROLINA AT</b>      |
|                                 | ) | <b>MAGNOLIA PLACE AT GREENVILLE,</b> |
|                                 | ) | <b>LLC D/B/A MAGNOLIA PLACE-</b>     |
| HUNT VALLEY HOLDINGS, LLC       | ) | <b>GREENVILLE'S MEMORANDUM IN</b>    |
| A/K/A FUNDAMENTAL LONG TERM     | ) | <b>SUPPORT OF MOTION TO DISMISS,</b> |
| CARE HOLDINGS, LLC;             | ) | <b>COMPEL ARBITRATION, AND STAY</b>  |
| FUNDAMENTAL CLINICAL AND        | ) | <b>COURT PROCEEDINGS AND MOTION</b>  |
| OPERATIONAL SERVICES, LLC;      | ) | <b>IN REPLY TO PLAINTI'S</b>         |
| FUNDAMENTAL ADMINISTRATIVE      | ) | <b>MEMORANDUM IN OPPOSITION</b>      |
| SERVICES, LLC; AND THI OF SOUTH | ) |                                      |
| CAROLINA AT MAGNOLIA PLACE      | ) |                                      |
| AT GREENVILLE, LLC D/B/A        | ) |                                      |
| MAGNOLIA PLACE-GREENVILLE ,     | ) |                                      |
|                                 | ) |                                      |
| DEFENDANTS.                     | ) |                                      |

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

The Defendant, THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville (hereinafter "this Defendant" or "Defendant Facility"), by and through its undersigned counsel, hereby submits the following Memorandum in Support of its Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings ("Motion to Compel Arbitration") pursuant to the Federal Arbitration Act ("FAA") 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff has asserted

claims against Defendants arising out of Plaintiff's decedent's residency at this Defendant's skilled nursing facility (hereinafter "Magnolia Place" or "Defendant Facility"). However, Plaintiff's decedent and this Defendant entered into an Arbitration Agreement which covers all allegations raised in the Complaint. Accordingly, and for the reasons set forth herein, this Defendant respectfully requests that Plaintiff's Complaint be dismissed and that this matter be compelled to arbitration, or in the alternative, stayed pursuant to 9 U.S.C. §1, et seq.

### **FACTUAL BACKGROUND**

On December 19, 2016, Plaintiff's decedent Patricia Royston, was admitted to Magnolia Place from Greenville Memorial Hospital, where she had been hospitalized for treatment of her extensive chronic medical conditions and an injured knee. On admission, Ms. Royston was 68 years old and was suffering from a host of chronic conditions including congestive heart failure, chronic obstructive pulmonary disease (COPD), unspecified chest wall pain, chronic pain, hypothyroidism, hyperlipidemia, osteoporosis, generalized muscle weakness, abnormalities of posture and immobility, nicotine dependence, depression, anxiety and bipolar disorder. Ms. Royston was taking many different prescription medications to treat her extensive chronic medical conditions.

Upon admission to Magnolia Place, Ms. Royston executed a number of documents, including various medical informed consent documents, the Admission Agreement and the Arbitration Agreement. *See Exhibit A, Exhibit B and Exhibit C attached hereto, respectively.* Ms. Royston was evaluated by a social worker on the date of her admission to Magnolia Place in connection with the Preadmission Screening and Resident Review (PASARR – Level I), as required by state and federal law. *See Exhibit D.* Ms. Royston's PASARR – Level I evaluation

by this licensed healthcare professional indicated that her cognitive functioning was normal such that she had adequate memory and concept formation abilities.

Ms. Royston executed the Admissions Agreement on her own behalf, executed the Arbitration Agreement on her own behalf and consented to receiving various medications for her psychological health on her own behalf, but *refused* other informed consent documents, such as the flu vaccine and pneumococcal vaccine authorization forms. *See Ex. B, Ex. C and Ex. A, respectively.* Magnolia Place accepted Ms. Royston for admission and began providing skilled nursing and other care and treatment to her.

The Arbitration Agreement at issue defines Magnolia Place as the “Facility” and Ms. Royston as the “Resident”. The Arbitration Agreement by its own terms is binding upon Magnolia Place, Ms. Royston and their respective “successors, assigns, heirs, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of” them. *See Ex. C, ¶ 1* (emphasis added). The Arbitration Agreement expressly states 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 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. *See Ex. B, ¶ 2-3.*

The Arbitration Agreement provides further:

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. *See Ex. B, ¶ 5.*

The Arbitration Agreement includes specific provisions regarding (i) governing law, (ii) how an arbitrator is chosen, (iii) the type of claims that the parties agreed must be submitted to arbitration, (iv) the rules that apply to the arbitration, (v) which persons are bound by the parties' agreement to arbitrate and other particulars. In bold and italicized font at the top, the Arbitration Agreement advises to "*PLEASE READ CAREFULLY.*" Further, also in bold font and in a stand-alone paragraph, it is noted that each party "understand(s) and agree(s) that [it is] waiving [its] right to a jury trial." *See Ex. C, ¶ 6.*

Entering into the Arbitration Agreement was completely voluntary for Ms. Royston and was not in any way a condition precedent to admission. Indeed, the Arbitration Agreement was voluntary in the same way that consenting or, in Ms. Royston's case, not consenting to certain healthcare authorizations were for Ms. Royston. At no time during her residency did Ms. Royston or any of her representatives and family members contest, question, or attempt to repudiate the consents, agreements and refusals that Ms. Royston made on her own behalf.

Ms. Royston passed away on December 31, 2016, approximately twelve days after unequivocally agreeing to arbitrate "any controversy or dispute between the parties . . . relating in any way to (Ms. Royston's) stay at the Facility, or to the provisions of care or services to (Ms. Royston)." *See Ex. C, ¶ 3.*

### **PROCEDURAL POSTURE**

On January 8, 2019 the parties participated in mandatory pre-suit mediation for this matter. The parties mediated this matter in person over the course of several hours. At that time, this Defendant was not able to locate the Arbitration Agreement. This Defendant, through the



undersigned attorneys, participated in mediation from that posture. Plaintiff's counsel did not disclose the existence of the Arbitration Agreement on that date. It is unknown when Plaintiff's counsel became aware of the Arbitration Agreement. The parties were unable to reach a resolution at pre-suit mediation.

On January 31, 2019, Plaintiff instituted the instant lawsuit asserting claims related to Ms. Royston's stay at Magnolia Place and the care and services she received. This Defendant answered Plaintiff's Complaint on March 6, 2019 expressly reserving its right to compel this matter to arbitration. *See Ex. E – Facility's Answer, ¶ Intro*. Plaintiff served this Defendant with discovery requests on May 6, 2019. On June 19, 2019, Plaintiff filed a Motion to Compel Discovery against this Defendant. Just six days later, on June 25, 2019, the parties held a Meet and Confer to address Plaintiff's requests and to decide on a mutually agreeable confidentiality order.

While at the June 25<sup>th</sup> Meet and Confer, and approximately five (5) months after Plaintiff filed her Complaint, Plaintiff's counsel produced for the first time the Arbitration Agreement that was signed and agreed to by Ms. Royston. *See Ex. C*. This Defendant, by and through its attorneys, informed Plaintiff's counsel that Plaintiff's claims are "Disputes" as that term is defined in the Arbitration Agreement and, therefore, it requested that Plaintiff's claims be submitted to the arbitration process provided for in the Arbitration Agreement as the parties had agreed to do. *See Ex. C, ¶ 2-3*. When Plaintiff refused to comply with the terms of the Arbitration Agreement as requested by Magnolia Place, this Defendant filed this Motion to Dismiss, Compel Arbitration and Stay Court Proceedings on July 26, 2019.

In light of Plaintiff's pending Motion to Compel Discovery, this Defendant has also separately moved this Court for a protective order, which would protect this Defendant's from

any obligations to respond to Plaintiff's discovery requests while this present Motion is pending.  
*See Ex. F – Defendant Facility's Motion for Protective Order (pending).*

### **ARGUMENT AND CITATION OF AUTHORITY**

Plaintiff's opposition to the instant Motion and enforcement of the Arbitration Agreement rests entirely upon the following arguments: (1) that the Arbitration Agreement is not valid because it is not signed by Magnolia Place; (2) that the Arbitration Agreement is not enforceable for lack of consideration of mutuality; (3) that the Arbitration Agreement should be invalidated because it is missing material and definitive terms; (4) that wrongful death claims cannot be submitted to arbitration; (5) that the Arbitration Agreement is unconscionable; and (6) and that this Defendant waived its right to arbitration by purportedly participating in *pre-suit* "discovery" and not producing the Arbitration Agreement immediately upon receipt of a records request months before any litigation commenced. The Defendant addresses each of these claims in their respective order.<sup>1</sup>

#### **I. POLICY IN FAVOR OF ARBITRATION**

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 Cir.1997). Indeed, both federal and state policy favors 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

---

<sup>1</sup> 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 as a result of Ms. Royston executing and binding herself and her representatives to the Arbitration Agreement on her own behalf. 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.

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).

## II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. *See Ex. C; Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014)(holding that skilled nursing facility admission agreements and residencies implicate interstate commerce and, thus, arbitration agreements executed between a skilled nursing facility and a resident are governed by the FAA). 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. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. 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). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to

arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not invalidate an arbitration agreement on legal rules that “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Centers Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

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. 9 U.S.C. § 2. As discussed and further described herein, such a valid, binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff’s claims should be compelled to arbitration.

### III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

Whether an arbitration agreement which is governed by the FAA, such as the instant Arbitration Agreement, is a valid contract is determined by applying general principles of South Carolina contract law. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001).

#### A. The Arbitration Agreement Is a Written Manifestation of this Defendant’s Offer and Patricia Royston’s Acceptance and Is Supported by Mutual, Valid Consideration

Under South Carolina law, the necessary elements of a valid contract are (i) offer, (ii) acceptance and (iii) valuable consideration. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012).

i. Offer and Acceptance

Magnolia Place made an offer to Ms. Royston when it presented the Arbitration Agreement to her for her review and consideration. Importantly, Ms. Royston did not make any changes to the Arbitration Agreement that Magnolia Place offered such that it could be reasonably argued that she made any type of “counter-offer.” Ms. Royston accepted Magnolia Place’s offer according to the *exact terms* that Magnolia Place presented to her when she executed the Arbitration Agreement. *See Ex. C.*

Plaintiff cites to Pennsylvania law in its Memorandum in Opposition to the Motion to Compel Arbitration (“Memorandum in Opposition”) to attempt to argue that Magnolia Place’s signature is required to have a valid, enforceable contract. Plaintiff resorts to citing to Pennsylvania state law because well-established South Carolina contract law does not support its position.

Under South Carolina law, it is of no legal significance that Ms. Royston signed the Arbitration Agreement but the Facility has not yet done so. Indeed, well-established South Carolina law provides that a contract is valid if signed by only one party. *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351 S.E.2d 343, 346 (Ct. App. 1986); *see also Bulwinkle v. Cramer*, 27 S.C. 376, 13 Am.St.R. 645 (1887); *Bishop Realty & Rentals v. Perk, Inc.*, 292 S.C. 182, 355 S.E.2d 298, 300 (App.), *cert denied*, 293 S.C. 538, 362 S.E.2d 26 (1987); *see also Laidlaw Environmental Services, (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 2409 (D.S.C. 1996).<sup>2</sup> “It has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both.” *Jaffe*, 290

---

<sup>2</sup> Notably, the Statute of Frauds, which is designed to give contracting parties enhanced protection against fraud when agreements concerning goods valued in excess of \$500 or agreements for services that cannot be completed within one year are at issue, requires only that there be a written agreement that is “**signed by the party against whom enforcement is sought**”. S.C. Code Ann. 36-2-201(1)(Law.Co-op. 1976).

S.C. at 468. Acceptance of an offer can be by signature or by actions indicating assent. *Id.*; see also *Bulwinkle*, 27 S.C. 376 (1887).

Magnolia Place assented to the terms of the Arbitration Agreement by drafting the agreement, filling in the names of the parties where appropriate and presenting the agreement to Ms. Royston for her review and voluntary consideration. Contrary to Plaintiff's contentions in her Memorandum in Opposition, there were no terms of the Arbitration Agreement that were left blank when Magnolia Place presented the contract to Ms. Royston. After Ms. Royston's review and consideration, she did not change any terms and she executed the same Arbitration Agreement that Magnolia Place presented, or offered, to her. *See Ex. C.* There was clear *meeting of the minds* – or assent and intent to form this particular contract by each party.

Magnolia Place further accepted the Arbitration Agreement executed by Ms. Royston when it admitted her as a resident and provided care and treatment to her according to the bargained-for exchange the parties made in the various documents related to her residency, including the Arbitration Agreement. Magnolia Place expressed its further acceptance of the Arbitration Agreement when it, through its attorneys, notified Plaintiff at the June 25, 2019 Meet and Confer the parties were required to submit Plaintiff's claims, or "Disputes" as defined by the Arbitration Agreement, to arbitration and that it was seeking to enforce the terms of the Arbitration Agreement. Magnolia Place manifested its acceptance further by filing this instant Motion on July 26, 2019 to enforce the Arbitration Agreement that both parties unequivocally agreed to – by signature in the case of Plaintiff and by a multitude of actions in the case of the Defendant.<sup>3</sup>

---

<sup>3</sup> Additionally, while this Defendant believes a valid offer and acceptance is unequivocally supported by the record before this Court and South Carolina law, this Defendant submits that South Carolina contract law permits and recognizes the validity of signature of a contract with retroactive effect to further affirm

iii. **Mutual, Valid Consideration Is Present**

The Arbitration Agreement possesses valid, legal consideration because the parties exchanged mutual promises by voluntarily agreeing to waive their respective right to a jury trial and by voluntarily bestowing upon each other a right to an alternative dispute resolution process. The promises by Ms. Royston and Magnolia Place, respectively, are mutual and concurrent.

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); *O'Neil*, 115 F.3d 272, 275 (4th Cir. 1997)(applying South Carolina Law). This undisputed notion is bedrock, black-letter contract law. Moreover, this long-standing principle is of equal application in the context of arbitration agreements, where both parties mutually assent to arbitration. *O'Neil*, 115 F.3d 272 (4th Cir. 1997). In *O'Neil*, the court specifically held 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); *see also 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).

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both Magnolia Place and Ms. Royston and their respective representatives (among others), including the Plaintiff as the personal representative of Ms. Royston's Estate. *See Ex. C, ¶ 1* (“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

---

the prior meeting of the minds and other acts of acceptance. This Defendant reserves the right to sign this contract to the extent necessary.

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 claims to the contrary should be disregarded.

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. Royston, as well as Plaintiff as personal representative of her estate. See Ex. C, ¶ 1. 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.<sup>4</sup>

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 is void, 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.

---

<sup>4</sup> 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, in *Jenkins v. THI at South Carolina at Charleston, LLC et al.*, 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 G*

To require further, additional consideration above and beyond the mutual exchange of promises would be to impose a rule in violation of the United States Supreme Court's holdings in *Concepcion*, *Marmet Healthcare Center, Inc. v. Brown* 565 U.S. 530 (2012), and *Kindred*, all of which stand for the proposition that arbitration agreements must be put on "equal footing with all other contracts." *See Kindred* at 1423. As a result, valid legal consideration is present as to this contract and this Court cannot deny enforcement of the Arbitration Agreement on grounds of lack of consideration.

**B. 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.

Contrary to Plaintiff's assertions, this Defendant submits to the Court that the Arbitration Agreement is clear, unambiguous, and represents an unequivocal understanding between Magnolia Place and Plaintiff with respect to its essential and material terms such that enforcement of these terms is required. There is a meeting of the minds between the parties as to the essential terms of the parties' agreement. Contrary to Plaintiff's contentions in her Memorandum in Opposition, there is not a single "blank line" pertaining to the material terms of the Arbitration Agreement. *See Ex. C.* As previously noted, Ms. Royston reviewed, considered and agreed to the same terms that Magnolia Place presented to her – clearly establishing a *meeting of the minds* and intent to agree the Arbitration Agreement. Ms. Royston reviewed,

considered and declined agreement to certain other documents related to her residency at Magnolia Place. *See Ex. A.* Likewise, Ms. Royston could have, but did not, decline the terms of the Arbitration Agreement. The context of Ms. Royston's refusal to provide consent to other documents related to her admission to Magnolia Place further supports Ms. Royston's clear intent to *agree* to the terms of the Arbitration Agreement.

The Arbitration Agreement includes specific provisions regarding (i) governing law, (ii) how an arbitrator is chosen, (iii) the type of claims that the parties agreed must be submitted to arbitration, (iv) the rules that apply to the arbitration, (v) which persons are bound by the parties' agreement to arbitrate and other particulars. Indeed, the Agreement expressly provides that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which provide for 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 Arbitration Agreement provides for a mutual process for selecting an arbitrator when a Dispute arises. *See Ex. C, ¶ 4.* Plaintiff erroneously maintains that providing for a mutual process of selection of an arbitrator instead of hardwiring a *specific arbitrator* into the Arbitration Agreement is somehow an omission of a material term. Providing for a mutual *process* of selecting an arbitrator is equally fair to both parties – and, certainly, is more fair to Ms. Royston than identifying a specific arbitrator would have been. Moreover, this mutuality of process is consistent with the spirit and intent of alternative dispute resolution, the subject matter of the contract. The Agreement provides for a mutual and cooperative process wherein the parties attempt to mutually agree upon an arbitrator and, only if that process does not succeed,

are the parties to seek court assistance. Indeed, this mutual and cooperative process definitively leads to identification of a *specific arbitrator* once the process is complete. Contrary to Plaintiff's claims, the lack of a *specifically* delineated arbitrator should not weigh against enforcement of the Arbitration Agreement for these reasons.

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 to, and the Defendant is unaware of, any binding precedent mandating that an arbitration agreement must contain such terms to be enforceable. have been held to be enforceable and were not void because they because they lacked the terms that the plaintiff urges are required.. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) (Norton, C.J.); *Benson v. THI of S.C. at Lake Emory at Spartanburg, LLC*, C.A. 7:11-2613-HMH; *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012)(attached hereto as **Exhibit H**); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012)(attached hereto as **Exhibit I**); *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (*See Price* decision, attached hereto as **Exhibit J**).

#### IV. THE ARBITRATION AGREEMENT IS EQUALLY APPLICABLE TO PLAINTIFF'S WRONGFUL DEATH CLAIM

Plaintiff's assertions that her wrongful death claim is not governed by the Arbitration Agreement must be rejected according to the South Carolina Supreme Court's holding in *Dean v. Heritage Healthcare of Ridgeway, LLC*. See 408 S.C. 371, 759 S.E.2d 727 (2014). According to the South Carolina Supreme Court in *Dean*, courts in South Carolina "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). In accordance with *Dean*, courts in South Carolina have held 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.)

Similarly, in *McCutcheon, supra*, by granting the defendant's motion to compel arbitration, the court 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 home's 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 in a representative capacity on behalf a of a decedent, are subject to binding arbitration. .

Similarly, 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 was found to have authority and signed an arbitration agreement in connection with his mother's admission to a skilled nursing facility. *Id.* 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. Indeed, The South Carolina Probate code itself tells us that such claims must be considered derivative. 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"). The majority of states concur with this approach including New Mexico, Mississippi, Florida, Texas, Michigan, Colorado, Pennsylvania, and Alabama<sup>5</sup>. To be sure, statutory beneficiaries have no right to a

---

<sup>5</sup> *THI of New Mexico at Hobbs Center, LLC v. Spradlin*, 532 Fed. Appx. 813 (10<sup>th</sup> 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

claim but through the standing of the decedent. *Spradlin*, 532 F. App'x 813, 816–18. It necessarily follows that if a decedent's rights to a claim are affected by a contract, such as how such claims are resolved pursuant to a binding arbitration agreement, the beneficiaries' rights are likewise affected, as they stand in the legal shoes of the decedent. See *In re Labatt Food Serv., L.P.*, at 645 (Tex. 2009). A contrary holding would violate the FAA and the Supreme Court's holding in *Kindred*, *supra*, because arbitration agreements must be put on equal footing with other contracts and, therefore, the express terms and intent of the parties to the Arbitration Agreement must be enforced as it would be in any other type of contract.

This 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 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.*

---

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 *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 F.Supp.2d 711, 718 (E.D.Pa.2005); *Briarcliff Nursing Home, Inc. v. Turcotte* 894 So.2d 661, 665 (Ala. 2004).

*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)).

Because Ms. Royston executed the Arbitration Agreement and personally would have been bound by its terms during her lifetime, the Plaintiff and the estate’s wrongful death beneficiaries are also bound. *See Wiggins, supra*, 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”). Moreover, 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.”** *See Ex. C, ¶ 1* (emphasis added). Ms. Royston signed the agreement on her own behalf and, as such, the Arbitration Agreement must be found binding on the wrongful death claim brought by Plaintiff, the personal representative of her estate, pursuant to Ms. Royston’s express intent.

