

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

---

Appeal from Spartanburg County  
Court of Common Pleas  
Grace Gilchrist Knie, Circuit Court Judge

---

Case No. 2019-CP-42-03236

---

**RECEIVED**

**Oct 12 2020**

**SC Court of Appeals**

Rita St. Aubin,  
as Personal Representative of the Estate of Irene Ramsey,  
  
Respondent,

v.

THI of South Carolina at Camp Care, LLC,  
d/b/a Lake Emory Post Acute Care; THI of South Carolina, LLC;  
Hunt Valley Holdings, LLC; THI of Baltimore, Inc.; and Casey Caddell,  
as Officer/Manager of THI of South Carolina at Camp Care, LLC,  
d/b/a Lake Emory Post Acute Care,

Appellants.

---

**RECORD ON APPEAL**

---

YOUNG CLEMENT RIVERS, LLP  
Stephen L. Brown (SC Bar No. 66468)  
D. Jay Davis, Jr. (SC Bar No. 12084)  
Matthew O. Riddle (SC Bar No. 76650)  
Russell G. Hines (SC Bar No. 72100)  
Gaillard T. Dotterer, III (SC Bar No. 103620)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488

*Attorneys for Appellants*

ANASTOPOULO LAW FIRM, LLC  
Stefan B. Feidler (SC Bar No. 101918)  
Eric M. Poulin (SC Bar No. 100209)  
Roy T. Willey, IV (SC Bar No. 101010)  
32 Ann Street  
Charleston, South Carolina 29403  
(843) 614-8888  
  
*Attorneys for the Respondent*

## **INDEX**

### **Page**

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

|                                                                                                                                                                     |    |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| Order Re: Defendants’ Motion to Compel Arbitration and Stay Action,<br>Filed January 9, 2020.....                                                                   | 1  |
| Order Re: Defendants’ Motion to Alter, Amend, and/or Reconsider Order<br>Denying Defendants’ Motion to Compel Arbitration and Stay,<br>Filed February 14, 2020..... | 11 |

### **Pleadings**

|                                                          |    |
|----------------------------------------------------------|----|
| Summons and Complaint,<br>Filed September 10, 2019 ..... | 16 |
|----------------------------------------------------------|----|

### **Transcripts**

|                                                 |    |
|-------------------------------------------------|----|
| Motion Hearing,<br>Held December 18, 2019 ..... | 50 |
|-------------------------------------------------|----|

### **Other Material or Documents**

|                                                                                                  |          |
|--------------------------------------------------------------------------------------------------|----------|
| Facility’s Motion to Stay Action and Compel Arbitration,<br>Filed October 28, 2019 .....         | 86       |
| <u>Exhibit A</u> , Arbitration Agreement .....                                                   | 88       |
| HVH’s Motion to Stay,<br>Filed October 28, 2019 .....                                            | 90       |
| THIB’s Motion to Stay,<br>Filed October 28, 2019 .....                                           | 92       |
| THISC’s Motion to Stay,<br>Filed October 28, 2019 .....                                          | 94       |
| Caddell’s Motion to Stay Action and Compel Arbitration,<br>Filed December 9, 2019.....           | 96       |
| <u>Exhibit A</u> , Arbitration Agreement .....                                                   | (see 88) |
| Memo in Support of Motion to Stay Action and Compel Arbitration, Filed<br>December 13, 2019..... | 98       |
| <u>Exhibit A</u> , Arbitration Agreement .....                                                   | (see 88) |
| <u>Exhibit B</u> , Power of Attorney .....                                                       | 114      |

|                                                                                                                                                      |          |
|------------------------------------------------------------------------------------------------------------------------------------------------------|----------|
| Memo in Opposition to Motion to Stay Action and Compel Arbitration,<br>Filed December 17, 2019.....                                                  | 123      |
| <u>Exhibit A</u> , Arbitration Agreement .....                                                                                                       | (see 88) |
| <u>Exhibit C</u> , Order re Estate of Vera Brown .....                                                                                               | 136      |
| <u>Exhibit D</u> , Order re Estate of David Holmes.....                                                                                              | 143      |
| <u>Exhibit E</u> , Order re Robert Abrams .....                                                                                                      | 151      |
| Email from Plaintiff’s Counsel to Court with Plaintiff’s Proposed Order,<br>Dated December 31, 2019 .....                                            | 159      |
| Plaintiff’s Proposed Order .....                                                                                                                     | 160      |
| Email from Defendants’ Counsel to Court with Defendants’ Proposed Order,<br>January 2, 2020 .....                                                    | 168      |
| Defendants’ Proposed Order .....                                                                                                                     | 171      |
| Motion to Alter, Amend and/or Reconsider Order Regarding Defendants’<br>Motion to Compel Arbitration and Stay Action,<br>Filed January 19, 2020..... | 182      |
| Notice of Appeal, including Proof of Service in Circuit Court,<br>Filed/Served February 25, 2020 .....                                               | 196      |
| <b><u>Certificate of Counsel</u></b> .....                                                                                                           | 201      |

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

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

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

### **PROCEDURAL BACKGROUND:**

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

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

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

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

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

**FACTUAL BACKGROUND:**

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

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

### **LEGAL ANALYSIS AND FINDINGS:**

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

This Court also interprets jury trial waivers narrowly and construes contract ambiguities against the Defendant as the drafter of the Arbitration Agreement. See WDI Meredith & Co. v. American Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004); Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. The South Carolina Supreme Court has stated “[a]lthough we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.” Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718, 720-21 (2007). Where the FAA looks to state law to decide the threshold questions of contract formation, the Arbitration Agreement is subject to the same defenses applicable to other contracts. Consequently, this Court’s inquiry included an examination of contractual defects such as lack of mutual assent, consideration, ambiguity, vagueness, and unconscionability to determine the enforceability of the Arbitration Agreement.

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

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

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

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

Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. Dowling v. Home Buyers Warranty Corp., II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. Player vs. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). An agreement that omits material terms may be determined to be unenforceable for indefiniteness. Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997); Ellis v. Taylor, 449 S.E.2d (S.C. App. 1994).

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

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

Specifically, the arbitration agreement is silent as to what “panel” the arbitrator is to be chosen from or who pays for arbitration. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Without a designated process to select an arbitrator from a “panel” to choose from, or any indication of what that “panel” would be or who it includes, the Court would be forced to fill in the parties’ alleged contract with an arbitrator selection clause. Again, the Arbitration Agreement that is the subject of this motion simply states that the “parties shall select an arbitration from a panel having experience and knowledge of the health care industry” and, if the parties cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The process for doing so is vague and indefinite.

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

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

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

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

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

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

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

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

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

**CONCLUSION:**

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

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

**IT IS SO ORDERED.**

/s/Grace Gilchrist Knie

Honorable Grace Gilchrist Knie  
Resident Judge, Seventh Judicial Circuit

January 8th, 2020  
Spartanburg, South Carolina



Spartanburg Common Pleas

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

**Case Number:** 2019CP4203236

**Type:** Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2020-01-09 16:30:10 page 10 of 10

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

RITA ST. AUBIN,  
as personal representative of the  
Estate of Irene Ramsey,

Plaintiff,

vs.

THI OF SOUTH CAROLINA AT CAMP  
CARE, LLC d/b/a Lake Emory Post Acute  
Care; THI OF SOUTH CAROLINA, LLC;  
HUNT VALLEY HOLDINGS, LLC; THI  
OF BALTIMORE, INC.; and CASEY  
CADDELL, as Officer/Manager of THI of  
South Carolina at Camp Care, LLC d/b/a  
Lake Emory Post Acute Care,

Defendants.