#### V. 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*, 531 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 Ms. Royston's 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. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident. *See Ex. C, ¶ 2.*

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" *See Ex. C, ¶ 6.*

By signing the Arbitration Agreement and Admission Agreement, Ms. Royston

represented that she understood and assented to their terms. Indeed, she was given the option of entering into the Arbitration Agreement – *or not* – and she freely and voluntarily made the decision to proceed. The record is clear that Ms. Royston expressly refused to agree to other documents related to her residency at Magnolia Place. *See Ex. A.* Considering Ms. Royston’s express agreement to the Arbitration Agreement in the context of her refusals to provide consent demonstrates that Ms. Royston was aware of her ability to likewise refuse the Arbitration Agreement and that her agreement was voluntary. Ms. Royston had meaningful choice and was clearly aware of the same. The Arbitration Agreement by its plain language was not a precondition of admission to Magnolia Place and simply could not have been an adhesion or “take it or leave it” contract. Ms. Royston had the option not to enter into the Arbitration Agreement, yet she voluntarily did so, voluntarily did not retract her agreement thereto and continued to stay at Magnolia Place and voluntarily receive skilled nursing care after admission.

The fact that Ms. Royston is an individual and this Defendant is a commercial entity is also 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 Ms. Royston 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 document from the admissions agreement. Additionally, by executing and consenting to the Arbitration Agreement, Ms. Royston expressly acknowledged that she “is

not required to use the aforesaid facility for [her] healthcare needs and that there are numerous other health care providers in the State where [Magnolia Manor] is located that are qualified to provide such care to [her].” See Ex. C, ¶ 2.

Ms. Royston was given the option of entering into the Arbitration Agreement and made the decision to proceed. She did not have to accept this offer nor has there been any allegation or evidence that she was actually coerced into signing this agreement. The waiver of the right to a jury trial as contained in the Arbitration Agreement was presented as a separate document, and Ms. Royston 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 select a third party arbitrator *jointly* “from a panel having experience and knowledge of the health care industry.” See Ex. C, ¶ 4. If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. The selected 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 United States District Court of South Carolina and this very Court have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon, supra*, at \*3; *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, supra*. Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA, which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and therefore fails.

#### **VI. NO WAIVER OF THIS DEFENDANT'S RIGHTS TO ARBITRATION HAS OCCURRED**

Plaintiff's last eleventh hour attempt to negate enforcement of the Arbitration Agreement rests 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. Further, Plaintiff asserts that Magnolia Place waived its right to enforce the Arbitration Agreement as a result of engaging in "pre-suit discovery," however the Plaintiff has not indicated what such pre-suit discovery entailed. 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).

There is no bright line rule of whether a non-moving party has been prejudiced by purported delay in seeking arbitration. *See Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122 (2007). A determination of prejudice from the undue burden of delay is made based on the particular facts before the court. *See Id.* At 126. However, Defendant submits that *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.* is instructive on the facts presented here. *See* 355 S.C. 605, 615, 586 S.E.2d 581, 585 (2003). In *Toler's Cove*, the Supreme Court of South Carolina found that there was no prejudicial delay to the non-moving party when there was a thirteen month delay, discovery was “very limited in nature and the parties had not availed themselves of the court’s assistance,” and no depositions had been held. *Id.*; *see also Gen. Equip.*

*& Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001). Where arbitration is sought less than a year after the plaintiff has brought suit and the parties have not engaged in extensive discovery, South Carolina case law prescribes that a determination that the moving party waived its arbitration rights is not warranted. *See Rhodes*, 374 S.C. at 128.

Plaintiff has erroneously argued that Magnolia Place waived its right to enforce the Arbitration Agreement by engaging in “pre-suit discovery.” It is not clear what “pre-suit discovery” Plaintiff maintains this Defendant engaged in. However, the only potential “pre-suit discovery” it could be argued this Defendant engaged in was sending certain health records for Ms. Royston to Plaintiff upon her request in accordance with federal regulation. Federal regulations applicable to skilled nursing facilities state: “an individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set.” 45 C.F.R. § 164.524. Pursuant to applicable federal regulations, Magnolia Place provided a copy of certain requested “protected health information”, as that term is defined by such regulations, to Plaintiff prior to filing this lawsuit. Plaintiff now makes a completely illogical argument in her Memorandum in Opposition that Magnolia Place waived its right to enforce the Arbitration Agreement by complying with governing federal regulations. According to this flawed line of reasoning, it would follow that this Defendant would be required to violate federal law in order to preserve its contractual rights to arbitrate, something which, unlike a contract for something that is criminal or otherwise violates the law, is embraced and favored by our legal system. Any such notion is illogical and, this Defendant submits, violates the policy underlying the Federal Arbitration Act and other prevailing policy considerations. Moreover, to the extent the provision of certain health records to Plaintiff in accordance with federal regulations at the pre-suit stage is what Plaintiff means by “pre-suit discovery,” Plaintiff does not assert any “prejudice” as a result of receiving certain health

information from Magnolia Place pre-suit in accordance with governing law, because there is no conceivable prejudice at the pre-suit stage – or otherwise.

In this case, despite Plaintiff's demonstrably false claims to the contrary, no real delay has occurred and no prejudice has been suffered. Moreover, any purported delay that has occurred is a result of Plaintiff's own failure to disclose to this Defendant the presence of the Arbitration Agreement to which her decedent signed and bound herself and the Plaintiff, as Ms. Royston's personal representative.

Plaintiff's submission to this Court that the Defendant "participated in pre-suit mediation without once mentioning the arbitration clause" and caused undue burden of delay to Plaintiff is not only disingenuous since all indications are that Plaintiff was aware of the Arbitration Agreement at that time – and therefore, the burden cannot be "undue", but it also is clearly not a valid basis for claiming prejudice under binding precedent in South Carolina. The South Carolina Supreme Court held in *Dean* that 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 of arbitration rights 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.") The determination of Here, this Defendant moved to compel arbitration on July 26, 2019, which was 30 days after Plaintiff confirmed the existence of the Arbitration Agreement at the June 25, 2019 Meet and Confer.

Plaintiff also suggests that the filing of this Motion to Compel Arbitration after Plaintiff's motion to compel discovery on June 19, 2019 is of some sort of legal significance. The timing of Magnolia Place's filing of the instant Motion was completely driven by what appears to be

Plaintiff's latent disclosure of its copy of the Arbitration Agreement signed by Ms. Royston and for no other reason.

In an attempt to create the appearance of prejudicial delay, Plaintiff asserts in her Memorandum in Opposition that this Defendant "ignored discovery requests for months." This is patently false and has the potential to mislead the Court. In fact, Defendant answered Plaintiff's Complaint on March 6, 2019, expressly stating that its Answer was "*subject to and without waiving its right to compel this matter to arbitration.*" See **Ex. E – Facility's Answer to Complaint**. Plaintiff served discovery requests on Magnolia Place two months later on May 6, 2019. Plaintiff filed its motion to compel discovery responses on June 19, 2019. The parties met to discuss the posture of this matter on June 25, 2019, at which time Plaintiff confirmed the existence of the Arbitration Agreement. On that same date, this Defendant, by and through the undersigned attorneys, indicated that it was seeking to enforce its arbitration rights under the valid Arbitration Agreement. Upon Plaintiff's refusal to comply and arbitrate the instant claims, this Defendant then filed this Motion to Compel Arbitration on July 26, 2019. This Defendant was expeditious in seeking to enforce its rights upon confirmation of the Arbitration Agreement as signed by Ms. Royston. And, in any event, this Defendant sought to enforce its right to arbitration a little more than five (5) months after Plaintiff filed her Complaint and had engaged in minimal, if any, discovery. The findings in *Toler's Cove* should guide this Court and, accordingly, no waiver of the Defendant's rights to arbitration should be found on the facts of this case.

For the reasons set forth above, under relevant South Carolina precedent and the facts particular to this case, any claims of prejudice from delay suffered by Plaintiff are without merit and the Defendant's rights to arbitration have not been waived.



**CONCLUSION**

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Russell G. Hines

Kate C. Mettler

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: August 28, 2019

# INFORMED CONSENT FOR INFLUENZA VACCINE Inactivated or Recombinant

## Why should you get an influenza vaccine?

Influenza (flu) is a contagious disease which spreads from person to person through coughing, sneezing and close contact. Symptoms come on suddenly and may last several days. Symptoms can include:

- Fever/Chills
- Sore throat
- Muscle aches
- Runny or stuffy nose
- Cough
- Headache
- Fatigue

Complications of influenza can include: • Pneumonia • Worsening of existing medical conditions

The influenza vaccine is recommended for everyone 6 months and older. It's especially important that a person gets vaccinated if he/she is at risk for complications from influenza or he/she can spread influenza to those at risk. People at higher risk for complications from influenza include:

- People 65 and older
- People with a weakened immune system
- People with certain health conditions, such as heart, lung or kidney disease

For most people, the influenza vaccine prevents serious influenza-related illness. The vaccine will not prevent disease from other viruses, including influenza viruses not contained in the vaccine.

## When should you get vaccinated?

Influenza viruses are always changing, so the vaccine is updated every year. **An annual vaccination is recommended.** Get the vaccine as soon as it is available. This should provide protection if the flu season comes early. It takes about 2 weeks for protection to develop after the vaccination and lasts through the flu season.

## Potential Adverse Effects/Negative Outcomes of Receiving the Vaccine

Most people who get a flu shot do not have any problems; however, as with any medicine, there is a very remote chance of a vaccine causing serious reaction, injury or death. **If you have a severe egg allergy, severe allergy to any vaccine component, or have had a severe reaction to a previous dose of influenza vaccine, tell your doctor.** Also, tell your doctor if you have ever had Guillain-Barre Syndrome (GBS) or you are presently ill.

The following **mild side effects** may occur soon after the shot and last 1 to 2 days:

- Hoarseness
- Cough
- Red or itchy eyes
- Fever
- Aches
- Fatigue
- Headaches
- Itching
- Soreness, redness, or swelling where the shot was given

**Signs of severe allergic reaction can include: hives, swelling of face and throat, difficulty breathing, a fast heartbeat, dizziness and weakness. If these reactions occur, call your doctor or seek medical attention immediately.**

## INFORMED CONSENT

I have read the above information or it has been explained to me, and I understand the potential adverse effects and negative outcomes. Understanding the benefits, potential negative outcomes and side effects of receiving an **influenza vaccine**:

### Initial appropriate response

☐ I hereby **GIVE** the facility permission to administer an **influenza vaccination**, unless medically contraindicated.

☒ I hereby **DO NOT GIVE** the facility permission to administer an **influenza vaccination**.

Resident Signature

*Patricia Royston*

☐ Resident Representative and/or ☐ Durable Power of Attorney for Healthcare Signature/Relationship

Facility Representative Signature/Title

*A. Davis RN*

Date *12/29/10*

Date

Date *12/29/10*

Resident Name

*Royston, Patricia*

ID #

Room #

*102*

Physician

*W. R. R.*

See reverse for Pneumococcal Vaccination Consent

**DEFENDANT'S  
EXHIBIT**

ROYSTON, P. 0009

## INFORMED CONSENT FOR PNEUMOCOCCAL VACCINE

**Why should you get a pneumococcal vaccine?**

Pneumococcal disease is an infection caused by a type of bacteria and can lead to serious infections including:

- Pneumococcal Pneumonia (lungs)
- Pneumococcal Meningitis (covering of the brain)
- Otitis media (middle ear infection)
- Pneumococcal Bacteremia (bloodstream infection)

Symptoms of pneumococcal pneumonia can include:

- Fever
- Shortness of breath
- Cough
- Chest pain

Symptoms of otitis media can include:

- Painful ear
- Red or swollen eardrum
- Sometimes sleeplessness, fever and irritability

Symptoms of pneumococcal meningitis can include:

- Stiff neck
- Fever
- Visual sensitivity to light
- Mental confusion and disorientation

Symptoms of pneumococcal bacteremia may be similar to some of the symptoms of pneumonia and meningitis, along with joint pain and chills.

Drugs such as penicillin were once effective in treating pneumococcal infections; but some strains of the disease have become resistant to these drugs, making treatment of pneumococcal infections more difficult. This makes prevention, through vaccination, even more important.

**When should you get vaccinated?**

The Advisory Committee on Immunization Practice recommends two pneumococcal vaccines for adults 65 years of age or older. Recent studies have shown that both the pneumococcal conjugate (PCV13) and the pneumococcal polysaccharide (PPSV23) vaccines are needed for the best protection against pneumococcal disease.

If you are 65 or older and have not had a pneumonia vaccine, you should receive one dose of PCV13 now, and in 6-12 months get a dose of PPSV23. If you have had a pneumonia vaccine after the age of 65, then you received the PPSV23 and should receive the second vaccine, PCV13.

**Potential Adverse Effects/Negative Outcomes of Receiving the Vaccine**

A vaccine, like any medicine, could possibly cause serious problem, such as severe allergic reaction. The risk of a vaccine causing serious harm, or death, is extremely small. However, if you have a severe allergy to any vaccine component or you've had a severe reaction after a previous dose of a pneumococcal vaccine, you should tell your doctor. You should also talk with your doctor if you are presently ill. The vaccine may be less effective in some people, especially those with lower resistance to infection. These people should still be vaccinated, because they are more likely to have serious complications if they get pneumococcal disease.

The following mild side effects may occur after the vaccination:

- Fever
- Muscle aches
- Soreness/redness where the shot was given

If you experience more severe side effects including: a high fever, difficulty breathing, wheezing, hives, paleness, weakness, fast heart beat or dizziness report these to your doctor immediately.

**INFORMED CONSENT**

I have read the above information or it has been explained to me and I understand the adverse effects and potential negative outcomes. Understanding the benefits, adverse effects and potential negative outcomes of receiving a pneumococcal vaccine:

**Initial appropriate response**

☐ I hereby **GIVE** the facility permission to administer a **pneumococcal vaccination**, unless medically contraindicated. To the best of my knowledge, I have not received a **pneumococcal vaccination** in the past five years.

☒ I hereby **DO NOT GIVE** the facility permission to administer a **pneumococcal vaccination**.

Resident Signature

*Patricia Royston*  
☐ Resident Representative and/or ☐ Durable Power of Attorney for Healthcare Signature/Relationship

Date: 12/29/16  
 Date:

Facility Representative Signature/Title

*A. Davis RN*

Date: 12/29/16

Parts of this document were excerpted from the following CDC Vaccine Information Statements: (08/07/2015) Inactivated Influenza Vaccine, (12/7/13) PCV13 Vaccine, and (4/24/15) PPSV Vaccine.

Resident Name

ID #

Room #

Physician

ROYSTON, P. 0010

CONSENT FOR [REDACTED] THERAPY

Date: 12/22/16

Resident: Royston Patricia 102/1 Physician: White

[REDACTED]

Form # NFF-AP097 (03/09)

Reorder From: MED-PASS 800-435-0884

|                                                                                                                                                                                   |          |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| The above consent was obtained from the appropriate person being:                                                                                                                 |          |
| <input checked="" type="checkbox"/> The resident: Patricia Royston (Print name)                                                                                                   |          |
| <input type="checkbox"/> The person authorized by law to consent on behalf of the resident (guardian) and the circumstances under which the consent was obtained is: (Print name) |          |
| Signature of Resident, Guardian, Legal Representative:                                                                                                                            | Date:    |
| Patricia Royston                                                                                                                                                                  | 12/22/16 |
| Signature of person obtaining permission: (nurse, etc.)                                                                                                                           | Date:    |
| [Signature]                                                                                                                                                                       | 12/22/16 |

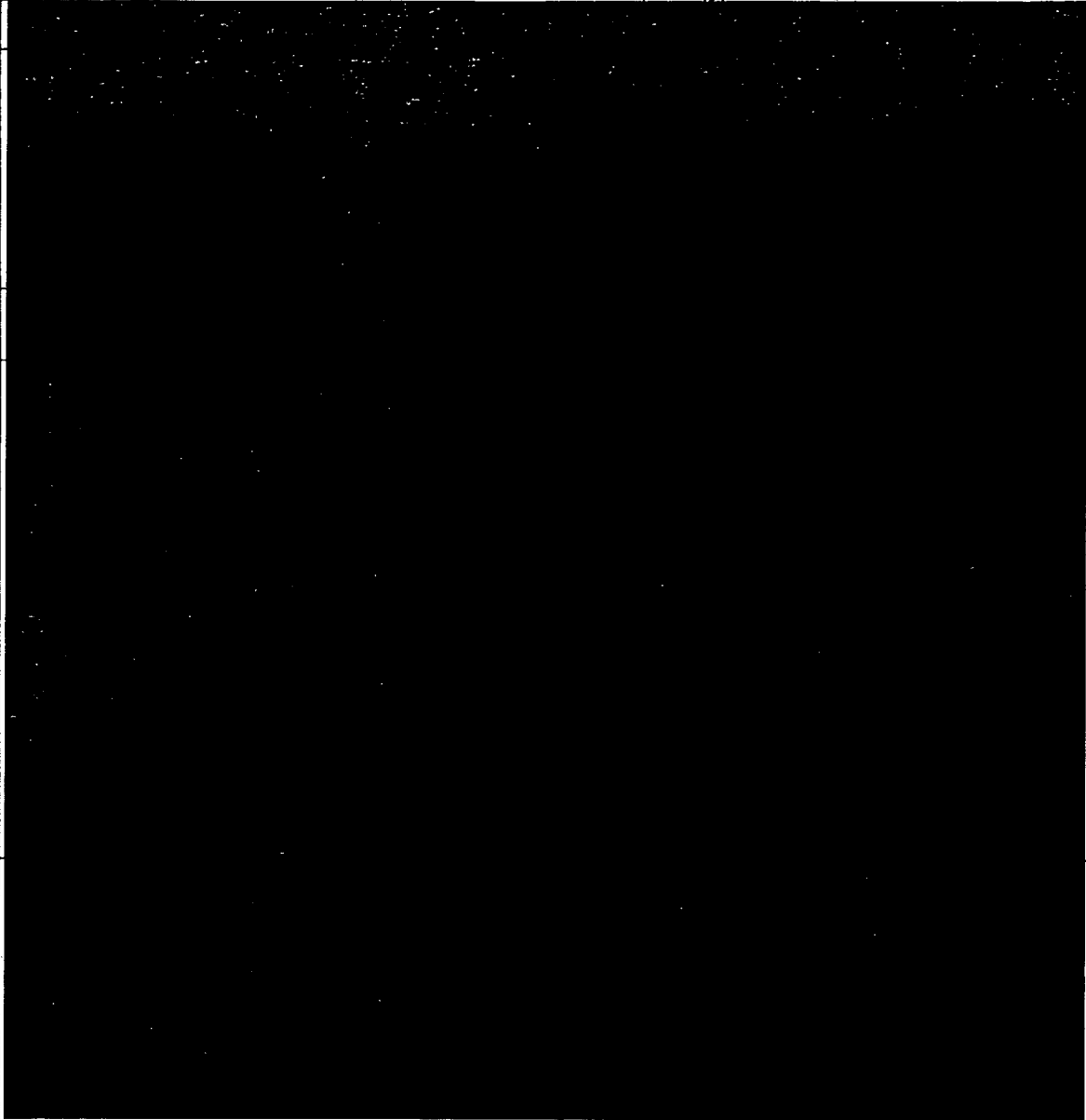
ROYSTON, P. 0011

CONSENT FOR [REDACTED] THERAPY

Date: 12/22/16

Resident: Royston

Physician: White



Form # NFF-AP037 (03/09)

Header From: MED-PASS 002-439-8884

The above consent was obtained from the appropriate person being:

☒ The resident: Royston Patricia (Print name)

☐ The person authorized by law to consent on behalf of the resident (guardian) and the circumstances under which the consent was obtained is: (Print name)

Signature of Resident, Guardian, Legal Representative:

X Patricia Royston

Date:

12/22/16

Signature of person obtaining permission: (nurse, etc.)

[Signature]

Date:

12/22/16

INT-03309

ROYSTON, P. 0012

CONSENT FOR [REDACTED] THERAPY

Date: 12/22/16

Resident: Royston

Physician: White



The above consent was obtained from the appropriate person being:

- ☒ The Resident: Patricia Royston (Print name)  
☐ The person authorized by law to consent on behalf of the resident (guardian) and the circumstances under which the consent was obtained is: \_\_\_\_\_ (Print name)

Signature of Resident, Guardian, Legal Representative:

Date:

Patricia Royston

12/22/16

Signature of person obtaining permission: (nurse, etc.)

Date:

[Signature]

12/22/16

Form 9 NFF-HP007 (03/09)

Reorder From: MED-PASS 800-438-8884

INF 03009

ROYSTON, P. 0013

# AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS

Please read, review and acknowledge each the following:

## Treatment/Health Care Professionals:

### Authorization for Treatment

P.A.  
(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

P.A.  
(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 is 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

P.A.  
(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

P.A.  
(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

ADMISSION AGREEMENT - SOUTH CAROLINA

RESIDENT NAME:

Patricia Royston

RESIDENT NUMBER:

30487

DATE OF ADMISSION:

12/19/2014

THIS ADMISSION AGREEMENT ("Agreement") as above dated is by and among Magnolia Place of Greenville ("Facility"), Patricia Royston ("Resident") and/or \_\_\_\_\_ ("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.