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT  
CASE NO. 2019-CP-42-03236

**ORDER REGARDING DEFENDANTS'  
MOTION TO ALTER, AMEND, and/or  
RECONSIDER THE COURT'S ORDER  
DENYING DEFENDANTS' MOTION TO  
COMPEL ARBITRATION AND STAY**

Counsel for Plaintiff:

Stefan Bjorn Feidler

Counsel for Defendants:

D. Jay Davis, Jr.

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

Judge Grace Gilchrist Knie signed and filed on January 9<sup>th</sup>, 2020, an order denying the Defendants' Motions to Compel Arbitration and Stay the Proceedings. On January 19<sup>th</sup>, 2020, Defendants filed a Motion pursuant to Rule 59 of the SCRCP to Alter, Amend, and/or Reconsider the Order regarding Defendants' Motions to Compel Arbitration and Stay Action. This order

pertains to the Motion to Alter, Amend, and/or Reconsider the Order regarding denying Defendants' Motion to Compel Arbitration and Stay the Action.

**PROCEDURAL BACKGROUND:**

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

Defendant THI of South Carolina, LLC filed an Answer to the Complaint on October 14<sup>th</sup>, 2019. Defendant Hunt Valley Holdings, LLC filed an Answer to the Complaint on October 14<sup>th</sup>, 2019. Defendant THI of Baltimore, Inc. filed an Answer to the Complaint on October 14<sup>th</sup>,

2019. Defendant Casey Caddell filed an Answer to the Complaint on October 14<sup>th</sup>, 2019.

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care filed an Answer to the Complaint on October 14<sup>th</sup>, 2019.

Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care filed a Motion to Stay the Action and Compel Arbitration on October 28<sup>th</sup>, 2019. Defendant Hunt Valley Holdings, LLC filed a Motion to Stay on October 28<sup>th</sup> 2019. Defendant THI of Baltimore, Inc. filed a Motion to Stay on October 28<sup>th</sup>, 2019. Defendant THI of South Carolina, LLC filed a Motion to Stay on October 28<sup>th</sup>, 2019. Defendant Casey Caddell filed a Motion to Stay the Action and Compel Arbitration on December 9<sup>th</sup>, 2019.

Judge Grace Gilchrist Knie signed and filed on January 9<sup>th</sup>, 2020, an order denying the Defendants' Motions to Compel Arbitration and Stay the Proceedings. On January 19<sup>th</sup>, 2020, Defendants filed a Motion to Alter, Amend, and/or Reconsider the Order regarding Defendants' Motions to Compel Arbitration and Stay Action. This order pertains to the Motion to Alter, Amend, and/or Reconsider the Order regarding denying Defendants' Motion to Compel Arbitration and Stay the Action.

### **CONCLUSION:**

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Defendants' Motion to Amend or Alter Judgment, made pursuant to Rule 59, SCRCF, filed with the Court on January 19<sup>th</sup>, 2020, is respectfully denied.

**IT IS SO ORDERED.**

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

February 14th, 2020  
Spartanburg, South Carolina



Spartanburg Common Pleas

**Case Caption:** Irene Ramsey VS Thi Of South Carolina At Camp Care, Llc ,  
defendant, et al  
**Case Number:** 2019CP4203236  
**Type:** Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

Electronically signed on 2020-02-14 11:29:31 page 5 of 5

IN THE STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS  
FOR THE 7TH JUDICIAL CIRCUIT  
CASE NO: 2019-CP-42-\_\_\_\_\_

RITA ST. AUBIN as Personal  
Representative of the ESTATE OF IRENE  
RAMSEY,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CAMP  
CARE, LLC d/b/a LAKE EMORY POST  
ACUTE CARE; THI OF SOUTH  
CAROLINA, LLC; HUNT VALLEY  
HOLDINGS, LLC; THI OF  
BALTIMORE, INC.; and CASEY  
CADDELL as Officer/Manager of THI OF  
SOUTH CAROLINA AT CAMP CARE,  
LLC d/b/a LAKE EMORY POST ACUTE  
CARE,

Defendant(s).

**SUMMONS**  
**(Jury Trial Demanded)**

**TO: THE DEFENDANT(S) ABOVE NAMED:**

**YOU ARE HEREBY SUMMONED** and required to Answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the Plaintiff or her attorneys, Stefan B. Feidler , Eric M. Poulin, Roy T. Willey, IV, at his/their office, 32 Ann Street Charleston, South Carolina, 29403, within (30) days after the service hereof, exclusive of the day of such service and if you fail to Answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint.

**Note: Defendant(s) failure to file a motion to dismiss and compel arbitration within thirty (30) days of service shall be deemed a waiver to enforce any and all arbitration agreements.**

Dated at Charleston, South Carolina on the 10 day of September, 2019.

**ANASTOPOULO LAW FIRM, LLC**

/s/ Stefan B. Feidler  
Stefan B. Feidler, Esquire  
S.C. Bar No.: 101918  
Roy T. Willey, IV, Esquire  
S.C. Bar No.: 101010  
Eric M. Poulin, Esquire  
S.C. Bar No.: 100209  
32 Ann Street  
Charleston, South Carolina 29403  
(843) 614-8888

IN THE STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS  
FOR THE 7TH JUDICIAL CIRCUIT  
CASE NO: 2019-CP-42-\_\_\_\_\_

RITA ST. AUBIN as Personal  
Representative of the ESTATE OF IRENE  
RAMSEY,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CAMP  
CARE, LLC d/b/a LAKE EMORY POST  
ACUTE CARE; THI OF SOUTH  
CAROLINA, LLC; HUNT VALLEY  
HOLDINGS, LLC; THI OF  
BALTIMORE, INC.; and CASEY  
CADDELL as Officer/Manager of THI OF  
SOUTH CAROLINA AT CAMP CARE,  
LLC d/b/a LAKE EMORY POST ACUTE  
CARE,

Defendant(s).

**COMPLAINT  
(Jury Trial Demanded)**

The Plaintiff, complaining of the Defendants, alleges and says as follows:

**PARTIES & JURISDICTION**

1. That the Plaintiff, Rita St. Aubin, (herein referred to collectively with the Estate of Irene Ramsey and decedent Irene Ramsey as "Plaintiff") is a citizen and resident of Spartanburg County, State of South Carolina.
2. That the Estate of Irene Ramsey was probated in Spartanburg County, State of South Carolina, and that Rita St. Aubin is the duly appointed Personal Representative of said Estate.
3. That Plaintiff's Decedent, Irene Ramsey, was a citizen and resident of Spartanburg County, State of South Carolina at the time of her death.
4. That upon information and belief, Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care Lake Emory Post Acute Care, (herein referred to as

“Defendant THI of South Carolina At Camp Care, LLC.”) is incorporated in the State of Delaware, with its principal place of business in Spartanburg County, and Corporation Service Company is the representative agent who can be served with process at 1703 Laurel Street, Columbia, South Carolina 29201.

5. That upon information and belief, THI of South Carolina, LLC, (herein referred to as “Defendant THI”) is incorporated in the State of Delaware, with its principal place of business in Spartanburg County, and Corporation Service Company is the representative agent who can be served with process at 1703 Laurel Street, Columbia, South Carolina 29201.
6. That upon information and belief, Hunt Valley Holdings, LLC, (herein referred to as “Defendant Hunt Valley”) is incorporated in the State of Delaware, with its principal place of business in Spartanburg County, State of South Carolina.
7. That upon information and belief, Defendant THI of Baltimore, Inc. (herein referred to as “Defendant THI of Baltimore”), is incorporated in the State of Delaware, with its principal place of business in Spartanburg County, State of South Carolina.
8. That upon information and belief, Defendant Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care (herein referred to as “Defendant Caddell”) is a citizen and resident of Spartanburg County, State of South Carolina.
9. The aforementioned Defendants are collectively referred to below as “Defendants” unless otherwise identified individually. Lake Emory Post Acute Care shall be referred to below as “Defendants’ facility.”

10. That upon information and belief, Defendants THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc, are subsidiaries and related entities of Defendant THI of South Carolina At Camp Care, LLC.
11. That upon information and belief, Defendant THI of South Carolina At Camp Care, LLC. owns, operates and controls the nursing home facility in question as part of a for-profit chain as defined by CMS-15 § 2150, and exerts control over the other Defendants including the acts and delicts by subsidiaries relating to the operation of Defendants' nursing home. Upon information and belief, all, or most of the following factors exists between Defendant THI of South Carolina At Camp Care, LLC, and its subsidiaries:
- a. Common Ownership;
  - b. Common directors or officers;
  - c. Financing of the subsidiary by the parent;
  - 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; and
  - 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.
12. That upon information and belief, Defendant THI of South Carolina At Camp Care, LLC delivers nursing home care for profit and executed the delivery of nursing home care to Irene Ramsey during her residency at Defendants' facility.