Original: Business File • Photocopy: Resident/Representative

**DEFENDANT'S  
EXHIBIT**



## 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.

Original: Business File • Photocopy: Resident/Representative

**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.

Original: Business File • Photocopy: Resident/Representative

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.

Original: Business File • Photocopy: Resident/Representative

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 \$ 225.00 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

Original: Business File • Photocopy: Resident/Representative

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.

Original: Business File • Photocopy: Resident/Representative

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,

Original: Business File • Photocopy: Resident/Representative

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 10<sup>th</sup> day of the month.

Original: Business File • Photocopy: Resident/Representative

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:

Magnolia Place of Greenville  
3550 Wainwright Dr.  
Greenville, SC 29607  
ATTN: Administrator

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.

Original: Business File • Photocopy: Resident/Representative



## 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.

Original: Business File • Photocopy: Resident/Representative

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.

Patricia Royston

Signature of Resident

Date

Patricia Royston

Printed Name of Resident

Resident Social Security Number

Witness Signature

Date

Printed Name of Witness

OR

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

Printed Name of Facility Official & Title

Date

Original: Business File • Photocopy: Resident/Representative

SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND HUMAN SERVICESPASARR - Level I  
SCREENING FORM

|                                                                                                             |                                              |
|-------------------------------------------------------------------------------------------------------------|----------------------------------------------|
| Name: <u>Patricia Royston</u>                                                                               | Date of Review: <u>12.19.2016</u>            |
| SSN: [REDACTED]                                                                                             | Location at assessment: <u>MPG</u>           |
| Medicaid: _____ Non-Medicaid: _____                                                                         | CLTC#: _____                                 |
| Date of birth: [REDACTED]                                                                                   | Referral source: <u>Social Service Dept.</u> |
| All Diagnosis (If dementia diagnosed or suspected, complete and attach the Mini-Mental Form):<br>[REDACTED] |                                              |

## I. SCREENING FOR MENTAL RETARDATION INDICATORS:

|                                                                                    | YES                                 | NO                                  |
|------------------------------------------------------------------------------------|-------------------------------------|-------------------------------------|
| 1. Diagnosis of mental retardation or related disability made prior to age 22?     |                                     | <input checked="" type="checkbox"/> |
| 2. IQ tested below 70?                                                             |                                     | <input checked="" type="checkbox"/> |
| 3. Was time of test prior to age 22?                                               |                                     | <input checked="" type="checkbox"/> |
| 4. Does client have 3rd grade education? If not, state reason in Comments Section. | <input checked="" type="checkbox"/> |                                     |
| 5. Adaptive behavior: Could client ever perform self care activities?              | <input checked="" type="checkbox"/> |                                     |
| - Did he/she help care for spouse/parents/children?                                | <input checked="" type="checkbox"/> |                                     |
| - Was client ever able to cook and perform household duties?                       | <input checked="" type="checkbox"/> |                                     |
| - Was client gainfully employed? If not, explain in Comments Section.              | <input checked="" type="checkbox"/> |                                     |
| - Did client have driver's license?                                                | <input checked="" type="checkbox"/> |                                     |
| 6. Cognitive Functioning:                                                          |                                     |                                     |
| - Memory: Does client remember what he/she had for breakfast or lunch?             | <input checked="" type="checkbox"/> |                                     |
| - Simple math: Can client add 12 + 8?                                              | <input checked="" type="checkbox"/> |                                     |
| - Concept formation: Can client describe the difference between a fish and dog?    | <input checked="" type="checkbox"/> |                                     |

7. Comments: \_\_\_\_\_

## II. SCREENING FOR MENTAL ILLNESS INDICATORS:

1. Diagnosis of mental illness: No ☐ Yes ☐ Diagnosis: \_\_\_\_\_

2. History of psychiatric hospitalization within previous two years. (Give dates of treatment) If no hospitalization, indicate here: \_\_\_\_\_  
 \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_ \_\_\_\_/\_\_\_\_/\_\_\_\_ to \_\_\_\_/\_\_\_\_/\_\_\_\_

3. Current behavioral indicators:

|                        |       |                               |
|------------------------|-------|-------------------------------|
| Attempted suicide      | _____ | Unrealistic fear of strangers |
| Assaultive             | _____ | Self-mutilation               |
| Incessant loud talking | _____ | Combative                     |
| Uncooperative          | _____ | Social isolation              |
| Hostile                | _____ | Destruction of property       |
|                        |       | None of these indicators:     |

4. Comments: (Include explanation of major symptoms): \_\_\_\_\_

DHHS Form 234 (1/96) Previous Editions are Obsolete.

**DEFENDANT'S  
EXHIBIT**

D

ROYSTON, P. 0264

SOUTH CAROLINA DEPARTMENT OF  
HEALTH AND HUMAN SERVICESPASARR - Level I  
SCREENING FORMNAME: Patricia Royston

SSN: [REDACTED]

IS PRESCRIBED INCLUDING DOSAGE AND FREQUENCY.

1. [REDACTED] 4. \_\_\_\_\_  
 2. \_\_\_\_\_ 5. \_\_\_\_\_  
 3. \_\_\_\_\_ 6. \_\_\_\_\_

## IV. RECOMMENDATION OF REVIEWER:

- \_\_\_\_ Recommend further evaluation based on mental retardation indicators.  
 \_\_\_\_ Recommend further evaluation based on mental illness indicators.  
 \_\_\_\_ No further evaluation recommended.  
 \_\_\_\_ No further evaluation recommended, but indicators present. (State reasons below.)

Comments: (Give justification for above recommendations, if needed.)

## V. PERTINENT INFORMATION

- \_\_\_\_ IMD admission requested; if so, indicate facility: \_\_\_\_\_  
 \_\_\_\_ Primary diagnosis of dementia; must be confirmed by a Mini-Mental Form.

Information obtained from: \_\_\_\_\_ CLTC Area # \_\_\_\_\_

Signature and title of assessor: [Signature]Agency/Institution completing form: Magnolia Place of GreenvilleAdmitting Nursing Facility: MPE Date of Admission (if known) 12.19.16

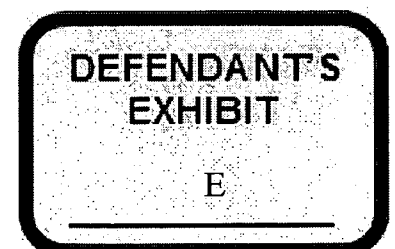
| FOR CLTC/IOC USE ONLY                                                                                                                                                                                                                                                                                                                                                        |  | FOR CLTC USE ONLY                             |  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-----------------------------------------------|--|
|                                                                                                                                                                                                                                                                                                                                                                              |  | Reviewed by Nurse Consultant _____ (initials) |  |
|                                                                                                                                                                                                                                                                                                                                                                              |  | Date Reviewed: _____                          |  |
| VI. ADVANCE CATEGORICAL DETERMINATION                                                                                                                                                                                                                                                                                                                                        |  |                                               |  |
| Advance categorical determination that specialized services are not required.                                                                                                                                                                                                                                                                                                |  |                                               |  |
| 1. Severity of physical impairments overrides need for specialized services (MI only)<br>2. Nursing facility respite not to exceed 14 days (MR or MI)<br>3. Emergency admission due to suspected abuse/neglect under authority of DSS (MR or MI)<br>4. 30-Day time limited certification (MR or MI)<br>5. Mental retardation with concurrent diagnosis of dementia (MR only) |  |                                               |  |
| Signature of CLTC Nurse Consultant: _____                                                                                                                                                                                                                                                                                                                                    |  |                                               |  |
| Date sent to nursing facility: _____                                                                                                                                                                                                                                                                                                                                         |  | Initials: _____                               |  |

|                                 |   |                               |
|---------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS  |
|                                 | ) |                               |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT   |
|                                 | ) |                               |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473     |
| ROYSTON, BY AND THROUGH THE     | ) |                               |
| APPOINTED PERSONAL              | ) |                               |
| REPRESENTATIVE MARIANNE         | ) |                               |
| MCCOIG, AND ON BEHALF OF THE    | ) |                               |
| STATUTORY BENEFICIARIES,        | ) |                               |
|                                 | ) |                               |
| PLAINTIFFS,                     | ) |                               |
|                                 | ) |                               |
| vs.                             | ) |                               |
|                                 | ) |                               |
| HUNT VALLEY HOLDINGS, LLC       | ) | THI OF SOUTH CAROLINA AT      |
| A/K/A FUNDAMENTAL LONG TERM     | ) | MAGNOLIA PLACE AT GREENVILLE, |
| CARE HOLDINGS, LLC;             | ) | LLC D/B/A MAGNOLIA PLACE-     |
| FUNDAMENTAL CLINICAL AND        | ) | GREENVILLE'S ANSWER TO        |
| OPERATIONAL SERVICES, LLC;      | ) | PLAINTIFF'S COMPLAINT         |
| FUNDAMENTAL ADMINISTRATIVE      | ) |                               |
| SERVICES, LLC; AND THI OF SOUTH | ) |                               |
| CAROLINA AT MAGNOLIA PLACE      | ) |                               |
| AT GREENVILLE, LLC D/B/A        | ) |                               |
| MAGNOLIA PLACE-GREENVILLE ,     | ) |                               |
|                                 | ) |                               |
| DEFENDANTS.                     | ) |                               |

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, ATTORNEY 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" or "the facility," *subject to and without waiving its right to compel this matter to arbitration*, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

1. Any and all allegations set forth in Plaintiff's Complaint which are not specifically admitted, qualified, or otherwise explained or denied, are hereby expressly denied and strict proof is demanded thereof.



2. In responding to the initial allegations set forth in Paragraph 1 of Plaintiff's Complaint, this Defendant admits that Ms. Royston was a resident of this Defendant's skilled nursing facility but would crave reference to the skilled nursing chart and admission and transfer records for the specific dates of her residency. This Defendant denies the remaining allegations set forth in the above Paragraph and demands strict proof thereof.

3. This Defendant is without sufficient information to form an opinion as to the truth of the allegations set forth in Paragraph 2 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

4. The allegations set forth in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

5. This Defendant is without sufficient information to form an opinion as to the truth of the allegations set forth in Paragraph 4 of Plaintiff's Complaint and therefore denies the same as stated and demands strict proof thereof.

6. This Defendant denies the allegations set forth in Paragraphs 5 and 6 of Plaintiff's Complaint as stated and demands strict proof thereof. Answering further, this Defendant denies that any other entity operates, manages or controls this Defendant's skilled nursing facility and further denies it is in a joint venture with the other Defendants.

7. In responding to the allegations set forth in Paragraph 7 of Plaintiff's Complaint, this Defendant asserts it is a Delaware limited liability company with a registered agent in South Carolina. To the extent the allegations in the above Paragraph are inconsistent with this response, they are denied.

8. This Defendant denies the allegations set forth in Paragraphs 8 and 9 of Plaintiff's Complaint as stated and demands strict proof thereof. Answering further, this Defendant denies that any other entity operates, manages or controls the skilled nursing care and treatment provided at the facility. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

9. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

10. The allegations set forth in Paragraph 11 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied. Answering further, this Defendant denies that any other entity operates, manages or controls the skilled nursing care and treatment provided at the facility.

11. This Defendant denies the allegations set forth in Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof.

12. To the extent they are directed at this Defendant, the allegations set forth in Paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 of Plaintiff's Complaint are denied as stated and strict proof is demanded thereof. Answering further, this Defendant denies that any other entity operates, manages or controls the skilled nursing care and treatment provided at the facility. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required. Further responding and to the extent the allegations in the above Paragraphs call for pure legal conclusions, no response is required.



13. This Defendant denies the allegations in the paragraph erroneously numbered as the second paragraph "28" on page 9 of Plaintiff's Complaint and strict proof is demanded thereof.

14. Responding to the allegations set forth in the paragraph erroneously numbered as the second paragraph "29" on page 9 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

15. Responding to the allegations set forth in Paragraph 30<sup>1</sup> of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. To the extent that the allegations set forth in the above Paragraph call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraph inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

16. This Defendant denies the allegations set forth in Paragraph 31 of Plaintiff's Complaint and demands strict proof thereof.

17. Responding to the allegations set forth in Paragraph 32 of Plaintiff's Complaint, this Defendant admits that as the licensee of the skilled nursing facility at issue, the Facility is the

---

<sup>1</sup> Hereinafter, these responses refer to the paragraph as numbered in Plaintiff's Complaint.

sole provider of skilled nursing care and treatment to its residents, including Ms. Royston, and a fee is provided for services related thereto. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. Any and all allegations inconsistent with this response are denied.

18. This Defendant denies the allegations set forth in Paragraphs 33 and 34 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

19. This Defendant denies the allegations set forth in Paragraphs 35, 36, 37, 38, 39, 40, 41, and 42 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required. To the extent the allegations in the above Paragraphs call for legal conclusions, no response is required.

20. Responding to Paragraph 43 of Plaintiff's Complaint, this Defendant affirmatively states that it is sole licensee and operator for the skilled nursing facility at issue located in Spartanburg County, South Carolina. Defendant also states that a fee is provided for services related thereto. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

21. This Defendant denies the allegations set forth in Paragraphs 44 and 45 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant and demands strict proof thereof. This Defendant asserts it is the sole entity that owed a duty to provide care and treatment to Plaintiff's decedent in compliance with the applicable standard of care, and further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the standard of care. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

22. This Defendant denies the allegations set forth in Paragraph 46 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations in the above Paragraph call for legal conclusions, no response is required.

23. The allegations set forth in Paragraph 47 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent they allege liability and/or damages against this Defendant.

24. This Defendant denies the allegations set forth in Paragraph 48 of Plaintiff's Complaint and demands strict proof thereof.

25. Responding to Paragraph 49 of Plaintiff's Complaint, this Defendant reasserts its responses to the above as if stated again verbatim.

26. This Defendant denies the allegations set forth in Paragraph 50 of Plaintiff's Complaint and demands strict proof thereof.

27. Responding to the initial allegations in Paragraph 51 of Plaintiff's Complaint, this Defendant admits that Ms. Royston was a resident at the Facility at times relevant to this action but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency status. The Defendant denies any and all remaining allegations in the above Paragraph. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the applicable standard of care.

28. This Defendant denies the allegations set forth in Paragraphs 52 and 53 of Plaintiff's Complaint and demands strict proof thereof.

29. Responding to the allegations set forth in Paragraph 54 of Plaintiff's Complaint, this Defendant affirmatively states that it had a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations inconsistent with this response are denied.

30. This Defendant denies the allegations in Paragraphs 55, 56, 57, 58, and 59 of Plaintiff's Complaint and demands strict proof thereof. To the extent those allegations are directed at parties other than this Defendant, no response is required.

31. Responding to the allegations set forth in Paragraphs 60, 61, and 62 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

32. This Defendant denies the allegations set forth in Paragraphs 63 of Plaintiff's Complaint demands strict proof thereof.

33. Responding to the allegations set forth in the Paragraphs 64 and 65 of Plaintiff's Complaint, this Defendant affirmatively states that it solely represents it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant

further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

34. The allegations set forth in Paragraphs 66, 67, 68, 69, 70, and 71 of Plaintiff's Complaint of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

35. This Defendant denies the allegations set forth in Paragraph 72 of Plaintiff's Complaint and demands strict proof thereof.

36. Responding to the allegations set forth in Paragraphs 73 and 74 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations

contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

37. This Defendant denies the allegations set forth in Paragraphs 75, 76, 77, and 78 of Plaintiff's Complaint and strict proof is demanded thereof.

38. The allegations set forth in Paragraph 79 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

39. Responding to the allegations set forth in Paragraphs 80, 81, 82, 83, 84, 85, and 86 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

40. This Defendant denies the allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint as stated and demands strict proof thereof. Instead, this Defendant affirmatively asserts it has the sole duty to provide skilled nursing care at the facility in compliance with the standard of care in regards to the areas set forth in the above Paragraphs. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the governing

standard of care, specifically in regards to all areas set forth in the above Paragraphs. Answering further, this Defendant denies it is in a joint venture with the other Defendants.

41. This Defendant denies the allegations set forth in Paragraph 89 of Plaintiff's Complaint and demands strict proof thereof.

42. Responding to the allegations set forth in Paragraph 90 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

43. The allegations set forth in Paragraph 91 of Plaintiff's Complaint are pure legal conclusions and therefore no response is required. To the extent those allegations are directed at this Defendant and allege or imply liability as to this Defendant, they are denied.

44. This Defendant denies the allegations set forth in Paragraphs 92, 93, 94, 95, 96, and 97 of Plaintiff's Complaint and strict proof is demanded thereof. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

45. Responding to the "allegations" set forth in Paragraphs 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, and 119 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing

facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

46. This Defendant denies the allegations set forth in Paragraphs 120 and 121 of Plaintiff's Complaint as stated and demands strict proof thereof. Instead, this Defendant affirmatively asserts it has the sole duty to provide skilled nursing care at the facility in compliance with the standard of care in regards to the areas set forth in the above Paragraphs. Further responding, this Defendant would affirmatively assert that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the governing standard of care, specifically in regards to all areas set forth in the above Paragraph.

47. Responding to the allegations set forth in Paragraphs 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, and 169 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no



response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

48. This Defendant denies the allegations set forth in Paragraphs 170, 171, 172, 173, 174, 175, 176, and 177 of Plaintiff's Complaint and demands strict proof thereof.

49. This Defendant denies the allegations set forth in Paragraphs 178 and 179 of Plaintiff's Complaint as stated and demands strict proof thereof. To the extent the allegations in the above Paragraphs are directed at parties other than this Defendant, they are denied.

50. The allegations set forth in Paragraph 180 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant can neither confirm nor deny those allegations. Nevertheless, this Defendant denies those allegations to the extent the allege liability or damages against this Defendant.

51. Responding to the allegations set forth in Paragraphs 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, and 214 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

52. Responding to Paragraph 215 of Plaintiff's Complaint, this Defendant craves reference to the policy cited by Plaintiff for its contents. This Defendant denies any and all allegations inconsistent with those contents or intended to allege liability or damages against this Defendant.

53. Responding to the allegations set forth in Paragraphs 216 and 217 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

54. Responding to the allegations set forth in Paragraph 218 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

55. Responding to the allegations set forth in Paragraphs 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, and 241 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of a skilled nursing

facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

56. This Defendant denies the allegations set forth in Paragraphs 242, 243, 244, and 245 of Plaintiff's Complaint and demands strict proof thereof. This Defendant further asserts that the care and treatment provided to Ms. Royston during her residency was at all times in compliance with the governing standard of care.

57. Responding to the allegations set forth in Paragraph 246 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

58. This Defendant denies the allegations set forth in Paragraphs 247 of Plaintiff's Complaint and demands strict proof thereof.

59. Responding to the allegations set forth in Paragraphs 248, 249, 250, 251, 252, and 253 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant

affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

60. This Defendant denies the allegations set forth in Paragraphs 254, 255, 256, 257, and 258 of Plaintiff's Complaint and demands strict proof thereof.

61. Responding the allegations in Paragraph 259 of Plaintiff's Complaint, this Defendant affirmatively states that it solely represents it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant further asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

62. Responding to the allegations set forth in Paragraph 260 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

63. This Defendant denies the allegations set forth in Paragraphs 261 and 262 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations in the above Paragraph are directed at other parties, no response is required.

64. Responding to the allegations set forth in Paragraph 263 of Plaintiff's Complaint, this Defendant admits Ms. Royston was under the skilled nursing care and treatment of the facility during her residency. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

65. This Defendant denies the allegations set forth in Paragraphs 264, 265, 266, 267, 268, 269, and 270 of Plaintiff's Complaint and demands strict proof thereof. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

66. Responding to the allegations set forth in Paragraph 271 of Plaintiff's Complaint, this Defendant admits it had the sole duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

67. Responding to Paragraph 272 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

68. Responding to the allegations set forth in Paragraph 273 of Plaintiff's Complaint, this Defendant admits it had the sole duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

69. This Defendant denies the allegations set forth in Paragraphs 274, 275, 276, and 277 of Plaintiff's Complaint, including all subparts, and strict proof is demanded thereof.

70. Responding to Paragraph 278 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

71. Responding to the allegations set forth in Paragraph 279 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Royston in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. To the extent the allegations in the above Paragraph are directed at parties other than this Defendant, no response is required.

72. This Defendant denies the allegations set forth in Paragraphs 280, 281, 282, 283, and 284 of Plaintiff's Complaint, including all subparts, and strict proof is demanded thereof.

73. Responding to Paragraph 285 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

74. The allegations set forth in Paragraphs 286, 287, and 288 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations assert or imply liability as to this Defendant, they are denied.

75. This Defendant denies the allegations set forth in Paragraph 289 of Plaintiff's Complaint as stated and demands strict proof thereof.

76. Responding to Paragraph 290 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

77. To the extent they are directed at this Defendant, the allegations set forth in Paragraph 291 of Plaintiff's Complaint are denied and strict proof is demanded thereof.

78. The allegations set forth in Paragraph 292 of Plaintiff's Complaint are unintelligible as drafted and therefore this Defendant cannot reasonably be required to formulate a response. Nevertheless, this Defendant denies those allegations to the extent they allege liability or damages against this Defendant.