13. That upon information and belief, Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, were involved in the ownership, operation, and/or management of nursing homes for profit including the facility where Irene Ramsey resided prior to her death.
14. That upon information and belief, Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, were involved in controlling the revenue and the budget which affected the budget, staffing, training, supervision, development and implementation of policies and procedures for Defendant's facility.
15. That upon information and belief, Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, at all relevant times hereto totally dominated and controlled Defendants' facility 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 THI of South Carolina at Camp Care, LLC, who is therefore liable and responsible for the acts and delicts of all Defendants.

16. 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 Defendants' facility at various times, and derived substantial revenue from services provided in South Carolina.
17. That upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, acted on behalf of themselves and on behalf of Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, and their affiliate and/or parent companies.
18. That upon information and belief, at all times relevant herein, Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, as well as their agents, employees, servants, and apparent agents owed a duty to Irene Ramsey and were all jointly, directly, and vicariously liable for the care and treatment of Irene Ramsey received as a resident at Defendants' facility.
19. That upon information and belief, Defendants THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, THI of South Carolina, LLC, Hunt Valley Holdings,

LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care, 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.

20. That Plaintiff filed Notice of Intent, Expert Affidavit, and Plaintiff's Responses to Standard and First Interrogatories on. Pursuant to S.C. Code Ann § 15-36-100.
21. That the parties conducted pre-suit mediation and an ADR Report was filed with the Court. Pursuant to S.C. Code Ann § 15-36-100.
22. That in response to Plaintiff's Notice of Intent, Plaintiff did not receive a copy of any alleged arbitration agreement within sixty (60) days of service and takes the position that Defendant has waived arbitration.
23. "[N]ot every action taken by a medical professional in a hospital or doctor's office necessarily implicates medical malpractice and, consequently, the requirements of [S.C. Code Ann.] [S]ection 15-79-125." Dawkins v. Union Hosp. Dist., 408 S.C. 171, 178, 758 S.E.2d 501, 504 (2014).
24. "However, at all times, the medical professional must 'exercise ordinary and reasonable care to ensure that no unnecessary harm [befalls] the patient.'" Id. at 178, 758 S.E.2d at 504 (further citations omitted).
25. "The statutory definition of medical malpractice found in section 15-79-110(6) does not impact medical providers' ordinary obligation to reasonably care for patients with respect to nonmedical, administrative, ministerial, or routine care." Id. (further citation omitted).

26. “Thus, medical providers are still subject to claims sounding in ordinary negligence.” Id. (further citations omitted).
27. That the wrongful death and the nursing home abuse and neglect that is the subject of this action occurred in Spartanburg County, State of South Carolina.
28. That Defendants principal place of business is located in Spartanburg County, State of South Carolina.
29. That this court has jurisdiction over the parties and subject matter of this cause of action and venue is proper in Spartanburg County, State of South Carolina.

### **BACKGROUND FACTS**

30. That on or about February 6, 2017, Irene Ramsey was admitted to Defendants’ nursing home and/or long-term care facility, Lake Emory Post Acute Care, in Spartanburg, State of South Carolina.
31. That previous to Ms. Ramsey’s admission into Defendants’ facility, Ms. Ramsey suffered a fall resulting in injuries, and such, was a high risk for falls.
32. That upon admission into Defendants’ facility, Ms. Ramsey was marked as a high risk for falls.
33. That despite being admitted and marked as high risk for falls, Defendants failed to implement any and all interventions to prevent Ms. Ramsey’s fall(s) and subsequent injuries, including her untimely death.
34. That while residing at Defendants’ facility, Irene Ramsey was improperly cared for and/or abused and/or neglected by Defendants’ staff.

35. That Irene Ramsey suffered a fall resulting in death, while at Defendants' facility, Irene Ramsey sustained serious injuries including a intraparenchmal brain and subdural hemorrhage, and Defendants:

- a. failed to prevent said injuries;
- b. caused said injuries;
- c. caused Irene Ramsey's death;
- d. never acknowledged said injuries;
- e. never documented said injuries;
- f. failed to assist Plaintiff's decedent; and
- g. failed to timely assist Irene Ramsey in obtaining treatment for said injuries.

36. That Irene Ramsey was admitted to the hospital from Defendants' facility and on May 19, 2017, Irene Ramsey was pronounced dead as a result of a fall she suffered at Defendants' facility while under Defendants' care.

37. That on May 19, 2017, Irene Ramsey passed away from her inability to recover from a combination of the injuries she sustained from a fall, while at Defendants' facility, as a result of Defendants' lack of care.

**FOR A FIRST CAUSE OF ACTION**  
**(Negligence / Gross Negligence)**

38. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

39. That Defendant(s) owed a duty to the Irene Ramsey as providers to act in a reasonable fashion, provide a safe and adequate facility and provide timely care to the Plaintiff in that of similar providers.

40. That the resulting injuries and damages to P Irene Ramsey were caused proximately by one or more of the following negligent, grossly negligent, careless, reckless, willful, wanton, and

unlawful acts, and/or omissions and/or breach of duty of Defendant in any one or more of the following respects:

- a. In deviating from the standard of care for medical and long-term care providers;
- b. In violating the Omnibus Adult Protection Act for South Carolina §43-35-25 which requires that any “physician, nurse, dentist, optometrist, medical examiner, coroner, other medical, mental health or allied health professional, Christian Science practitioner, religious healer, school teacher, counselor, psychologist, mental health or intellectual disability specialist, social or public assistance worker, caregiver, staff or volunteer of an adult day care center or of a facility, or law enforcement officer having reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited shall report the incident;”
- c. In violating the Nurse Practice Act of South Carolina §40-33-80 by failing to thoroughly investigate complaints and violations;
- d. In violating South Carolina Department of Health & Environmental Control (SC DHEC) Regulation Number 61-17, § 800 et. Seq., which requires that all entries in the medical record for each resident are to be adequate and complete;
- e. In violating 42 CFR §483.75 which requires that:
  - i. Medical records be maintained in accordance with acceptable professional standards and practices that are “complete, accurately documented, and readily accessible;”
  - ii. The facility be administered in a matter that allows the resident to maintain his/her highest level of physical well-being; and

- iii. The facility be operated and provide services in compliance with all applicable Federal, State, and local laws, regulations, and code and with accepted professional standards and principles that apply to professionals providing services in such a facility.
- f. In violating 42 CFR §483.10 regarding the Irene Ramsey's right to a dignified existence including, but not limited to notification of changes, which required the Defendants to immediately consult with a resident's physician and notify a resident's legal representative when there is a significant change in the resident's physical, mental, or psychosocial status or need to alter treatment significantly due to adverse consequences;
- g. In violating 42 CFR §483.25 regarding quality of care, which requires that:
  - i. Each resident must receive and the facility must provide necessary care and services in accordance with the comprehensive assessment and plan of care;
  - ii. "A resident who is unable to carry out activities of daily living received the necessary services to maintain good nutrition, grooming, and personal and oral hygiene;"
  - iii. The facility ensure a resident maintains acceptable parameters of nutritional status such as body weight and protein levels and receives a therapeutic diet when there is a nutritional problem;
  - iv. "Each resident receives adequate supervision and assistance devised to prevent accidents;" and
  - v. The facility provide the resident with sufficient fluids to maintain proper hydration and health.