79. This Defendant denies the allegations set forth in Paragraph 293 of Plaintiff's Complaint and demands strict proof thereof.

80. Responding to Paragraph 294 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

81. This Defendant denies the allegations set forth in Paragraphs 295 and 296 of Plaintiff's Complaint and demands strict proof thereof.

82. The allegations set forth in Paragraph 297 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations indirectly assert or imply liability as to this Defendant, they are denied.

83. This Defendant denies the allegations set forth in Paragraphs 298 and 299 of Plaintiff's Complaint as stated and demands strict proof thereof.

84. Responding to Paragraph 300 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

85. The allegations set forth in Paragraphs 301 and 302 of Plaintiff's Complaint are pure legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

86. This Defendant denies the allegations set forth in Paragraphs 303, 304, 305, 306, 307, 308, 309, and 310 of Plaintiff's Complaint and demands strict proof thereof. Further, this Defendant affirmatively asserts that the care and treatment provided to Ms. Royston was the sole responsibility of this Defendant, who was at all times operating in compliance with the applicable standard of care.

87. Responding to Paragraph 311 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

88. This Defendant denies the allegations set forth in Paragraphs 312, 313, and 314 of Plaintiff's Complaint and demands strict proof thereof.

89. This Defendant denies the allegations set forth in Plaintiff's Prayer for Relief.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**



90. This Court lacks jurisdiction over this Defendant pursuant to Rule 12(b)(2) of the South Carolina Rules of Civil Procedure and S.C. Code Ann. § 36-2-803. Accordingly, Plaintiff's claims against this Defendant must be dismissed.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

91. Plaintiff's claim for punitive damages and an award of punitive damages would violate those clauses of the Constitutions of the United States and South Carolina related to privileges and immunities, due process and equal protection and this Defendant would further assert the protections, defenses, and statutory rights set forth in S.C. Code Ann. § 15-32-510, *et seq.*

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

92. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure 12(b)(6).

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

93. Plaintiff's right to a recovery in this matter, if any, is limited by and subject to the provisions of the South Carolina Noneconomic Damages Awards Act of 2005 which is codified at SC Code §15-32-200 *et seq.*, which is pled as a limitation or partial bar to the Plaintiff's claims and alleged damages.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

94. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act,

Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not limited to §15-38-15; §15-32-200 *et. seq.*; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

95. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties and/or other parties to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

96. This Defendant would assert that some, or all, of the standards alleged by the Plaintiff do not create a standard of care applicable to Plaintiff's claims or private right of action in this matter.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

97. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

98. Some or all of the Plaintiff's claims are barred by the applicable Statute of Limitations.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

99. To the extent this Defendant is required to raise the affirmative defense of comparative negligence under applicable South Carolina law in order to avoid an argument of waiver by Plaintiff, this Defendant would assert Plaintiff's damages, if any, should be

proportionately barred or reduced under the doctrine of comparative fault if such evidence is found as the case proceeds.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

100. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims she alleges.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

101. The care and treatment provided to Plaintiff provided by this Defendant was at all times in compliance with the governing standard of care.

**FURTHER ANSWERING AND FOR A FURTHER AFFIRMATIVE DEFENSE**

102. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend its Answer to assert any such defenses. Furthermore, this Defendant hereby incorporates all defenses asserted by its Codefendants in this matter to the extent they are applicable.

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[signature block on following page]

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; gdotterer@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: March 6, 2019

|                                 |   |                                       |
|---------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS          |
|                                 | ) |                                       |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT           |
|                                 | ) |                                       |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473             |
| ROYSTON, BY AND THROUGH THE     | ) |                                       |
| APPOINTED PERSONAL              | ) |                                       |
| REPRESENTATIVE MARIANNE         | ) |                                       |
| MCCOIG, AND ON BEHALF OF THE    | ) |                                       |
| STATUTORY BENEFICIARIES,        | ) |                                       |
|                                 | ) |                                       |
| PLAINTIFFS,                     | ) |                                       |
|                                 | ) |                                       |
| vs.                             | ) |                                       |
|                                 | ) |                                       |
| HUNT VALLEY HOLDINGS, LLC       | ) | <b>DEFENDANT THI OF SOUTH</b>         |
| A/K/A FUNDAMENTAL LONG TERM     | ) | <b>CAROLINA AT MAGNOLIA PLACE AT</b>  |
| CARE HOLDINGS, LLC;             | ) | <b>GREENVILLE, LLC D/B/A MAGNOLIA</b> |
| FUNDAMENTAL CLINICAL AND        | ) | <b>PLACE-GREENVILLE'S MOTION FOR</b>  |
| OPERATIONAL SERVICES, LLC;      | ) | <b>PROTECTIVE ORDER</b>               |
| FUNDAMENTAL ADMINISTRATIVE      | ) |                                       |
| SERVICES, LLC; AND THI OF SOUTH | ) |                                       |
| CAROLINA AT MAGNOLIA PLACE      | ) |                                       |
| AT GREENVILLE, LLC D/B/A        | ) |                                       |
| MAGNOLIA PLACE-GREENVILLE,      | ) |                                       |
|                                 | ) |                                       |
| DEFENDANTS.                     | ) |                                       |

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

YOU WILL PLEASE TAKE NOTICE that Defendant THI of South Carolina at Magnolia Place at Greenville, LLC, (hereinafter the "Facility Defendant", "Facility" , or this "Defendant") by and through its undersigned attorneys, will move as soon hereafter as counsel can be heard, before the presiding Judge for the Court of Common Pleas for Greenville County, for a protective order under South Carolina Rules of Civil Procedure 26(c) preventing this Defendant from being required to respond to any further discovery requests until the Court rules on this Defendant's Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings. The instant motion is based on the following:

**DEFENDANT'S  
EXHIBIT**

F

1. On May 6, 2019, Plaintiff served this Defendant with discovery requests.

2. On June 19, 2019, Plaintiff filed a Motion to Compel Discovery against this Defendant.

3. On June 25, 2019 the parties held a Meet and Confer to address the scope of Plaintiff's requests and to decide on a mutually agreeable confidentiality order.

4. While at the Meet and Confer and almost five months after the Plaintiff filed her Complaint, Plaintiff's counsel produced for the first time an Arbitration Agreement that was signed by the Plaintiff upon her admission to the Facility Defendant's skilled nursing facility. Previously, this Defendant had not been able to locate the signed Arbitration Agreement.

5. On July 26, 2019 the Facility Defendant filed a Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings and requested that the Court stay any obligation to respond to any discovery requests while the Motion is pending. Until the Court decides the threshold jurisdictional issue of whether to compel this matter to arbitration, this Defendant requests protection from participating in any further discovery.

6. Plaintiff's Motion to Compel Discovery has been reset for a hearing for August 29, 2019.

For all of these reasons, this Defendant would respectfully request that this Honorable Court grant its motion for a protective order staying any requirement to respond to further discovery until the Facility Defendant's Motion to Dismiss, Compel Arbitration, and Stay Court proceedings is resolved.

This motion may be followed by a memorandum of law.

[Signature block on the following page]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

Gaillard T. Dotterer, III

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: August 15, 2019

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF CHARLESTON ) NINTH JUDICIAL CIRCUIT  
STEPHANIE JENKINS-FLEMMINGS ) CASE NO. 2017-CP-10-2964  
AS GUARDIAN AD LITEM FOR  
STEVIN JENKINS,

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.

**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

**DEFENDANT'S  
EXHIBIT**

G



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.<sup>1</sup>

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

---

<sup>1</sup> 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.

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

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

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

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*, 531 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.

"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.

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.

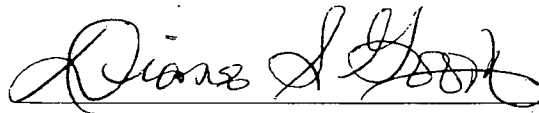
Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case as Plaintiff must still show that the "terms [of the agreement] are so oppressive that no reasonable person would make them 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





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

ELECTRONICALLY FILED - 2019 Aug 28 4:19 PM - GREENVILLE - COMMON PLEAS - CASE#2019CP2300473

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SPARTANBURG ) SEVENTH JUDICIAL CIRCUIT  
ROBERT ABRAMS, ) CASE NO. 2010-CP-42-6861  
PLAINTIFF, )  
vs. )  
FUNDAMENTAL LONG-TERM CARE )  
HOLDINGS, LLC D/B/A MAGNOLIA )  
MANOR-INMAN; THI OF SOUTH )  
CAROLINA AT MAGNOLIA MANOR- )  
INMAN, LLC D/B/A MAGNOLIA )  
MANOR-INMAN; ROBERT CROOKS; )  
DALE LYLES; AND CAROL CLARK, )  
DEFENDANTS. )

ORDER

Date of Hearing: July 21, 2011  
Date of Re-hearing: March 13, 2012  
Attorneys for Plaintiff: Gary W. Poliakoff and Raymond P. Mullman, Jr.  
Attorneys for Defendant: Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark, and a Motion to Stay on behalf of Defendant Fundamental Long-Term Care Holdings, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has sued Defendants for Negligence, Negligence per Se, Intentional and Negligent Infliction of Emotional Distress, Breach of Fiduciary Duty and

DEFENDANT'S  
EXHIBIT

H

pursuant to the Plaintiff's residency at the Magnolia Manor-Inman nursing facility. Plaintiff was a resident of the Magnolia Manor-Inman facility from approximately November 23, 2008, to January 23, 2009. Pursuant to Plaintiff's admission to Magnolia Manor-Inman, his wife Rebecca Abrams, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement.

The Arbitration Agreement defines Magnolia Manor-Inman as the "Health Care Center," Robert J. Abrams as the "Resident" and Rebecca Abrams as "Representative." Mot. Exh. A. The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, 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.

Id. The Arbitration Agreement further states that:

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.

Id. Regarding Rebecca Abrams authority to sign on behalf of her husband, the Arbitration Agreement states:

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.

The Arbitration Agreement was executed by Rebecca Abrams as "Representative" and the admissions director at Magnolia Manor-Inman as the "Authorized Agent for Healthcare Center."



## II. DISCUSSION

### A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause."); 9 U.S.C. §2. The Court must "decide whether there is an agreement to arbitrate according to common law principles of contract law" and "apply ordinary state-law principles that govern the formation of contract." Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). "The policy of the United States and this State is to favor arbitration of disputes." Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). "[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the "scope of arbitrable issues" should be resolved in favor of arbitration.

*PSL*  
*07*

FILED  
2019 AUG 28 AM 11:47  
CLERK OF COURT  
JOHN J. COOPER, JR.  
CLERK OF COURT

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a "broad principle of enforceability;" arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are "placed upon the same footing as other contracts." Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party's request to arbitrate an issue "unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

#### **B. Application of the FAA**

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed

to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.” Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties’ transaction and relationship in fact involve interstate commerce. As required, this court has “examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA].” Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). “[T]he FAA applies in federal and 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, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate

commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005)(noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Manor-Inman’s Administrator, Dale Lyles, submitted an affidavit wherein he attested that medical supplies used in the care of residents and personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. D. These supplies must be shipped across state lines to reach Magnolia Manor-Inman’s facility. Dale Lyles further attested that part of Mr. Abrams stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility’s bank accounts which are also outside of South Carolina. Id. These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that

"[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." Id., 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mot. Exh. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037 (2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"- that is, "within the flow of interstate commerce," . . . [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a "substantial effect on interstate commerce." **Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice ... subject to federal control." Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

FILED  
CLERK OF COURT  
2019 JUL 25 AM 11:47  
GREENVILLE



The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

### C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Manor-Inman.

#### 1. Equitable Estoppel

Magnolia Manor-Inman argues the Plaintiff should be equitably stopped from denying that Rebecca Abrams had authority to bind Robert Abrams.

"[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("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.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) ("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

FILED  
CLERK OF COURT  
2019 AUG 28 AM 11:47

instruments together. The theory is that the instruments are effectively one instrument or contract.”).

Plaintiff admits he was a resident of Magnolia Manor-Inman pursuant to the terms of the Admissions Agreement. (See Complaint ¶34: Plaintiff states he “resided at the [] facility pursuant to the terms of the admissions agreement.”) Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Rebecca Abrams had authority to sign the Admissions Agreement on behalf of Robert Abrams, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court’s denial of the defendant’s motion to compel arbitration, the Court stated:

The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

2012 JUN 25 AM 11:47

CLERK OF COURT  
GREENVILLE  
COMMON PLEAS

*Post*  
19

substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.

Id. (Emphasis added.) (Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

## 2. Third Party Beneficiary

Magnolia Manor-Inman alternatively argues that Robert Abrams is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-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. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

*Pls*  
p/0

FILED  
CLERK OF COURT  
JAN 25 AM 11:48

Robert Abrams' care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Robert Abrams as resident of the facility, and Magnolia Manor-Inman as the caregiver. As such, Robert Abrams was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNCS Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

### 3. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms). In

FILED  
CLERK OF COURT  
2019 JUN 25 AM 11:48  
GREENVILLE  
SOUTH CAROLINA

addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

In determining whether a contract was "tainted by an absence of meaningful choice," 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.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the

2019 JUL 25 AM 11:48  
 CLERK OF COURT  
 GREENVILLE, SC

aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Rebecca Abrams does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Abrams in arbitration, and as such Robert Abrams is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Rebecca Abrams was bound to read, indicate she understood and agreed that she was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Manor-Inman alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

#### 4. Federal Statutes and Regulations Governing Medicare and/or Medicaid

Abrams' further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of other consideration as a precondition of admission." This argument too is unpersuasive.

In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

##### 5. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include "any controversy or dispute . . . relating in any way to Resident's stay at Health Care Center, or to the provisions of

*Pl*  
p. 14

2019 AUG 28 4:19 PM  
CLERK OF COURT  
GREENVILLE, OHIO

care or services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . .” Mot. Exh. A. Furthermore, the FAA’s “text includes no exception for personal-injury [] claims” but rather “requires courts to enforce the bargain of the parties to arbitrate.” Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff’s Complaint fall under the terms of the Arbitration Agreement.

#### **6. Defendants have not Waived their Right to Arbitrate**

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff’s Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

#### **D. Defendants Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark Have Standing to Assert Arbitration**

The express written language of the Arbitration Agreement indicates the following:

This Agreement is made between Magnolia Manor-Inman (“Health Care Center”), its agents, employees and servants, and Robert J. Abrams (“Resident”) or Rebecca Abrams [as “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.

Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Dale Lyles and Carol Clark were members of Magnolia Manor-



Inman's governing body. Further, it appears Dale Lyles was the facility administrator and Carol Clark was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Dale Lyles and Carol Clark are all agents of Magnolia Manor-Inman pursuant to their roles as members of the governing body. Further, Dale Lyles and Carol Clark are employees of Magnolia Manor-Inman. As such, each individual has a right to assert the terms of the Arbitration Agreement.

### III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark. The Court **STAYS** the matter as to the remaining Defendant, Fundamental Long-Term Care Holding, LLC, until the arbitration process has been completed. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

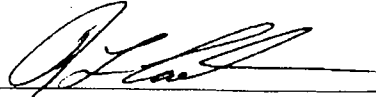
It is therefore

**ORDERED** that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman, Robert Crooks, Dale Lyles and Carol Clark are **GRANTED** and the matter is **STAYED** for the remaining Defendant until arbitration has been completed.

*PSL*  
8/16

CLERK OF COURT  
2019 JUN 25 AM 11:48

IT IS SO ORDERED.



Honorable Roger L. Couch  
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

*Roll P.17  
10-CP-42-6861  
6/22/12*

CLERK OF COURT  
SPARTANBURG COUNTY  
2012 JUN 25 AM 11:48

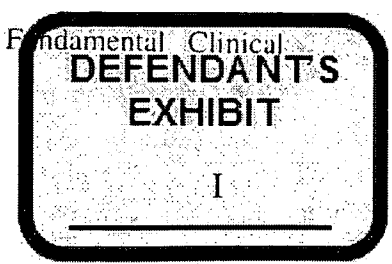
STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SPARTANBURG ) SEVENTH JUDICIAL CIRCUIT  
FRANK A. CAMPSBY AND ) CASE NO. 2011-CP-42-0438  
THROUGH HIS ATTORNEY-IN-FACT )  
LARRY F. CAMPSBY, )  
PLAINTIFFS, )  
VS. )  
FUNDAMENTAL LONG-TERM CARE )  
HOLDINGS, LLC; FUNDAMENTAL )  
CLINICAL CONSULTING, LLC; )  
FUNDAMENTAL ADMINISTRATIVE )  
SERVICES, LLC; THI OF BALTIMORE, )  
INC.; THI OF SOUTH CAROLINA, )  
LLC; THI OF SOUTH CAROLINA AT )  
MAGNOLIA PLACE AT )  
SPARTANBURG, LLC D/B/A )  
MAGNOLIA PLACE AT )  
SPARTANBURG; EDWARD WARREN, )  
MD; NETWORK GERIATRICS )  
SERVICES, P.A.; ROBERT CROOKS; )  
PATRICIA HARRIS; AND MARGARET )  
KELLER, )  
DEFENDANTS. )

ORDER

CLERK OF COURT  
SPARTANBURG COUNTY  
2019 JUL 25 AM 11:48

Date of Hearing: July 21, 2011  
Date of Re-hearing: March 13, 2012  
Attorneys for Plaintiff: Gary W. Poliakoff and Raymond P. Mullman, Jr.  
Attorneys for Defendant: Lori Proctor

This matter is before the Court on Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg ("Magnolia Place"), Robert Crooks, Patricia Harris and Margaret Keller, and Motions to Stay on behalf of Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical



Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court denied these motions by Order dated August 25, 2011, after a hearing on July 21, 2011. Defendants filed a Motion to Alter, Amend or Reconsider the August 25, 2011 Order. For the reasons set forth below, the Court vacates the August 25, 2011 Order and grants Defendants' motions.

# **I. FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff has sued Defendants for Negligence, Negligence per Se, Breach of Fiduciary Duty and Unjust Enrichment, pursuant to Frank A. Campsen's residency at the Magnolia Place nursing facility. Mr. Campsen was a resident of the Magnolia Place facility from approximately October 21, 2009, to December 20, 2009. Pursuant to Mr. Campsen's admission to Magnolia Place, Larry F. Campsen, acting as his representative, executed an Admissions Agreement and an Arbitration Agreement. Frank Campsen had previously designated Larry F. Campsen as his General Durable Power of Attorney and Healthcare Power of Attorney, and given him authority to enter into agreements on his behalf. Mtn. Exh. D.

The Arbitration Agreement defines Magnolia Place as the "Facility," Frank A. Campsen as the "Resident" and Larry Campsen as "Resident's Durable Power of Attorney for Healthcare" and "Representative." *Id.* The relevant provisions of the Arbitration Agreement state the following:

It is further understood that in the event of any controversy or dispute . . . 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.

*Id.* The Arbitration Agreement further states that:

FILED  
CLERK OF COURT  
2019 AUG 28 AM 11:48  
GREENVILLE, SOUTH CAROLINA

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.

Id. Regarding Larry Campsen's authority to sign on behalf of Frank Campsen, the Arbitration Agreement states:

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.

The Arbitration Agreement clearly sets forth the parties to be bound by the Agreement:

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.

Id. The Arbitration Agreement was executed by Larry Campsen as "Representative" of Frank Campsen and by the "Authorized Agent of Facility."

## II. DISCUSSION

### A. Arbitration Under the Federal Arbitration Act

Defendants move for arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. The FAA and its expression of the federal policy favoring arbitration are binding in state and federal courts. Zabinski v. Bright Acres Associates, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). Arbitration is available "only when the parties involved contractually agree to arbitrate." Towles v. United HealthCare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). (Citations omitted.). State law governs issues of contract formation. See Hill v. PeopleSoft USA, Inc., 412 F.3d 540, 543 (4th Cir. 2005); Davis v. KB Home of S. Carolina, Inc., 394 S.C. 116, 124, 713 S.E.2d 799, 803 (Ct. App. 2011)("[E]ven in cases where the FAA otherwise applies, general contract principles of state law apply in a court's evaluation of the enforceability

of an arbitration clause.”); 9 U.S.C. §2. The Court must “decide whether there is an agreement to arbitrate according to common law principles of contract law” and “apply ordinary state-law principles that govern the formation of contract.” Towles, 338 S.C. at 37, 524 S.E.2d at 844.

There is a “strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). “The policy of the United States and this State is to favor arbitration of disputes.” Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). “[T]he heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co., 867 F.2d 809, 812 (4th Cir. 1989). Any doubts concerning the “scope of arbitrable issues” should be resolved in favor of arbitration. Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S. Ct. 927, 941 (1983).

The FAA establishes a “broad principle of enforceability;” arbitration agreements must not be singled out for suspect status, but rather it is required that arbitration provisions are “placed upon the same footing as other contracts.” Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 682, 684-85, 116 S. Ct. 1652, 1653, 1655 (1996).

Thus, the court may not deny a party’s request to arbitrate an issue “unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute.” Towles, 338 S.C. at 41-42, 524 S.E.2d at 846 (Ct. App. 1999).