- h. In violating 42 CFR §483.30, regarding nursing services, which requires nursing homes to have sufficient staff to provide nursing related services to attain or maintain the highest practicable physical well-being;
- i. In failing to provide Irene Ramsey with the reasonably required care expected of and typically exercised by similarly situated professional medical care providers;
- j. In failing to acknowledge and/or properly document and/or record Irene Ramsey's injuries and/or physical conditions while in Defendants' care;
- k. In causing Irene Ramsey and/or Plaintiff to incur medical costs associated with numerous visits and extended stays at the hospital;
- l. In causing Irene Ramsey and/or Plaintiff to incur the costs of transferring Irene Ramsey to another facility;
- m. In causing and/or refusing to alleviate Irene Ramsey's severe pain and suffering prior to her death;
- n. In causing Irene Ramsey to suffer from anxiety and/or mental anguish and/or emotional and/or psychological pain and suffering as a result of Defendants' abuse and/or neglect during and/or after Irene Ramsey resided at Defendants' facility;
- o. In causing and/or accelerating and/or expediting Irene Ramsey's premature death;
- p. In causing Plaintiff's emotional and/or psychological pain and suffering and/or mental anguish as a result of the premature death of her loved one;
- q. Failure to develop a plan of care for Irene Ramsey at any time prior to or during her stay at Defendants' facility;
- r. Failure to conduct accurate assessments of Irene Ramsey during her time at Defendants' facility;

- s. Failure to provide goods and services to prevent the development of UTI infection;
- t. Failure to provide sufficient fluids to maintain health and adequate hydration and/or develop a plan for provision of the same;
- u. Failure to provide the care, goods, and/or services necessary to maintain the health or safety of a vulnerable adult;
- v. Failure to properly and/or adequately and/or timely record and/or document and/or monitor patient's blood pressure and/or intake of fluids;
- w. Failure to properly and/or adequately and/or timely record and/or document patient's severe injuries;
- x. In any such other particulars as may be ascertained through discovery or shown at trial; and
- y. Additionally, Irene Ramsey's injuries were caused by the Defendants' deviations from the acceptable standards of care.

All of which were direct and proximate cause of the injuries and damages suffered by the Plaintiff and Irene Ramsey, said acts being in violation of the Laws of the State of South Carolina.

- 41. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of Defendants, as is set forth more fully above, Irene Ramsey and her beneficiaries were injured, endured pain and suffering, have suffered mentally and emotionally, have incurred various expenses, and have otherwise been damaged and injured.
- 42. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness, and wantonness of all Defendant, as is set forth more fully above,

Irene Ramsey suffered in various ways and wrongfully died because of receiving inadequate medical care while in Defendants' care.

43. That upon information and belief, Plaintiff is entitled to judgment against the Defendants for actual, compensatory, and exemplary or punitive damages for her personal injuries set forth herein in an amount that is fair, just and reasonable under the circumstances, plus whatever costs, interest and attorney fees that she may be entitled, to be determined by a jury.
44. That as a direct and proximate result of the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness of the Defendant, as is set forth more fully above, Irene Ramsey and her beneficiaries have been damaged and injured in the following respects:
  - a. Irene Ramsey endured physical pain and suffering as a result of the serious injuries she sustained while in Defendants' care;
  - b. Irene Ramsey endured physical pain and suffering as a result of her dehydration and dangerously low blood pressure which Defendant caused and/or exacerbated and/or failed to appropriately address and/or failed to properly monitor;
  - c. Irene Ramsey suffered from anxiety, mental anguish, and emotional and/or psychological pain and suffering as a direct result of Defendants' breach of duty and/or neglect and/or abuse;
  - d. Irene Ramsey died prematurely as a result of Defendants' deviation for the generally accepted standard of care exercised by similarly situated medical care providers and long-term care facilities;
  - e. Plaintiff and/or Irene Ramsey incurred medical costs for the hospital visits and extended stay Irene Ramsey endured;