*ASL*  
04

FILED  
CLERK OF COURT  
SPRING - 2019  
2019 JUN 25 AM 11:48

## B. Application of the FAA

Plaintiff argues that the South Carolina Uniform Arbitration Act applies to the Arbitration Agreement and that the FAA does not apply to the Arbitration Agreement because the parties' agreement does not touch on interstate commerce.

The FAA will govern the enforcement of an arbitration agreement when a contract provides that it shall be governed by the FAA. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 363-364 (2001); Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248 (1989). "Arbitration agreements, like other contracts, are enforceable in accordance with their terms." Id. Clearly, the parties here have agreed that the Arbitration Agreement will be governed by the FAA.

Because the FAA applies, the requirements as set forth under the South Carolina Uniform Arbitration Act, ("SCUAA") S.C. Code §15-48-10 et seq., are not applicable. In passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration . . . Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." Perry v. Thomas, 482 U.S. 483, 489, 107 S. Ct. 2520, 2525 (1987). Therefore, the FAA supersedes state acts governing arbitration agreements, including the SCUAA, in situations such as the case here.

Furthermore, the parties' transaction and relationship in fact involve interstate commerce. As required, this court has "examine[d] the agreement, the complaint, and the facts to ascertain whether the transaction is one involving commerce within the meaning of the [the FAA] Mathews v. Fluor Corp., 312 S.C. 404, 407, 440 S.E.2d 880, 881 (1994). "[T]he FAA applies in federal and state court to any arbitration agreement regarding a transaction that in fact involves

FILED  
CLERK OF COURT  
2019 AUG 28 AM 11:48  
GREENVILLE, SC

interstate commerce, regardless of whether or not the parties contemplated an interstate transaction.” Munoz, 343 S.C. at 538-539, 542 S.E.2d at 363, citing Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265, 115 S. Ct. 834 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996). “The FAA has an expansive reach, similar to that of the Commerce Clause, such that an arbitration clause merely ‘affecting’ interstate commerce would be covered by the statute.” THI of S. Carolina at Columbia, LLC v. Wiggins, 2011 WL 4089435 (D.S.C. 2011), citing Allied-Bruce, 513 U.S. 265, 273-74. “Congress’ Commerce Clause power may be exercised in individual cases without showing any specific effect upon interstate commerce if in the aggregate the economic activity in question would represent a general practice . . . subject to federal control.” Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56 (2003) (internal quotation marks omitted).

The Arbitration Agreement here clearly states that “the services and reimbursement thereof effects a transaction that involves interstate commerce.” Mot. Ex. A. Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce. Am. Gen. Life & Acc. Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (noting that courts must consider “the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce”). “Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001), citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). Even without this stipulation in the Arbitration Agreement, the FAA must apply because the type of nursing home care involved here affects interstate commerce. Magnolia Place’s Business Office Manager, Lynn Henderson, submitted an affidavit wherein she attested that medical supplies used in the care of residents and

FILED  
CLERK OF COURT  
2019 AUG 28 AM 11:48



personal supplies used at the facility come from outside the state of South Carolina. Mtn. Ex. F. These supplies must be shipped across state lines to reach Magnolia Place's facility. Timothy Johnson further attested that part of Mr. Campsen stay at the facility was paid for by the federal Medicare program; insurance companies outside of South Carolina electronically deposited payments in the facility's bank accounts which are also outside of South Carolina. *Id.* These are clear examples of interstate commerce.

Furthermore, arbitration agreements have consistently been interpreted under the FAA in similar nursing home negligence cases. See Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012); McCutcheon v. THI of S.C. at Charleston, LLC, 2011 WL 6318575 (D.S.C. 2011); Wiggins.

Plaintiff cites to Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642, (1993), as support for his argument that the transaction at issue does not involve interstate commerce as necessary to apply the FAA. In Timms, the administrator of a nursing home set forth via affidavit a number of factors indicating how the nursing home engaged in interstate commerce. The Court held that "[a]lthough these factors could evidence the [nursing home]'s involvement in interstate commerce, we find that their relationship to the agreement between the [nursing home] and the [plaintiff] is insufficient to form the basis of the contract between the parties." *Id.*, 310 S.C. at 473, 427 S.E.2d at 644. Timms is distinguishable from the present case for a number of reasons, namely that the parties here explicitly agreed that the FAA would apply and that "the services and reimbursement thereof effects a transaction in interstate commerce." Mtn. Ex. A. Furthermore, the reasoning used in Timms has been subsequently implicitly overruled by the United States Supreme Court. In Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 123 S. Ct. 2037

FILED  
CLERK OF COURT  
SPRINGFIELD  
2019 AUG 28 4:19 PM

*Handwritten signature*  
27

(2003), the Court discussed the relationship between the arbitration agreement and interstate commerce such as to require the application of the FAA. The Court held:

We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"- words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the [FAA] provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"- that is, "within the flow of interstate commerce," ... [A]pplication of the FAA [is not] defeated because the [the transactions at issue,] taken alone, did not have a "substantial effect on interstate commerce." **Congress' Commerce Clause power "may be exercised in individual cases without showing any specific effect upon interstate commerce" if in the aggregate the economic activity in question would represent "a general practice ... subject to federal control." Only that general practice need bear on interstate commerce in a substantial way.**

Id., 539 U.S. at 56-57, 123 S. Ct. at 2040. (Citations omitted.)(Emphasis added.) When determining effect on interstate commerce, it is the general practice, not the particular transaction at issue, which must be analyzed. Here, the nursing home at issue is clearly involved in interstate commerce, and provision of nursing home services effects interstate commerce in a substantial way. See Mot. Exh. D. As such, the Timms analysis of the interstate commerce question is effectively overruled, and must not be given credence by this Court.

The Court finds this evidence sufficient to fulfill the interstate commerce requirement.

### C. Existence of Enforceable Arbitration Agreement

Plaintiff denies the validity of the Arbitration Agreement with Magnolia Place.

#### 1. Larry Campsen As Personal Representative of the Estate of Frank Campsen

In pursuing this action, Larry Campsen acts as personal representative of Frank Campsen's estate. Under South Carolina law, "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." S.C.Code

Ann. § 62-3-703. Thus, Larry Campsen is bound in his capacity as personal representative if Frank Campsen would have been bound immediately prior to his death.

## 2. Equitable Estoppel

Magnolia Place argues the Plaintiff should be equitably stopped from denying that Larry Campsen had authority to bind Frank Campsen.

"[T]he doctrine of estoppel is equitable in nature." Ahrens v. State, 392 S.C. 340, 348, 709 S.E.2d 54, 58 (2011). "Equitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do." Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). "[N]o party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001); see Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 418 (4th Cir. 2000) (internal quotation marks omitted) ("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.").

Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were executed by the same parties, at the same time, and regarding the same transaction; therefore, the two instruments constitute the entire agreement between the parties and must be construed together. See Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88-89, 232 S.E.2d 20, 24, (1977) ("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

22  
29

FILED  
CLERK OF COURT  
2019 AUG 28 PM 11:48  
GREENVILLE, SC

instruments together. The theory is that the instruments are effectively one instrument or contract.”).

Plaintiff admits Frank Campsen was a resident of Magnolia Place pursuant to the terms of the Admissions Agreement. (See Amended Complaint ¶37: Plaintiff states Frank Campsen “resided at the [] facility pursuant to the terms of the admissions agreement.”) Yet Plaintiff simultaneously denies the enforceability of terms of the Arbitration Agreement. The Admissions Agreement and Arbitration Agreement must be construed as one agreement; Plaintiff cannot claim the benefits of one while denying the perceived burdens of the other.

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, Plaintiff still takes inconsistent positions regarding these contracts. It would be inequitable, for example, to allow Plaintiff to assert that Larry Campsen had authority to sign the Admissions Agreement on behalf of Frank Campsen, but lacked such authority to sign the Arbitration Agreement.

Plaintiff further argues that no cause of action for breach of contract has been pled, and thus the doctrine of equitable estoppel should not apply. However, the doctrine of equitable estoppel has a much broader application than suggested by Plaintiff. It is well settled that when a duty arises from contractual obligations, equitable estoppel may apply with equal effect to a related tort action. The Fourth Circuit Court of Appeals examined this exact issue in American Bankers Ins. Group v. Long, 453 F.3d 623 (4th Cir. 2006). In reversing the trial court’s denial of the defendant’s motion to compel arbitration, the Court stated:

The legal principle [underlying the theory of equitable estoppel] rests on a simple proposition: it is unfair for a party to rely on a contract when it works to its advantage, and repudiate it when it works to its disadvantage. To be equitably estopped from denying the applicability of an arbitration clause, therefore, the [plaintiff] need not necessarily assert a cause of action for breach of contract containing the arbitration clause. Instead, **estoppel is appropriate if in**

2017 JUN 25 AM 11:48

CLERK OF COURT  
SHARON L. COVATTA

substance the [plaintiff]'s complaint [is] based on the [defendant's] alleged breach of the obligations and duties assigned to it in the agreement, regardless of the legal label assigned to the claim.

Id. (Emphasis added.)(Internal citations omitted.) South Carolina District Courts have continually endorsed this precise proposition as well. See Thomas v. Matrix Sys. Auto. Finishers, LLC, 2010 WL 147956, at 8 (D.S.C. 2010); Wiggins. Because Plaintiff's claim in substance is based on the breach of certain duties assigned the Defendants pursuant to their contractual agreements, equitable estoppel may be applied to prevent Plaintiff from denying the validity of the Arbitration Agreement.

For these reasons, the Court finds that Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

### 3. Third Party Beneficiary

Magnolia Place alternatively argues that Frank Campsen is a third-party beneficiary and is therefore bound by the Arbitration Agreement.

"A third party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). Moreover, "[w]ell-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. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416-417 (4th Cir. 2000).

*File  
p 11*

FILED  
CLERK OF COURT  
22 JUN 25 AM 11:48  
GREENVILLE, SC

Frank Campsen's care was the essential purpose of the parties' agreement, as he is named in both the Arbitration Agreement and the Admissions Agreement as the resident to be admitted into the facility. Further, the terms of both agreements refer to the rights and obligations of Frank Campsen as resident of the facility, and Magnolia Place as the caregiver. As such, Frank Campsen was an intended beneficiary to the contract, and the Court finds that the arbitration provision is binding on him. See Wiggins ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); Cook v. GGNSC Ripley, LLC, 786 F. Supp. 2d 1166, 1172 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care bound third-party beneficiary and her estate).

#### 4. Unconscionability

Plaintiff further argues the Arbitration Agreement is invalid because it is unconscionable.

"[A]n adhesion contract is not per se unconscionable." Munoz, 343 S.C. at 541, 542 S.E.2d at 365. "Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996). "Further, a person who can read is bound to read an agreement before signing it." Munoz, 343 S.C. at 541, 542 S.E.2d at 365 (holding that arbitration provision was not unconscionable even though plaintiffs did not read it and were not advised of those terms. In

*Reel*  
*012*

FILED  
CLERK OF COURT  
2019 JUL 25 AM 11:48  
GREENVILLE, SC

addition, "inequality of bargaining power alone will not invalidate an arbitration agreement." Id. at n.5.

In Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, (2007), our Supreme Court held that:

In determining whether a contract was "tainted by an absence of meaningful choice," 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.

373 S.C. at 25, 644 S.E.2d at 669 (citation omitted).

"[W]here the contract is subject to the FAA, this court must defer to that legislative policy and may not view arbitration as an inherently less beneficial form of dispute resolution." Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 400, 498 S.E.2d 898, 905 (Ct. App. 1998). In addition, "a party desiring to avoid an arbitration clause on the grounds that no reasonable person would have agreed to it merely because it precludes judicial remedies must demonstrate how he or she has been prejudiced by compelled arbitration. This requires, at the least, identification of judicial relief not available in arbitration." Id. "The loss of the right to a jury trial is an obvious result of arbitration." Simpson, 373 S.C. at 27, 644 S.E.2d at 670 (holding that arbitration clause was unconscionable because in addition to "the inconspicuous nature of [the] provision, which was drafted by the superior party," the provision "also required Simpson to forego certain [significant] remedies that were otherwise required by statute").

The Arbitration Agreement clearly states that the party entering into the Agreement is fully aware of his healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the

FILED  
CLERK OF COURT  
2019 JUN 25 11:48  
GREENVILLE COUNTY

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.

Mot. Exh. A. Furthermore, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" Mot. Exh. A (Emphasis in Original.).

Any lack of sophistication on the part of Larry Campsen does not overcome the fairness of the terms in the agreement itself. See Munoz. All judicial remedies available in a jury trial are available to Plaintiff in arbitration, and as such Plaintiff is not prejudiced by enforcement of the Arbitration Agreement. Furthermore, the express terms of the Arbitration Agreement, which Larry Campsen was bound to read, indicate he understood and agreed that he was giving up the right to a jury trial. There is no fine print or convoluted language here; the Arbitration Agreement is fair, clear and unambiguous.

Further, the Arbitration Agreement does not create any unfair process for selection of arbitrators, such as requiring that the arbitrators be chosen from a list created by Magnolia Place alone. Cf. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999). The Arbitration Agreement is not unconscionable, as it applies equally to both the resident and the facility. Each party is given equal rights to seek arbitration of disputes.

For these reasons, the court finds that the Arbitration Agreement is not unconscionable.

##### **5. Federal Statutes and Regulations Governing Medicare and/or Medicaid**

Plaintiff further argues that the Arbitration Agreement is not enforceable because it amounts to an additional charge for admission into the facility pursuant to 42 U.S.C. §1396r(c)(5)(A)(iii) and 42 C.F.R. §483.12(d)(3), which prohibit the requirement of other consideration as a precondition of admission." This argument too is unpersuasive.

FILED  
CLERK OF COURT  
2019 AUG 25 AM 11:48



In Sanford v. Castleton Health Care Ctr., LLC, 813 N.E.2d 411, 419 (Ind. Ct. App. 2004), the Indiana Court of Appeals noted that requiring a nursing-home admittee to sign an arbitration agreement is not akin to charging an additional fee or other consideration as a prerequisite of admittance. Rather, an arbitration agreement merely establishes a forum for future disputes; both parties are bound to it and both parties receive whatever benefits and detriments accompany the arbitral forum. Id.; Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983, 989 (Ala. 2004) (finding that the argument that arbitration agreement violated 42 U.S.C. §1396r(c)(5)(A)(iii) prohibition of "other consideration" failed and noting that "[i]f we were to agree with Owens, virtually any contract term Owens decided she did not like could be construed as requiring other consideration in order to gain admittance to the nursing home and thus be disallowed by the statute); Owens v. Nat. Health Corp., 263 S.W.3d 876, 887 (Tenn. 2007) (finding no violation); Broughsville v. OHECC, LLC, 2005 WL 3483777 (Ohio Ct. App. 2005) (unpublished); Gainesville Health Care Ctr., Inc. v. Weston, 857 So.2d 278, 288 (Fla. Ct. App. 1 Dist. 2003) ("We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation."). The Court agrees with the reasoning in the above cited cases and finds that 42 U.S.C. § 1396r(c)(5)(A)(iii) and 42 C.F.R. § 483.12(d)(3) are not intended to apply to this case and further, that an arbitration agreement is not considered an additional charge as contemplated therein.

#### 6. Plaintiff's Claims Fall within the Scope of the Arbitration Agreement

Plaintiff further argues that his claims do not fall within the scope of the Arbitration Agreement. However, the Arbitration Agreement is broadly worded to include "any controversy or dispute . . . relating in any way to Resident's stay at Facility, or to the provisions of care or

FILED  
CLERK OF COURT  
2019 JUN 25 PM 11:48  
GREENVILLE

services to Resident, including but not limited to any alleged tort, personal injury, negligence or other claim . . .” Mot. Exh. A. Furthermore, the FAA’s “text includes no exception for personal-injury [] claims” but rather “requires courts to enforce the bargain of the parties to arbitrate.” Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203 (2012). Clearly the disputes raised in Plaintiff’s Amended Complaint fall under the terms of the Arbitration Agreement.

#### **7. Defendants have not Waived their Right to Arbitrate**

Plaintiff further argues Defendants have by their conduct nullified the Arbitration Agreement and waived their right to Arbitrate. Defendants filed their Motion to Dismiss and Petition to Compel Arbitration at their first opportunity for a responsive pleading i.e. at the same time as answering the Plaintiff’s Complaint. No action was pending against the Defendants prior to Plaintiff filing his Complaint, and as such no assertion of the right to arbitration was required and no possibility of waiver existed. Defendants have not waived or abandoned their right to enforce a proper arbitration agreement.

#### **D. Defendants Magnolia Place, Robert Crooks, Patricia Harris and Margaret Keller Have Standing to Assert Arbitration**

The express written language of the Arbitration Agreement indicates the following:

This Agreement is made between Magnolia Place at Spartanburg (“Facility”); its agents, employees and servants, and Frank A. Campsen (“Resident”) or Larry Campsen [as “Resident’s Durable Power of Attorney for Health Care” and “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.

2017 JUN 25 AM 11:48  
CLERK OF COURT  
GREENVILLE, SOUTH CAROLINA

Mot. Exh. A. It is well established that non-signatories have the right to enforce arbitration agreements in certain situations. See Am. Bankers Ins. Group, Inc. v. Long, 453 F.3d 623 (4th Cir. 2006). Robert Crooks, Patricia Harris and Margaret Keller were members of Magnolia Place’s governing body. Further, it appears Patricia Harris was the facility administrator and

Margaret Keller was the director of nursing at all times relevant to Plaintiff's claim. Plaintiff does not contest this. As such, Robert Crooks, Patricia Harris and Margaret Keller are all agents of Magnolia Place pursuant to their roles as members of the governing body for the purposes of the Arbitration Agreement. Further, Patricia Harris and Margaret Keller are employees of Magnolia Place for the purposes of the Arbitration Agreement. As such, each individual has a right to assert the terms of the Arbitration Agreement.

### III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller. The Court **STAYS** the matter as to the Defendants Fundamental Long-Term Care Holdings, LLC, Fundamental Administrative Services, LLC, Fundamental Clinical Consulting, LLC, THI of Baltimore, Inc. and THI of South Carolina, LLC. The Court retains jurisdiction of the matter as to the Dismissed Defendants only to the following extent: should the parties to the Arbitration Agreement be unable to select an arbitrator or unable to agree on one pursuant to the terms of the Arbitration Agreement, this Court retains jurisdiction of the matter to assist the parties in selecting an arbitrator.

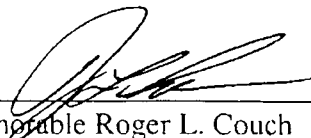
It is therefore

**ORDERED** that Motions to Dismiss and Petitions to Compel Arbitration on behalf of Defendants THI of South Carolina at Magnolia Place at Spartanburg, LLC d/b/a Magnolia Place at Spartanburg, Robert Crooks, Patricia Harris and Margaret Keller are **GRANTED** and the matter is **STAYED** for the remaining Defendants until arbitration has been completed.

*Handwritten signature*  
8/19

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2017 JUN 25 AM 11:49

IT IS SO ORDERED.

  
Honorable Roger L. Couch  
Presiding Judge Seventh Judicial Circuit

Spartanburg, South Carolina

Dated: 6/22/12

  
P 18  
11-CP-42-438  
6/22/12

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2012 JUN 25 AM 11:49

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG  
MACIE PRICE AS PERSONAL  
REPRESENTATIVE OF THE ESTATE  
OF MELVIN PRICE,

PLAINTIFF,

vs.

THI OF SOUTH CAROLINA AT  
MAGNOLIA MANOR INMAN, LLC  
D/B/A MAGNOLIA MANOR-INMAN;  
THI OF SOUTH CAROLINA, LLC;  
AND NAKEHYA STANTON AS  
OWNER/MANAGER OF MAGNOLIA  
MANOR SPARTANBURG,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

SEVENTH JUDICIAL CIRCUIT

CASE NO. 2018-CP-42-01054

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 13 AM 11:50  
M. HOPE BLACKLEY

**ORDER GRANTING DEFENDANT THI  
OF SOUTH CAROLINA AT MAGNOLIA  
MANOR-INMAN, LLC'S MOTION TO  
DISMISS AND COMPEL ARBITRATION**

This matter was before the Court on June 6, 2018 upon Defendant THI of South Carolina at Magnolia Manor-Inman, LLC d/b/a Magnolia Manor-Inman's ("Magnolia" or "Defendant Magnolia") Motion to Dismiss and Compel Arbitration. Counsel of record for all pertinent parties were present including Perry M. Buckner, IV for Defendant Magnolia and Stefan B. Fielder for the Plaintiff. Having reviewed the submissions by counsel and heard all arguments advanced, the Court hereby **GRANTS** Magnolia's Motion and orders that this matter be compelled to arbitration in accordance with the below findings.

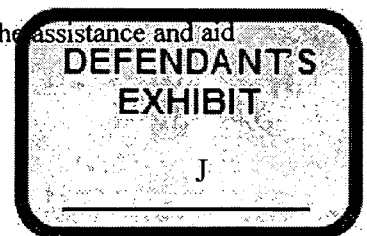
**FACTUAL BACKGROUND**

Plaintiff's decedent, Mr. Melvin Price, was admitted to Magnolia in February of 2015. Mr. Price was legally blind at the time of his admission with a history of multiple strokes and was recovering from a recent hospitalization. He was admitted to Magnolia with the assistance and aid

← SCANNED

Page 1 of 17

*[Signature]*



of his wife of nearly 50 years, the named Plaintiff, Mrs. Macie Price. Prior to his admission, Mr. Price entered into a number of contracts with Magnolia. The contracts were each signed by the Plaintiff, as representative of Mr. Price, on February 16, 2015. These executed contracts included an Admission Agreement and Arbitration Agreement. Based on the Admission Agreement and pursuant to the agreements set forth therein, Mr. Price was admitted to Magnolia Manor and received skilled nursing care and treatment. During his stay at Magnolia, Mr. Price accepted the benefits of the contracts entered into on his behalf by his representative, Macie Price. Such benefits included, but are not limited to, Mr. Price's admission to Magnolia and his receipt of the skilled nursing care provided therein. Mr. Price never challenged any agreement's validity during his lifetime nor did any representative challenge any agreement until the Arbitration Agreement was challenged by Plaintiff in response to the instant Motion. Notably, Plaintiff does not assert that the Admissions Agreement is invalid or that Mr. Price entered Magnolia unwillingly or without consent.

Upon admission, Mrs. Price explicitly represented that she was authorized to admit Mr. Price to Magnolia and execute necessary documents on his behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admissions Agreement states that all information provided, including her authority to bind her husband to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor as the "Facility," Mr. Price as the "Resident," and Mrs. Price as the "Representative." The relevant provisions of the Arbitration Agreement state the following:

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

Page 2 of 17

ROA 356

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.

Regarding Mrs. Price's authority to sign on behalf of her husband, the Arbitration Agreement states:

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.

The Arbitration Agreement was executed by Macie Price as "Representative" and Darlene Lindsay, the Admissions Director of the Facility, on behalf of Magnolia Manor. Because the acts complained of by the Plaintiff fall within the scope of the Arbitration Agreement, the Court finds that matter should be dismissed and compelled to arbitration.

#### LAW/ANALYSIS

#### **I. POLICY IN FAVOR OF ARBITRATION**

At the outset, this Court is mindful of the 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 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



FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2019 AUG 13 AM 11:50  
M. J. P. LACKEY

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).

## II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

This Court finds that the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014). 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. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. 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). “By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2019 AUG 13 AM 11:50  
M. HOPE BLACKLEY



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. 9 U.S.C. § 2. This Court finds that Defendant Magnolia has demonstrated both.

### III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

#### A. The Plain Language of the Agreement Binds Plaintiff

This Court finds that the Plaintiff represented herself to staff and admissions personnel Magnolia as her husband's representative, with the authority to sign documents on Mr. Price's behalf and bind Mr. Price and the Facility pursuant to those documents.<sup>1</sup> It was clearly Mrs. Price's intention to bind Mr. Price (and herself, as personal representative) according to the terms of the Admissions Agreement and Arbitration Agreement and Mr. Price evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

#### B. Plaintiff Possessed the Apparent and Inherent Authority to Bind Mr. Price under the Arbitration Agreement, and Plaintiff Should be Estopped from Denying the Validity of the Arbitration Agreement

##### a. Agency Relationship / Apparent Authority / Inherent Agency

A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "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 principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49,

<sup>1</sup> "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of Resident." (emphasis added).



748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006). "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 v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.)

This Court finds the records presented to it show that Plaintiff held herself out as an agent for her husband without any indication to the contrary. Under the record before this Court, an apparent agency relationship has been fairly demonstrated such that the Arbitration Agreement should be deemed enforceable. While Plaintiff's counsel has asserted that Mr. Price was capable of making his own decisions, no evidence was offered that Mr. Price objected or opposed the execution of any documents whatsoever. To the contrary, these facially valid contracts remained in effect for years without any formal or informal challenge by him or the Plaintiff. While the arbitration agreement is now being formally challenged, Mr. Price does not assert that the Admissions Agreement was invalid or that his wife lacked authority to admit him to Magnolia. *See, Dean v. Heritage Healthcare of Ridgeway, LLC*, 2014 WL 11802563, at \*4 (S.C. Com. Ct. September 8, 2014) ("To the extent the Plaintiff is correct that [the resident] had capacity to contract, I find that [the resident] gave apparent authority to her daughter to contract on her behalf or she ratified both contracts during her two and a half years residency."); *See also, Fuller v. Eastern Fire & Cas. Ins Co* 240 S.C. 75, 86, 124 S.E.2d 602, 608 (1962) (holding "[r]atification as it relates to the law of agency may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.").

Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct..." See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(abrogated on unrelated grounds)(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7<sup>th</sup> Cir. 1987)("[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.")(citing *Lumbermen's Mut. Ins. Co. v. Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7<sup>th</sup> Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as Magnolia, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether the Plaintiff was authorized to admit her husband to Magnolia. To the extent Plaintiff takes issue with her own authority to bind her husband to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit Mr. Price as a resident at Magnolia. Magnolia should not be disadvantaged for acting in accordance with the express representations of Plaintiff regarding her authority.

The Court finds *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007) as additional persuasive authority, as the facts are substantially similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. The arbitration agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf).

Applying *Carraway* to the instant facts, Plaintiff executed various admission documents on behalf of her husband including the Arbitration Agreement. She executed these documents in her capacity as "representative." Just as in *Carraway*, the Arbitration Agreement provides that

signing was on behalf of the resident. It was Magnolia's reasonable and justified belief that Mrs. Price was her husband's authorized representative and had the authority to execute the documents on his behalf.

**b. Agency by Estoppel**

"When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G*, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: "(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." *Boyd v. Bellsouth Tel. Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In the case at bar, Magnolia had no knowledge or reason to believe that Plaintiff was not Mr. Price's authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. Magnolia relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Defendant Magnolia for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this court such that the arbitration agreement is similarly enforceable.

*THU*

FILED  
CLERK OF COURT  
SPRINGFIELD COUNTY  
2019 AUG 13 AM 11:51  
HOF BLACKLEY

**C. The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration**

**a. Merger**

As additional grounds to compel arbitration, the Court finds the Admissions Agreement and Arbitration Agreement should be construed together and merged such that the Plaintiff is bound to arbitrate her claims against the Facility. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that "any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement . . . or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. This Court finds that the Arbitration Agreement and the Admission Agreement were both signed by Mrs. Price on behalf of her husband on the same day, at the same time, upon Mr. Price's admission to Magnolia.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when 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 generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro*



*Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord *Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

The United States District Court for the District of South Carolina in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011). Indeed, this very Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admissions agreement for purposes of equitable estoppel under precisely the same circumstances. See *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Accordingly, Mr. Price, by and through the acts of his representative, the Plaintiff and Magnolia, both contemplated that the terms of the agreement to admit Mr. Price were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Mr. Price's residency at Magnolia Place); the Arbitration Agreement and Admissions Agreement were

executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admissions Agreement should be construed as part and parcel of the same agreement between the parties.

**b. Equitable Estoppel of Merged Agreement**

This Court finds the doctrine of equitable estoppel applies to the instant case such that Plaintiff cannot dispute the validity of the Arbitration Agreement. "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." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlae'en GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). "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)).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel "exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision." *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that "no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein." *States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

"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*

*[Handwritten signature]*



*Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

[W]here ... 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.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007)(quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981)(citing in part *Int'l Paper Co.*, 206 F.3d at 416)( internal quotations omitted).<sup>2</sup>

**c. Coleman and Hodge are Distinguishable**

To the extent Plaintiff argues the Admissions Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544,

<sup>2</sup> See also *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) ("Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate."); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at \*4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

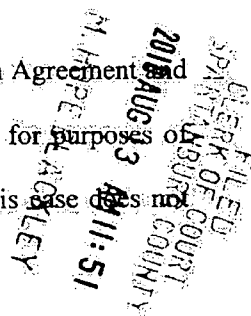


813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, 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.* at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

Similarly, in *Hodge*, the admissions agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, 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." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admissions Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not

state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements "were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction" and, therefore, the documents merged." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admissions and Arbitration Agreements were executed for the same parties, by Plaintiff, on her husband's behalf, and the Facility on February 15, 2016. The documents were signed by the exact same people: Macie Price as representative for her husband and by Darlene Lindsay, Admissions Director for Magnolia, as representative for Magnolia. The documents were signed for the same purpose and transaction of establishing Mr. Price's residency at the skilled nursing facility. While the Admissions Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Accordingly, there is no language in either the Admission or Arbitration Agreement akin to the language in *Hodge* or *Coleman* to indicate the parties desired the documents be considered as separate contracts. As such, *Coleman* and *Hodge* are not controlling Plaintiff's claims should be compelled to arbitration pursuant to the contract.

This Court recognizes that the agreements are in fact separately signed and have different terms and provisions. That is to be expected. However, unlike *Coleman* and *Hodge*, the documents are not sufficiently separate such that the presumption of merger can be overcome.

**D. The Arbitration Agreement is Not Unconscionable**

Lastly, this Court finds that the Arbitration Agreement is unconscionable. In an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 13 AM 11:39  
M. JOPE BLACKEY

agreements identical to the one *sub judice* are not unconscionable. See *McCutcheon v. THI of S.C. at Charleston, LLC*, *supra*, at 6\* - \*8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

Furthermore, on that same signature page, the Arbitration Agreement states clearly **in bold**



FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2019 AUG 13 AM 11:51  
M. HOPKINS  
M. HOPKINS  
M. HOPKINS

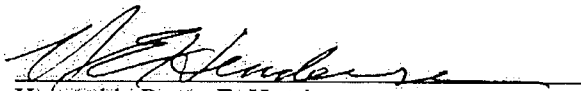
lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" (emphasis in original).

Since Mr. Price's representative and agent, Mrs. Price, had a duty to read and understand the documents she was signing on Mr. Price's behalf under proper authority, she also had a duty to communicate those terms to Mr. Price as his agent. To the extent she did not, Plaintiff cannot now claim that Mr. Price was unaware of the terms of the Arbitration Agreement that Mrs. Price voluntarily and with proper authority executed on her husband's behalf.

**CONCLUSION**

For the reasons set forth herein, the Defendant's Motion to Compel is hereby **GRANTED** and this matter is compelled to arbitration.

IT IS SO ORDERED!

  
Honorable Roger E. Henderson  
Presiding Judge

*Chesterfield*  
~~Spartanburg~~, South Carolina

August 7, 2018

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2018 AUG 13 AM 11:51  
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

THE ESTATE OF PATRICIA ) CASE NO. 2019-CP-23-00473  
ROYSTON, BY AND THROUGH THE )  
APPOINTED PERSONAL )  
REPRESENTATIVE MARIANNE )  
MCCOIG, AND ON BEHALF OF THE )  
STATUTORY BENEFICIARIES, )

PLAINTIFFS, )

vs. )

HUNT VALLEY HOLDINGS, LLC )  
A/K/A FUNDAMENTAL LONG TERM )  
CARE HOLDINGS, LLC; )  
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. )

**DEFENDANT FUNDAMENTAL  
ADMINISTRATIVE SERVICES, LLC'S  
MEMORANDUM IN SUPPORT OF ITS  
MOTION TO STAY**

**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's decedent, Patricia Royston (the "Arbitration Agreement"), around the time of Ms. Royston's admission to Magnolia Place. Per the

Arbitration Agreement, Ms. Royston 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. Royston upon her admission to the facility affected and involved interstate commerce.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See Exhibit 1 - Motion to Dismiss and Compel Arbitration.* 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, a stay 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.

(Emphasis added.)<sup>1</sup>

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

---

<sup>1</sup> 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)



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 (7<sup>th</sup> 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 to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Place are solely concerned with Ms. Royston's 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 ¶¶ 272 - 314. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Magnolia Place should be viewed as one in the same by this Court. *See* Pltf.'s Complaint at ¶¶ 1-314. 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 (5<sup>th</sup> 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.  
Russell G. Hines  
Kate C. Mettler  
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: August 28, 2019

# Exhibit 1

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

THE ESTATE OF PATRICIA ) CASE NO. 2019-CP-23-00473  
ROYSTON, BY AND THROUGH THE )  
APPOINTED PERSONAL )  
REPRESENTATIVE MARIANNE )  
MCCOIG, AND ON BEHALF OF THE )  
STATUTORY BENEFICIARIES, )

PLAINTIFFS, )

vs. )

HUNT VALLEY HOLDINGS, LLC )  
A/K/A FUNDAMENTAL LONG TERM )  
CARE HOLDINGS, LLC; )  
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. )

**DEFENDANT THI OF SOUTH  
CAROLINA AT MAGNOLIA PLACE AT  
GREENVILLE, LLC D/B/A MAGNOLIA  
PLACE- GREENVILLE'S MOTION TO  
DISMISS, COMPEL ARBITRATION, AND  
STAY COURT PROCEEDINGS**

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, AND MATTHEW CHRISTIAN,  
ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Place at Greenville, LLC (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.

Plaintiff has sued this Defendant for wrongful death allegedly arising out of Plaintiff's decedent's residency at the Facility. Prior to being admitted to the Facility, Plaintiff's decedent 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 her 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]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

Gaillard T. Dotterer, III

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: July 26, 2019

|                                 |   |                               |
|---------------------------------|---|-------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS  |
|                                 | ) |                               |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT   |
|                                 | ) |                               |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473     |
| ROYSTON, BY AND THROUGH THE     | ) |                               |
| APPOINTED PERSONAL              | ) |                               |
| REPRESENTATIVE MARIANNE         | ) |                               |
| MCCOIG, AND ON BEHALF OF THE    | ) |                               |
| STATUTORY BENEFICIARIES,        | ) |                               |
|                                 | ) |                               |
| PLAINTIFFS,                     | ) |                               |
|                                 | ) |                               |
| vs.                             | ) |                               |
|                                 | ) |                               |
| HUNT VALLEY HOLDINGS, LLC       | ) | DEFENDANT FUNDAMENTAL         |
| A/K/A FUNDAMENTAL LONG TERM     | ) | CLINICAL AND OPERATIONAL      |
| CARE HOLDINGS, LLC;             | ) | SERVICES, LLC'S MEMORANDUM IN |
| FUNDAMENTAL CLINICAL AND        | ) | SUPPORT OF ITS MOTION TO STAY |
| 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.                     | ) |                               |

**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's decedent, Patricia Royston (the "Arbitration Agreement"), around the time of Ms. Royston's admission to Magnolia Place. Per the

Arbitration Agreement, Ms. Royston 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. Royston upon her admission to the facility affected and involved interstate commerce.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See Exhibit 1 - Motion to Dismiss and Compel Arbitration.* 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, a stay 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.



(Emphasis added.)<sup>1</sup>

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

---

<sup>1</sup> 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)

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 (7<sup>th</sup> 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 to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Place are solely concerned with Ms. Royston's 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 ¶¶ 272 - 314. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Magnolia Place should be viewed as one in the same by this Court. *See* Pltf.'s Complaint at ¶¶ 1-314. 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 (5<sup>th</sup> 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.

Russell G. Hines

Kate C. Mettler

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: August 28, 2019

# Exhibit 1

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

THE ESTATE OF PATRICIA ) CASE NO. 2019-CP-23-00473  
ROYSTON, BY AND THROUGH THE )  
APPOINTED PERSONAL )  
REPRESENTATIVE MARIANNE )  
MCCOIG, AND ON BEHALF OF THE )  
STATUTORY BENEFICIARIES, )

PLAINTIFFS, )

vs. )

HUNT VALLEY HOLDINGS, LLC )  
A/K/A FUNDAMENTAL LONG TERM )  
CARE HOLDINGS, LLC; )  
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. )

**DEFENDANT THI OF SOUTH  
CAROLINA AT MAGNOLIA PLACE AT  
GREENVILLE, LLC D/B/A MAGNOLIA  
PLACE- GREENVILLE'S MOTION TO  
DISMISS, COMPEL ARBITRATION, AND  
STAY COURT PROCEEDINGS**

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, AND MATTHEW CHRISTIAN,  
ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Place at Greenville, LLC (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.

Plaintiff has sued this Defendant for wrongful death allegedly arising out of Plaintiff's decedent's residency at the Facility. Prior to being admitted to the Facility, Plaintiff's decedent 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 her 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]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

Gaillard T. Dotterer, III

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: July 26, 2019

RECEIVED ELECTRONICALLY FILED - 2019 AUG 28 9:30 AM - GREENVILLE - COMMONWEALTH - CASE#2019CP2300473

|                                 |   |                              |
|---------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA         | ) | IN THE COURT OF COMMON PLEAS |
|                                 | ) |                              |
| COUNTY OF GREENVILLE            | ) | THIRTEENTH JUDICIAL CIRCUIT  |
|                                 | ) |                              |
| THE ESTATE OF PATRICIA          | ) | CASE NO. 2019-CP-23-00473    |
| ROYSTON, BY AND THROUGH THE     | ) |                              |
| APPOINTED PERSONAL              | ) |                              |
| REPRESENTATIVE MARIANNE         | ) |                              |
| MCCOIG, AND ON BEHALF OF THE    | ) |                              |
| STATUTORY BENEFICIARIES,        | ) |                              |
|                                 | ) |                              |
| PLAINTIFFS,                     | ) |                              |
|                                 | ) |                              |
| vs.                             | ) |                              |
|                                 | ) |                              |
| HUNT VALLEY HOLDINGS, LLC       | ) |                              |
| A/K/A FUNDAMENTAL LONG TERM     | ) |                              |
| CARE HOLDINGS, LLC;             | ) |                              |
| 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.                     | ) |                              |
|                                 | ) |                              |

**DEFENDANT HUNT VALLEY  
HOLDINGS, LLC'S MEMORANDUM IN  
SUPPORT OF ITS MOTION TO STAY**

**COMES NOW**, Defendant Hunt Valley Holdings, 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's decedent, Patricia Royston (the "Arbitration Agreement"), around the time of Ms. Royston's admission to Magnolia Place. Per the



Arbitration Agreement, Ms. Royston 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. Royston upon her admission to the facility affected and involved interstate commerce.

As set forth herein, Facility Defendant has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See Exhibit 1 - Motion to Dismiss and Compel Arbitration.* 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, a stay 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.

(Emphasis added.)<sup>1</sup>

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

---

<sup>1</sup> 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)

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 (7<sup>th</sup> 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 to the Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Place are solely concerned with Ms. Royston's 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 ¶¶ 272 - 314. In no uncertain terms, Plaintiff alleges and seeks to prove that this Defendant and Magnolia Place should be viewed as one in the same by this Court. *See* Pltf.'s Complaint at ¶¶ 1-314. 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 (5<sup>th</sup> 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.  
Russell G. Hines  
Kate C. Mettler  
P.O. Box 993, Charleston, SC 29402  
(843) 720-5406; jdavis@ycrlaw.com  
*Attorneys for the Defendant Hunt Valley Holdings, LLC*

Charleston, South Carolina

Dated: August 28, 2019

# Exhibit 1

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE ) THIRTEENTH JUDICIAL CIRCUIT

THE ESTATE OF PATRICIA ) CASE NO. 2019-CP-23-00473  
ROYSTON, BY AND THROUGH THE )  
APPOINTED PERSONAL )  
REPRESENTATIVE MARIANNE )  
MCCOIG, AND ON BEHALF OF THE )  
STATUTORY BENEFICIARIES, )

PLAINTIFFS, )

vs. )

HUNT VALLEY HOLDINGS, LLC )  
A/K/A FUNDAMENTAL LONG TERM )  
CARE HOLDINGS, LLC; )  
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. )

**DEFENDANT THI OF SOUTH  
CAROLINA AT MAGNOLIA PLACE AT  
GREENVILLE, LLC D/B/A MAGNOLIA  
PLACE- GREENVILLE'S MOTION TO  
DISMISS, COMPEL ARBITRATION, AND  
STAY COURT PROCEEDINGS**

TO: RAYMOND P. MULLMAN, JR., ESQUIRE, AND MATTHEW CHRISTIAN,  
ATTORNEYS FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Place at Greenville, LLC (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.

Plaintiff has sued this Defendant for wrongful death allegedly arising out of Plaintiff's decedent's residency at the Facility. Prior to being admitted to the Facility, Plaintiff's decedent 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 her 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]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

Gaillard T. Dotterer, III

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: July 26, 2019



STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

The Estate of Patricia Royston, by and through  
the appointed Personal Representative  
Marianne McCoig, Individually and on behalf  
of the statutory beneficiaries,

Plaintiffs,

v.

Hunt Valley Holdings, LLC a/k/a  
Fundamental Long Term Care Holdings, LLC;  
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: 2019-CP-23-00473

**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.

**TABLE OF CONTENTS**

- I. Factual Background
- II. Burden of Proof
- III. Statement of Issues
  - a. *The Arbitration Agreement is not a valid and enforceable agreement because it was not signed by the party who is seeking its enforcement.*
  - b. *The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances; there was no meeting of the minds and thus the agreement is not binding.*
  - c. *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.*
  - d. *The Arbitration Agreement does not govern the wrongful death claim*
  - e. *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.*

- f. The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid agreement.*
- g. Equitable estoppel is inapplicable to the facts of this case*
- h. Defendant abandoned enforcement of the arbitration proceeding by failing to produce the Agreement when Plaintiffs requested Patricia'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 Patricia Royston. (**See filed Complaint**). Patricia died as a consequence of acute morphine intoxication administered by the employees at the nursing home.

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), Fundamental Administrative Services, LLC (which Defendants assert provided “administrative services” to the facility), and Hunt Valley Holdings, LLC a/k/a Fundamental Long Term Care Holdings, LLC, these latter three entities being hereinafter referred to as the “Corporate Defendants.” Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Patricia, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care received by Patricia.

Marianne McCoig was Patricia's daughter and now serves as the personal representative of Patricia's estate. Patricia was admitted as a short-term resident into Magnolia Place-Greenville (“Facility”) on **December 19, 2016** according to the Admission contract. (**Exhibit 1–Admission**

**Agreement**). The Admission Agreement governed the type of care Patricia would receive at the Facility and Patricia'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"<sup>1</sup> provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Patricia's admission to the Facility. This document is undated, and unsigned by Facility.

Another entirely separate contract called "Arbitration Agreement" was allegedly provided to Patricia, but the facility claims they are not in possession of it, and the copy Plaintiffs have is not signed by the facility. (**Exhibit 2 – Arbitration Agreement**). The original signed copy cannot be located by Defendants. Plaintiffs need the original to verify the authenticity and genuineness of the alleged signature of Patricia. There is no evidence the Arbitration Agreement was signed by Patricia Royston during the Admission process and provided to Defendants. It is undisputed that the copy at issue was never signed by Defendants.

Additionally, the Arbitration Agreement was not required to be admitted and was not a condition of residency. Defendants did not rely on this contract to provide services or treatment to Patricia. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate agreement (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Patricia, provides for alternative dispute resolution for any claim a party may bring against another arising out of Patricia's care at the Facility.

---

<sup>1</sup> "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."

On **January 31, 2019**, the lawsuit was initiated by the personal representative for Patricia's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' failure to monitor and supervise the safety and well-being of Patricia while at the Facility. On **July 26, 2019**, the Facility filed a Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings. Accordingly, the Facility must show a valid and enforceable arbitration agreement between Patricia and the Facility to prevail on its motion. Defendants' motion, memorandum, and attached documents do not meet this burden.

## **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.<sup>2</sup> 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."<sup>3</sup> Whether the parties agreed to arbitrate is a question of substantive state law. Simpson v. MSA of Myrtle Beach, Inc., 644 S.E.2d 663, 668 (S.C. 2007)

<sup>2</sup> See e.g., Leasing Serv. Corp. v. Crane, 804 F.2d 828, 833 (4<sup>th</sup> 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).

<sup>3</sup> Nat'l Acceptance Co., 381 F.Supp. at 271).

("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.

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). When parties dispute the existence of a valid arbitration agreement, the presumption in favor of arbitration disappears. Dumais v. American Golf Corp., 299 F.3d 1216, 1220 (10th Cir. 2002). 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., 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 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, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

The 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., 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 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 it was not signed by the party seeking its enforcement.***

At the onset, a dispute to whether parties are bound by an arbitration agreement is for the court to decide. Howsam v. Dean Witter Reynolds., 537 U.S. 79, 84 (2002). An agreement to arbitrate is fundamentally a matter of consent. Nestle Waters N. Am., Inc. v. Bollman, 505 F.3d 498, 504 (6th Cir. 2007); 4 Am. Jur. 2d *Alternative Dispute Resolution* § 48 (1998) ("[B]ecause

arbitration involves a waiver of the right to pursue a case in a judicial forum, the courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent.”). Arbitration cannot be compelled in the absence of an express agreement to arbitrate. EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Emlenton Area Municipal Authority v. Miles, 548 A.2d 623, 625 (Pa. Super. 1988).

The arbitration agreement is a separate document from the Admission Agreement with the Facility. At the bottom of the Arbitration Agreement there were lines provided for the resident and an agent of Facility to sign, date, and print their names. While not dated, Ms. Royston allegedly signed at the signature line reserved for “Resident/Representative Signature”. A signature line existed for Facility to execute the agreement as well. A blank was provided for the facility to sign as “Authorized Agent of Facility”, and a separate blank for the agent to print his/her name and title. At no time did anyone from Facility ever sign and execute the agreement on behalf of Facility. As previously noted, the Facility bears the burden of proving that a valid arbitration agreement exists and was executed.

Because the facility did not sign the agreement, there is no indicia of mutual assent as required for a valid enforceable arbitration agreement. The alleged agreement by its express terms requires both parties to sign and confirm in writing that they are waiving their right to a jury trial and consenting to the terms of the agreement by affixing their signatures. The arbitration provision itself references the parties’ intention to select arbitration, however, there is no party signature on behalf of Facility and its affiliates. The fact that there is a signature line for “Authorized Agent of Facility” and that it is left blank further indicates that there was no mutual assent. See Baier v. Darden Restaurants, 420 S.W.3d 733, 739 (Mo. Ct. App. 2014).

As the Pennsylvania Superior Court noted in the seminal case of Bair v. Manor Care of Elizabethton, PA, LLC, et al., 108 A3d 94 (Pa. 2015), the issue is not necessarily just whether or not the arbitration agreement was signed by the parties sought to be bound but whether there was a meeting of the minds, that is, whether the parties agreed in a clear and unmistakable manner to arbitrate their disputes. Id. at 97. The Court concluded that the parties did not agree in a clear and unmistakable manner to arbitrate the disputes due to the lack of signature on behalf of the nursing home facility. As the Court noted, by failing to affix its signature, the facility did not consent to arbitrate. Absent mutual assent at the time of the creation of the agreement, there was no enforceable agreement to arbitrate. Id. at 98. As the Pennsylvania Court noted, “it is not just the lack of the signature of the nursing home facility that is problematic but the fact that there was not mutual assent of the parties to the alleged contract. It is not the resident’s consent that is the problem, it is Manor Care’s failure to fill in essential terms and sign the agreement that fell short in manifesting its consent to arbitrate”. Id. at 98. Further, the lack of mutual assent is also proven by Defendants’ lack of possession of the original signed agreement allegedly signed by Patricia during the admission process.

South Carolina courts have further made it clear that mutual assent and meeting of the minds is necessary for an enforceable arbitration agreement. South Carolina 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”. Grant v. Magnolia Manor-Greenwood, Inc., 678 S.E.2d 435 (2009) citing Player v. Chandler, 382 S.E.2d 891 (1989). Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. Additionally, our Courts have stated, “Vagueness of expression, indefiniteness, and uncertainty as to any of the essential terms of an agreement have often been



held to prevent the creation of an enforceable contract”. Reed v. Boykin, 320 S.E.2d 68 (Ct. App. 1984). Because the Facility never indicated its assent to the terms of the agreement, failed to complete all of the necessary portions of the agreement, failed to fill in the necessary blanks, and otherwise failed to come to agreement on the material terms of the agreement by signing the agreement, the arbitration agreement is unenforceable.

***B. The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances; there was no meeting of the minds and thus the agreement is not binding.***

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 813 S.E.2d 292, 308 (Ct. App. 2018); Thompson v. Pruitt Corp., 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 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. 784 S.E.2d at 684; 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, 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, 784 S.E.2d at 685 n. 1; Hodge, 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, 784 S.E.2d at 685; Hodge, 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, 755 S.E.2d at 455; Thompson, 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.

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.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)). 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, 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 confines of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 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.

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).

In the instant case, it is undisputed that Patricia 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 Patricia'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 3**) 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 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 4**):

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) 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 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. Royston 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.**” 784 S.E.2d at 688 (emphasis added).

***C. 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, 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. 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.

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 5**

- Campsen v. THI of SC Motion for Clarification and/or Protection from Discovery and Exhibit 6 - 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.

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, the Commission on Health Care Dispute Resolution<sup>4</sup> 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.<sup>5</sup> Contracts may be rescinded based upon **an omission of some material element affecting the subject matter** or terms and stipulations of the contract.<sup>6</sup> The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court.<sup>7</sup> 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

---

<sup>4</sup> 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>.

<sup>5</sup> Id., Principle 3: Knowing and Voluntary Agreement to Use ADR.

<sup>6</sup> Truck South, Inc. v. Patel, 528 S.E.2d 424, 429 (S.C. 2000).

<sup>7</sup> 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.

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.

Even if there is a valid agreement between Patricia 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 does not exist. 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 7 – Harrington Order - Powell v. FLTCH**).

***D. 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 Patricia'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

As this Honorable Court decided in Young v. NHC (**Exhibit 8**) 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 Patricia'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 Patricia cannot bind the Patricia'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 9**) which held:

[T]he Arbitration Agreement is unenforceable against the Patricia'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 Patricia'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 Patricia 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 Patricia 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, Patricia 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) (**Exhibit 17**). 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.

Further, at least one other South Carolina court judge has come to the same conclusion as the Federal District Court. See Wilson v. Amisub Order at **Exhibit 10**. These orders from a South Carolina Circuit Court Judge as well as a Federal District Court Judge for the District of South Carolina when read together evince a growing trend by the courts to recognize that wrongful death claims are not derivative from a survival action. Following this, the wrongful death claimants should not be bound by arbitration agreements which strip them of their right to a jury trial when they never signed away their right in the first place.

**E. *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<sup>8</sup> 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 its revenue. Judge Nettles's Order in Coleman (**Exhibit 11**) 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.4<sup>th</sup> 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 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.

---

<sup>8</sup> Related entity is an industry term that means the entities have common ownership, management, and control.

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 Patricia and his estate equitably are estopped from arguing that the arbitration agreement is not binding and enforceable *by each of the defendants.*” See the Honorable Judge Cercone’s Order in Hawthorne (Exhibit 12) 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 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 13 - 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).

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 facility, then Plaintiffs' claims against the remaining Defendants should proceed, on one forum or another.

***F. 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 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.<sup>9</sup> The need to find a placement arises quickly<sup>10</sup> 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.<sup>11</sup> Time pressure significantly impairs the ability to seek and carefully consider alternatives.<sup>12</sup> Patricia Royston and her family had no choice or time in making such a decision. Many facilities lack a coherent

<sup>9</sup> See, e.g., *Podolosky v. First Healthcare Corp.*, 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogio, *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).

<sup>10</sup> 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).

<sup>11</sup> Denise Ashbugh Vlosky, et al., "Say-so" as a Predictor of Nursing Home Readiness, 93 J. of Family & Consumer Science 59 (2001).

<sup>12</sup> 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.

admissions process, adding to the chaos surrounding the admission of a resident.<sup>13</sup> 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.<sup>14</sup> It is not, therefore, likely to get much attention from the non-drafting party.<sup>15</sup> 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.<sup>16</sup>

The Honorable Judge Diane Goodstein found an arbitration agreement unconscionable in a similar circumstance in Rawl v. West Ashley Rehab (**Exhibit 4**) 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.

<sup>13</sup> Donna Ambrogio & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 *The Gerontologist* 82, 83-88 (1988).

<sup>14</sup> 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.")

<sup>15</sup> 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).

<sup>16</sup> 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).



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 Patricia at their facility.*

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 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 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, SCRPC; 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. Also, the cost of the arbitration must be paid by the parties including the Estate of Patricia Royston 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.

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 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.”

Clark v. Renaissance W., LLC, 232 Ariz. 510, 307 P.3d 77, 666 Ariz. Adv. Rep. 29 (Ariz. App., 2013). (**Exhibit 14**).

***G. 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 conduct 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. 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 at odds with U.S. Supreme Court precedent. An arbitration contract concerning interstate commerce is 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 Andersen 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 & Anlae 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 Patricia’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 contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Patricia’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. 784 S.E.2d at 688; see also Coleman, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson’s estoppel analysis. 813 S.E.2d at 300.<sup>17</sup> Since admission is unavailable as a “direct benefit” to support estoppel, the Facility would be required to point to some benefit Patricia received from the Arbitration Agreement alone. However, Patricia 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 [Patricia] 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

---

<sup>17</sup> 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”).

[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).

***H. Defendant abandoned enforcement of the arbitration proceeding by failing to request arbitration and participating in pre-suit discovery.***

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 Patricia’s injury and discharge from Defendants’ facility, a request was sent for her entire nursing home file from Defendants. (**Exhibit 15 – Records Request**). The request specifically asked for a complete copy of Mrs. Royston’s 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 Patricia Royston. However, Defendants failed to produce the original or a copy of the arbitration agreement. Defendants did not mention arbitration when Plaintiff filed the Notice of Intent almost a year ago on **September 21, 2018** which specifically requests if an arbitration agreement applies and warns that any delay would be treated as a waiver of arbitration. (**Exhibit 16**). 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. Defendants failed to move to compel arbitration until after Plaintiffs filed a Motion to Compel discovery requests which were ignored by Defendants for months. 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 all claims against the Corporate Defendants 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.

POLIAKOFF & ASSOCIATES, PA

s/Raymond P. Mullman, Jr.  
Gary Poliakoff, Esq., S.C. Bar # 4488  
[atty@gpoliakoff.com](mailto:atty@gpoliakoff.com)  
Ray Mullman, Esq., S.C. Bar# 8662  
[rmullmanjr@gmail.com](mailto:rmullmanjr@gmail.com)  
215 Magnolia Street  
Spartanburg, SC 29306  
(864) 582-5472

Date: August 27, 2019  
Spartanburg, SC

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

Attorneys for Plaintiff



move this Honorable Court to alter, amend, and/or reconsider its Order Denying Defendants' Motion to Dismiss, Compel Arbitration and Stay Court Proceedings (the "Subject Order").<sup>1</sup>

**1. The Subject Order incorrectly refers to this litigation as "two [separate] civil actions --- a Survival Action and a Wrongful Death action."<sup>2</sup>**

Most respectfully, there is only *one* action in which Plaintiff is pursuing the subject survival and wrongful death claims, Case No. 2019-CP-23-00473. Please know that the Facility does not mean to pester the Court with mere trivialities, but, out of an abundance of caution, in the interest of preventing this apparently inadvertent reference to a second action (which does not in fact exist) from confusing the record or otherwise setting the stage for some undue problem or prejudice going forward, Defendants ask that the Court correct the same.

**2. The Subject Order unduly recites as fact Plaintiff's contention (which is denied and disputed) that the Facility "is owned and operated by" HVH.<sup>3</sup>**

Even though this language is merely contained in the "Factual Background" section of the Subject Order and does not constitute a *finding* of fact (i.e., obviously, in setting forth some brief background in the Subject Order, the Court was not deciding the merits of any factual dispute), out of an abundance of caution, in the interest of avoiding any potential for undue meaning to be

---

<sup>1</sup> Filed October 9, 2019, the Subject Order denied the Facility's motion to compel arbitration and, it would appear, by extension, HVH, FCOS, and FAS's respective motions to stay this action pending the outcome of the arbitrability dispute/arbitration proceedings, and all Defendants' respective motions to be protected from discovery pending the resolution of the Facility's motion to compel arbitration. All these motions (i.e., the Facility's motion to compel arbitration; HVH, FCOS, and FAS's respective motions to stay, and all Defendants' respective motions for a protective order) were on the Court's roster for hearing on August 29, 2019. Given the interrelated nature of these motions, Defendants' counsel understands that the Court intended its decision on the Facility's motion to compel arbitration to dispose of them all. *To the extent that counsel is mistaken, however, the instant motion includes Defendants' request that the Court clarify the scope of the Subject Order.*

<sup>2</sup> (Subject Order p. 2 (emphasis added); *see also id.* ("Both actions involve allegations of corporate negligence and nursing home neglect resulting in the alleged wrongful death of Patricia Royston.") (emphasis added).)

<sup>3</sup> (Subject Order p. 2 (emphasis added).)

ascribed to this language in the future (whether in this case or in any other litigation involving these Defendants, or any of them), and given that the language is unnecessary to the Court's decision, Defendants ask that the Court remove this language from the Subject Order. To this end, the following alternative language is proposed in place of what is presently the second paragraph on page 1 of the Subject Order:

Plaintiff's complaint names as defendants THI of South Carolina at Magnolia Place at Greenville, LLC d/b/a Magnolia Place-Greenville (the "Facility") as well as Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, Fundamental Clinical and Operational Services, LLC, and Fundamental Administrative Services, LLC, these latter three entities being hereinafter referred to as the "Corporate Defendants."

3. **The Subject Order improperly states, "All Defendants are related entities of the nursing home and have a significant relationship in the ownership, operation, and management of the nursing home, and derive significant economic benefit from its revenue."**<sup>4</sup>

The Subject Order states what is in fact a disputed contention (i.e., Plaintiff's contention<sup>5</sup>) about the relationship between the Facility and the so-called "Corporate Defendants" (HVV, FCOS, and FAS) as if it were not in dispute, or had already been adjudicated. Obviously, Defendants very much dispute this contention, and it could not possibly have been adjudicated by this Court because the matter was neither (a) presented to it for decision nor (b) capable of being decided by the Court as a matter of law. *See Worsley Companies, Inc. v. Town of Mount Pleasant*,

---

<sup>4</sup> (Subject Order p. 6 (footnote omitted).) In a footnote the Subject Order improperly adds, "Related entity is an industry term that means the entities are have [sic] common ownership, management, and control." (*Id.* at p. 6 n.5.)

<sup>5</sup> As the Subject Order itself states, "Plaintiff's *claims* against Defendants are based on a *theory* of unified operation and control. Each is *alleged* to have participated in exactly the same wrongful conduct. . . . Plaintiff *alleges* each Corporate Defendant is a parent entity, agent or employee of the Facility that share a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against the Corporate Defendant and, in turn, each can rely on the principles of agency law and the broad scope of the FAA to compel and participate in the Arbitration Agreement." (Subject Order p. 6 (emphasis added).)

339 S.C. 51, 528 S.E.2d 657 (2000) (“If triable issues exist, those issues must go to the jury.”); *see also Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 173–74, 467 S.E.2d 439, 442 (1996) (“Whether an agency relationship exists is a question of fact.”)<sup>6</sup> Nowhere in the Court’s September 24, 2019, letter announcing its ruling on Defendants’ motions and requesting a proposed order from Plaintiff’s counsel is there any mention of any relationship between the Facility and the Corporate Defendants. (A copy of the Court’s letter is attached hereto as Exhibit 1, which is incorporated herein by reference.) Defendants assume this language (to include footnote 5) was inadvertently included in the order Plaintiff’s counsel prepared for the Court. It is not necessary to the Court’s decision, nor, indeed, did the Court request it; and, in any event, its inclusion is erroneous as a matter of law and fact, and it should not be in the Subject Order (or any other order issued by the Court at this stage of the proceedings).

**4. Regarding the Subject Order’s determination that “[t]he Arbitration Agreement is not a valid and enforceable agreement because it was not signed by the party seeking its enforcement.”<sup>7</sup>**

- (a) The Subject Order is not correct in stating, “[t]here is no evidence the Arbitration Agreement was signed by Patricia Royston during the admission process and provided to Defendants.”<sup>8</sup> The Facility has proved that a valid Arbitration Agreement exists.**

As the Subject Order itself states, the Arbitration Agreement (specifically, the copy of the Arbitration Agreement before the Court) “*was found in [Ms. Royston’s] personal effects and produced by the Plaintiff.*” (Subject Order p. 1 (emphasis added).) Given that it was found in Ms.

---

<sup>6</sup> To be clear, Plaintiff did not move for summary judgment on this (or any other) issue. Nor did Plaintiff otherwise attempt to argue, much less actually show, “that there is no genuine issue as to any material fact [on this point] and that [she] was entitled to judgment as a matter of law,” as is required under Rule 56(c) & (e), SCRCP, to even put the burden on the Facility to show the existence of a genuine issue for trial on this point.

<sup>7</sup> (Subject Order pp. 4–5.)

<sup>8</sup> (Subject Order p. 2.)

Royston's personal effects; that it clearly bears what purports to be Ms. Royston's signature,<sup>9</sup> written in what cannot reasonably be denied as being the same hand as that which signed the separate Admission Agreement (the validity of which Plaintiff has not disputed<sup>10</sup>) in Ms. Royston's name;<sup>11</sup> and that Plaintiff (Ms. Royston's daughter) herself has not actually denied that Ms. Royston signed the document,<sup>12</sup> the only reasonable conclusion capable of being drawn is that Ms. Royston did in fact sign the Arbitration Agreement, as reflected on the copy before the Court.

As for whether Ms. Royston provided her signed Arbitration Agreement to the Facility, here again, the only reasonable conclusion is that she did—either at the time of her admission or via her personal representative, Plaintiff. Ms. Royston did not create the Arbitration Agreement herself; rather, it was presented to her by the Facility. (*See* Subject Order p. 7 (regarding construing the Arbitration Agreement against the Facility as the drafting party).) In other words, it would not have been possible for the Arbitration Agreement to be found in Ms. Royston's personal effects unless she had first received it from the Facility. To conclude that Ms. Royston did not provide a signed Arbitration Agreement to the Facility requires belief in the patently improbable scenario in which Ms. Royston, after being presented with the Arbitration Agreement by the Facility, must

---

<sup>9</sup> (*See* Mot. to Compel Arbitration at Ex. A; Mem. in Supp. of Mot. to Compel Arbitration at Ex. C.)

<sup>10</sup> (*See* Mem. in Opp'n to Mot. to Compel Arbitration p. 2 (“[Ms. Royston] was admitted as a short-term resident into [the Facility] on **December 19, 2016** according to the Admission contract. (**Exhibit 1—Admission Agreement**). The Admission Agreement governed the type of care [Ms. Royston] would receive at the Facility and [her] financial obligation to pay for those services.”) (bold print in original).)

<sup>11</sup> (*Compare* Mot. to Compel Arbitration at Ex. A *and* Mem. in Supp. of Motion to Compel Arbitration at Ex. C. *with* Mem. in Supp. of Mot. to Compel Arbitration at Ex. B p. 12 *and* Mem. in Opp'n to Mot. to Compel Arbitration at Ex. 1 p. 12.)

<sup>12</sup> Plaintiff has done no more than refrain from admitting that the Arbitration Agreement bears her mother's signature. (*See* Mem. in Opp'n to Mot. to Compel Arbitration p. 3 (stating that Plaintiff “need[s] the original [Arbitration Agreement] to verify the authenticity and genuineness of the alleged signature of [Ms. Royston].”).)

have signed the agreement, but then decided not to provide her signed agreement to the Facility, but nonetheless decided to keep the signed agreement among her personal effects. Additionally, what is before the Court is what Plaintiff produced, i.e., a *copy* of the Arbitration Agreement signed by Ms. Royston, not the original document bearing her signature. (*See* Mem. in Opp'n to Mot. to Compel Arbitration p. 3 (stating that Plaintiff "need[s] the original [Arbitration Agreement] to verify the authenticity and genuineness of the alleged signature of [Ms. Royston]," thus confirming that the original was not found in Ms. Royston's personal effects). This bolsters the conclusion that Ms. Royston provided the *original* document bearing her signature to the Facility and kept a *copy* for her own records. The fact that the Facility is unable to locate this paperwork presently does not mean that it never existed.

**(b) The Subject Order wrongfully concludes that there was a lack of mutual assent because the Facility did not sign the Arbitration Agreement.**

The Facility made an offer to Ms. Royston when it presented the Arbitration Agreement to her for her review and consideration. Ms. Royston did not propose any changes to the Arbitration Agreement, i.e., she did not make a counteroffer, but rather accepted the offer according to its *exact terms* when executed the Arbitration Agreement. (Mem. in Supp. of Mot. to Compel Arbitration at Ex. 3.)

In their memorandum in opposition to the Facility's motion to compel arbitration, Plaintiffs cite *Pennsylvania* law in support of their argument that the Facility's signature is required to have a valid, enforceable contract; however, under *South Carolina* law, it is of no legal significance that the Facility did not—or at least has not yet—signed the Arbitration Agreement. South Carolina law has long recognized that the mutual assent required to form a binding contract can exist even absent the signature of one of the contracting parties. *Jaffe v. Gibbons*, 290 S.C. 468, 473, 351

S.E.2d 343, 346 (Ct. App. 1986); *see also* *Bulwinkle v. Cramer*, 27 S.C. 376 (1887); *Bishop Realty & Rentals v. Perk, Inc.*, 292 S.C. 182, 355 S.E.2d 298 (Ct. App. 1987); *Laidlaw Envt'l Servs., (TOC), Inc. v. Honeywell, Inc.*, 966 F. Supp. 1401, 2409 (D.S.C. 1996).<sup>13</sup> “It has long been a paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both.” *Jaffe*, 290 S.C. at 473, 351 S.E.2d at 346; *see id.* (“A contract does not always require the signature of both parties; it may be sufficient, if signed by one and accepted and acted on by the other.”); *see also* *Bulwinkle*, 27 S.C. 376.

Certainly, the Facility assented to the terms of the Arbitration Agreement, as evidenced by its drafting and presenting the same to Ms. Royston for her consideration, whereupon Ms. Royston manifested her agreement by signing the Arbitration Agreement as presented to her. Without question, there as a “meeting of the minds,” with each party manifesting assent and intent to form this particular contract.

The Facility acted on, and further demonstrated its acceptance of, the Arbitration Agreement executed by Ms. Royston when it admitted her as a resident and provided care and treatment to her according to the bargained-for exchange the parties made in the various documents

---

<sup>13</sup> Notably, the Statute of Frauds, which is designed to give contracting parties enhanced protection against fraud when agreements concerning goods valued in excess of \$500 or agreements for services that cannot be completed within one year are at issue, requires only that there be a written agreement that is “signed by the party *against whom enforcement is sought*.” S.C. Code Ann. 36-2-201(1) (emphasis added). In other words, even if the statute of frauds were applicable, which it is not, *see Roberts v. Gaskins*, 327 S.C. 478, 485, 486 S.E.2d 771, 774 (Ct. App. 1997) (“[T]he Statute of Frauds applies only to contracts which are impossible of performance within one year. . . . If there is a possibility of performance within a year, the contract is not barred by the Statute of Frauds. The fact that performance within a year is highly improbable or not expected by the parties does not bring a contract within the scope of this clause.”) (citations omitted), a signature on behalf of the Facility would not be required, because it is not the party against whom enforcement is sought, but rather the party seeking enforcement.



related to her residency, including the Arbitration Agreement. The Facility again acted on, and further demonstrated its acceptance of, the Arbitration Agreement when it, through its attorneys, notified Plaintiffs at the June 25, 2019, meet-and-confer that the parties were required to submit Plaintiffs' claims, or "Disputes" as defined by the Arbitration Agreement, to arbitration and that it was seeking to enforce the terms of the Arbitration Agreement. The Facility again acted on, and further demonstrated its acceptance of, the Arbitration Agreement when, on July 26, 2019 (the day after the meet-and-confer), it moved to compel arbitration, i.e., to enforce the Arbitration Agreement that both parties unequivocally agreed to—Plaintiff via her signature, the Facility via its conduct.<sup>14</sup>

**5. Regarding the Subject Order's determination that "[t]he parties on the Arbitration Agreement are not those specifically listed in this lawsuit."<sup>15</sup>**

Most respectfully, this part of the Subject Order (or at least the majority of it) does not make sense. All but the final paragraph of this part of the Subject Order is devoted to addressing (though not in fact refuting) an argument that has not actually been raised to this Court. Specifically, it is the argument that the Arbitration Agreement is enforceable not just by the Facility, but by the Corporate Defendants, too. According to the Subject Order, "these same Defendants" made this argument some years ago in another case. (Subject Order p. 6.) The Subject Order then goes on to suggest that all Defendants might be able to compel Plaintiff to arbitration and, in turn, Plaintiff might be able to enforce any award she obtains in arbitration against all Defendants. (*Id.* at pp. 6–7.)

---

<sup>14</sup> Additionally, while the Facility believes a valid offer and acceptance is unequivocally supported by the record before this Court and South Carolina law, it submits that South Carolina contract law permits and recognizes the validity of signature of a contract with retroactive effect to further affirm the prior meeting of the minds and other acts of acceptance. The Facility has the right to sign the Arbitration Agreement now and, if necessary, is ready, willing, and able to do so.

<sup>15</sup> (Subject Order pp. 5–7.)

First off, if anything, this part of the Subject Order would seem to support the *grant* of the Facility's motion to compel arbitration, not the denial of it—all it really seems to be saying is that the arbitration should not just be between Plaintiff and the Facility but between Plaintiff and all Defendants. In any event, however, this part of the Subject Order is wholly misplaced and provides no reason to deny the motion to compel arbitration because, quite simply, it is wholly dedicated to addressing an argument that does not exist here. It is only the *Facility*, not all Defendants, who has moved to compel arbitration here. (See footnote 1, *infra*.)

The only other analysis in this part of the Subject Order reads as follows:

It is also worth noting that at the beginning of the Arbitration Agreement in question where the parties are identified the Facility has listed itself as “Magnolia Place *of* Greenville.” (Emphasis added). In actuality the Facility's correct title would be Magnolia Place – Greenville which is the name THI of South Carolina at Magnolia Place at Greenville, LLC is doing business as. It is up to the drafter of the Arbitration Agreement to be able to sufficiently and correctly identify themselves as a party of the Arbitration Agreement. Failure to do so must be construed against the drafting the party.

(Subject Order p. 7) (emphasis in original.)

As an initial matter, it is not even clear whether the Court is actually citing this as providing a basis to deny the Facility's motion to compel arbitration or merely something “worth[y] of not[e],” but not itself dispositive; however, assuming the Court intends this point to suffice as a basis to deny the Facility's motion to compel arbitration, most respectfully, the Court is mistaken.

As an arbitration agreement covered by the FAA,<sup>16</sup> the subject Arbitration Agreement “must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to

---

<sup>16</sup> See *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732–33 (2014) (finding the FAA applied to arbitration agreement signed in conjunction with admission to skilled nursing facility because “the terms of the residency agreement implicate interstate commerce and, thus, the FAA”).

[its] terms[.]” *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. *Litchfield Co. of S. C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986). Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). “An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided.” *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). For a contract to be ambiguous, “the terms of the contract [must be] *reasonably* susceptible of more than one interpretation.” *See S.C. Dep’t of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (emphasis added); *see also Rodarte v. University of South Carolina*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017) (“[A]n unambiguous contract is by definition capable of only one *reasonable* interpretation.”) (citation omitted) (emphasis added).

The discrepancy at issue here (“Magnolia Place of Greenville” versus “Magnolia Place – Greenville”) does render the Arbitration Agreement *reasonably* susceptible of more than one interpretation. Moreover, “[a] contract is good between the parties, no matter how incorrect the names used in the paper may be, if it appears they were intended as the names of the parties to be bound by the contract or to receive its benefits.” *Cobb & Seal Shoe Store v. Aetna Ins. Co.*, 78 S.C. 388, 58 S.E. 1099 (1907). Without question, the names of the parties to be bound to the contract at issue, i.e., the Arbitration Agreement, were sufficiently stated here, and refusal to enforce the Arbitration Agreement cannot properly be based on the discrepancy at issue.

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of Defendants' motions, whether in written or oral form, all of which Defendants now ask the Court to reconsider and expressly rule upon), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order and either vacate it in favor of an order(s) granting Defendants' various motions or, as a lesser alternative (subject to and without waiving Defendants' primary request for relief, or any part thereof), should the Court remain disinclined to grant Defendants' motions, to correct the Subject Order in respect of the points raised above about the language included in the order that is incorrect and improper.

PLEASE NOTE: Defendants reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,  
YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.  
D. Jay Davis, Jr.  
Russell G. Hines  
Kate C. Mettler  
P.O. Box 993  
Charleston, SC 29402  
(843) 720-5406  
[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)  
[rhines@ycrlaw.com](mailto:rhines@ycrlaw.com)  
[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com)  
*Attorneys for Defendants*

Charleston, South Carolina

October 21, 2019



State of South Carolina  
The Circuit Court of the Thirteenth Judicial Circuit

Robin B. Stilwell  
Judge

Greenville County Courthouse  
305 East North Street, Suite 315  
Greenville, SC 29601-2113  
Phone: (864) 467-8406  
Fax: (864) 235-3625  
rstilwellj@sccourts.org

September 24, 2019

Mr. Matthew W. Christian  
Christian and Davis, LLC  
Post Office Box 332  
Greenville, SC 29602

Mr. Raymond P. Mullman, Jr.  
Poliakoff & Associates, PA  
Post Office Box 1571  
Spartanburg, SC 29304

Mr. D. Jay Davis, Jr.  
Young Clement Rivers, LLP  
Post Office Box 993  
Charleston, SC 29402

Mr. John J. Owens  
Willoughby & Hoefer, PA  
133 River Landing, Suite 200  
Charleston, SC 29492

RE: The Estate of Patricia Royston, et al., vs. Hunt Valley Holdings, LLC, et al.  
Civil Action Number: 2019-CP-23-00473

Dear Counsel:

I have had the opportunity to review your respective submissions and the relevant law related to the issues at bar. After having done so, I am persuaded by arguments of the Plaintiff and would deny the Motions to Compel Arbitration. There are two factual matters that strike me as compelling in this analysis. First, the Arbitration Agreement is not signed by both parties and was produced, unsigned, by the Plaintiff during discovery. Second, the parties on the Arbitration Agreement are not those parties specifically listed in this lawsuit. Therefore, I find that the Plaintiff is not bound by the Arbitration Agreement.

I apologize for having been delayed in addressing this matter. I was called up for hurricane duty the week following this term of court and have struggled to catch up. I would appreciate Plaintiff's Counsel drafting a proposed Order and submitting the same to me via email in Word format. You may use those arguments advanced in your Memorandum of Law as the Court's reasoning. Please let me know should you need any further clarification or guidance in this matter.

With kindest regards,



ROBIN B. STILWELL

RBS:cor

Received  
9/26/19  
Scanned  
00180876

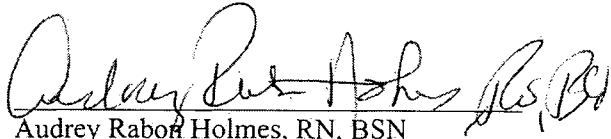
**AFFIDAVIT OF EXPERT WITNESS  
IN MEDICAL MALPRACTICE CASE  
§§ 15-36-100, 15-79-125  
1976 SC Code (As Amended)**

Personally appeared before me Audrey Rabon Holmes, RN, BSN, who, having been duly sworn, deposes and states:

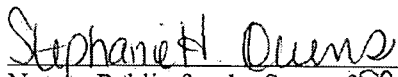
- 1) That I am over the age of 18 years and am qualified and competent to issue this Affidavit.
- 2) That I qualify as an "expert", as defined in S.C Code §15-36-100(A).
- 1) That my professional qualifications are accurately set forth in my curriculum vitae, which is attached hereto.
- 2) This Affidavit is made pursuant to §15-36-100 of the South Carolina Code of Laws, which requires that this Affidavit must specifically name at least one negligent act or omission claimed to exist in the factual basis for each claim based on the available evidence at the time of the filing of the Affidavit.
- 3) That I have reviewed various records pertaining to Patricia Royston and the care and treatment rendered. The medical records I have reviewed included the following:
  - a. Magnolia Place Greenville;
  - b. Greenville Memorial Hospital;
  - c. Greenville County EMS;
  - d. Pain Management Associates; and
  - e. Easley Internal Medicine.
- 4) Through my professional standing as set forth above, I am familiar with the applicable standard of care for the performance of a nursing home, physicians, nurses and related staff for patients/residents such as Patricia Royston and applicable to the conduct of Defendant Magnolia Place Greenville (and all entities or individuals charged with operating and managing Magnolia Place Greenville which treated Patricia Royston). The standard of care requires the following:
  - a. Timely evaluation and assessment of Patricia Royston, outlining all risk factors with which she presented in order to design an appropriate plan of care;
  - b. Provision of timely and comprehensive monitoring of Ms. Royston's condition and any changes thereto;
  - c. Timely and appropriate care planning, monitoring, and intervention for a patient at risk for falls
  - d. Appropriate coordination, administration, and monitoring of medications and the effects of same; and

- e. Timely and appropriate care planning, monitoring, and interventions of a resident at risk for infection and intervention of same once it occurs.
- 5) I have reviewed the evidence submitted to me, and based on my skill, expertise, and knowledge, it is my opinion that Magnolia Place Greenville (and all entities or individuals charged with managing or operating the facility), committed the following negligent acts and omissions which constitute a failure to comply with the appropriate standards of care:
- a. Failing to provide timely and comprehensive monitoring of the resident's condition and any changes thereto;
  - b. Failing to timely evaluate and assess Patricia Royston's risk factors with which she presented in order to design and appropriate plan of care;
  - c. Failing to implement and follow an appropriate plan of care and act on changes in condition;
  - d. Failing to properly care plan, properly monitor, and properly intervene in a patient at risk for falls;
  - e. Failing to properly administer, coordinate and monitor medications and failure to monitor the effect of the medications;
  - f. Failing to appropriately care plan, monitor, and intervene in a resident at risk for infection and failure to timely and appropriately intervene once it occurred.
- 6) These violations of the standards of care and the negligent treatment provided by the defendants resulted in a progressive decline of Patricia Royston's health, comfort, and well-being which were the cause of her injuries and death.
- 7) I specifically reserve the right to add to, amend, or subtract from this Affidavit as new evidence comes into discovery or as new opinions are formulated.

The Affiant further sayeth naught.

  
Audrey Rabor Holmes, RN, BSN

Sworn to and subscribed before me  
this the 17th day of September, 2018

  
Notary Public for the State of SC  
My commission expires: 9/17/2024

**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. 2019-CP-23-00473

The Estate of Patricia Royston, by and through  
the appointed personal representative, Marianne McCoig,  
individually and on behalf of the statutory beneficiaries, Respondent,

V.

Hunt Valley Holdings, LLC,  
a/k/a Fundamental Long Term Care Holdings, LLC;  
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)  
Russell G. Hines (SC Bar No. 72100)  
Kate C. Mettler (SC Bar No. 103762)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29402  
P.O. Box 993 (29402)  
(843) 720-5488

*Attorneys for Appellants*

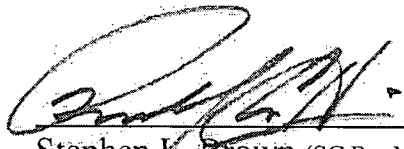


Defendants, Hunt Valley Holdings, LLC, a/k/a Fundamental Long Term Care Holdings, LLC ("HVH"), Fundamental Clinical and Operational Services, LLC ("FCOS"), Fundamental Administrative Services, LLC ("FAS"), and THI of South Carolina at Magnolia Place at Greenville, LLC, d/b/a Magnolia Place-Greenville (the "Facility") (collectively, "Appellants"), hereby appeal the following orders of the Honorable Robin B. Stilwell, Circuit Court Judge, copies of which are attached hereto:

- **Order filed October 9, 2019** (denying the Facility's motion to compel arbitration; HVH, FCOS, and FAS's respective motions to stay this action pending the outcome of the arbitrability dispute/arbitration proceedings; and all Appellants' respective motions to be protected from discovery pending the resolution of the Facility's motion to compel arbitration); and
- **Order filed October 23, 2019** (denying Appellants' motion to alter, amend, and/or reconsider).

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Russell G. Hines (SC Bar No. 72100)

Kate C. Mettler (SC Bar No. 103762)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29402

P.O. Box 993 (29402)

(843).720-5488

*Attorneys for Appellants*

Charleston, South Carolina

Dated: 11/20/19

**\*Other Counsel of Record Identified on Following Page\***

Other Counsel of Record:

Gary W. Poliakoff (SC Bar No. 4488)  
Raymond P. Mullman, Jr. (SC Bar No. 8662)  
POLIAKOFF & ASSOCIATES, P.A.  
215 Magnolia Street  
Spartanburg, South Carolina 29306  
P.O. Box 1571 (29304)  
(864) 582-5472

*and*

Matthew W. Christian (SC Bar No. 70516)  
CHRISTIAN & DAVIS, LLC  
1007 E. Washington Street  
Greenville, South Carolina 29601  
P.O. Box 332 (29602)  
(864) 232-7363

*Attorneys for Respondent*

**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. 2019-CP-23-00473

The Estate of Patricia Royston, by and through  
the appointed personal representative, Marianne McCoig,  
individually and on behalf of the statutory beneficiaries, Respondent,

v.

Hunt Valley Holdings, LLC,  
a/k/a Fundamental Long Term Care Holdings, LLC;  
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,

**PROOF OF SERVICE**

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)

Kate C. Mettler (SC Bar No. 103762)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29402

P.O. Box 993 (29402)

(843) 720-5488

*Attorneys for Appellants*

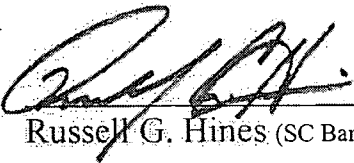
I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellants, hereby certify that the foregoing **NOTICE OF APPEAL** was served on all other parties to this matter by depositing a copy of the same in the U.S. Mail on November 20, 2019, properly posted for delivery to the following addressees:

Gary W. Poliakoff, Esquire  
Raymond P. Mullman, Jr., Esquire  
Poliakoff & Associates, P.A.  
P.O. Box 1571  
Spartanburg, South Carolina 29304  
*Attorneys for Respondent*

Matthew W. Christian, Esquire  
Christian & Davis, LLC  
P.O. Box 332  
Greenville, South Carolina 29602  
*Attorneys for Respondent*

I further certify that a copy of this **NOTICE OF APPEAL** is this day, November 20, 2019, being E-Filed with the lower court (which will also, i.e., in addition to service by mail, effect service of this notice electronically on counsel of record for all parties to this matter).

Respectfully submitted,  
YOUNG CLEMENT RIVERS, LLP

By:   
Russell G. Hines (SC Bar No. 72100)  
*Attorneys for Appellants*

Charleston, South Carolina

Dated: 11/20/19

**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

By: 

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Russell G. Hines (SC Bar No. 72100)

Kate C. Mettler (SC Bar No. 103762)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29401

P.O. Box 993 (29402)

(843) 720-5488

*Attorneys for Appellants*

Charleston, South Carolina

Dated: 8/28/20

**RECEIVED**

AUG 31 2020

**SC Court of Appeals**