- f. Plaintiff and/or Irene Ramsey incurred costs associated with transferring Irene Ramsey to another facility;
  - g. Plaintiff incurred costs associated with Irene Ramsey's funeral expenses; and
  - h. Plaintiff suffered from emotional and/or psychological pain and suffering as a result of the Defendants' neglect and/or abuse towards her loved one which caused and/or facilitated and/or accelerated Irene Ramsey's wrongful death.
45. Notwithstanding undertaking that duty and while Irene Ramsey was under the care of the Defendant, the Defendant departed from prevailing and acceptable professional standards of care and treatment of Irene Ramsey and were thereby negligent, careless, grossly negligent, reckless and in violation of the duties owed to Irene Ramsey, and they are liable for one of more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care.
46. The Defendant deviated from the standard of care and skill exercised by nurses generally and under similar conditions and like surrounding circumstances as those presented by Irene Ramsey. In particular, without limitation, they deviated from the standard of care as set forth above.
47. That Defendant knew or should have known that Irene Ramsey would suffer foreseeable financial injury, including hospital and/or medical expenses and costs of transfer to another health care facility, as a result of Defendants' failure to exercise ordinary care as set forth more fully above.
48. The Defendants further deviated:
- a. In failing to properly monitor the resident's physical well-being while residing at the Defendants' facility;

- b. In failing to properly train and supervise the personnel and staff and employees at the Defendants' facility with regard to Irene Ramsey's care;
- c. In failing to relieve incompetent and/or improperly trained and/or negligence staff and employees at the Defendants' facility;
- d. In failing to properly revise and modify plans of care for Irene Ramsey in response to Irene Ramsey's needs;
- e. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;
- f. In violating state and/or federal regulations requiring actions to protect the safety and health of Irene Ramsey, so as to constitute negligence per se;
- g. In failing to ensure that the Defendants' personnel and employees had sufficient, adequate, and current training, credentials and skills to properly prevent Irene Ramsey from suffering injury and pain;
- h. In failing to have in place proper and adequate policies, protocols, procedures, rules and regulations for the care and treatment of nutritional and infection control issues and fall prevention issues at the Defendants' facility, if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;
- i. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and fall prevention procedures;

- j. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and fall prevention procedures were available to agents, servants and employees of the Defendant;
  - k. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent judgment and skill;
  - l. In failing to ensure that Irene Ramsey had proper care;
  - m. In failing to properly document the medical records of Irene Ramsey;
  - n. In failing to properly document significant clinical findings; and
  - o. In any such other particulars as may be ascertained through discovery or shown at trial.
49. That as a direct and proximate cause of the Defendants' conduct, as aforesaid, Plaintiff and/or Irene Ramsey and/or her beneficiaries under the Wrongful Death Act, for whom this action is brought, have experienced economic loss associated with Irene Ramsey's medical expenses and are entitled to relief for the same.

**FOR A SECOND CAUSE OF ACTION**  
***Negligence per se***

50. Plaintiff restates and re-alleges every allegation set forth above as if states herein verbatim.
51. The Defendant is a long-term health care provider who has a duty to abide by certain state regulations in the care and treatment of their residents.
52. The state regulations combine to form a minimum standards of care which the Defendant must meet and exceed in order to ensure proper treatment of patients, including, specifically, Irene Ramsey.

53. The Defendant failed to abide by said standards, rules and regulations promulgated by the State of South Carolina in their treatment and care of Irene Ramsey.
54. The standards, rules and regulations promulgated by the State of South Carolina were specifically enacted for the benefit of the class of persons for which Irene Ramsey was a member.
55. As a direct and proximate result of the Defendants' negligence, recklessness, carelessness, willfulness and wantonness in failing to abide by the standards of care, rules and regulations promulgated by the State of South Carolina, Irene Ramsey suffered severe injuries and resulting death as described above, constituting negligence *per se*.

**FOR A THIRD CAUSE OF ACTION**  
**Breach of Contract**

56. The Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.
57. Irene Ramsey entered into a contract with Defendants for the adequate provision of her care, treatment, and safety.
58. Pursuant to such agreement, the Defendants promised to care for Irene Ramsey, exercise due care, and follow all state and federal laws and regulations relating to care of residents of long-term health care facilities.
59. In exchange for such promises, Irene Ramsey agreed to compensate the Defendants for such care.
60. This bargained-for exchange constitutes a contract.
61. The Defendants breached the contract by not exercising due care, by not following state or federal laws and regulations relating to care of patients/residents of long-term health care

facilities, and by its acts and omissions as described in the Complaint or as may be proven through discovery or at trial.

62. Irene Ramsey was deprived of the benefit of the bargain, and suffered damages which directly and proximately flowed from the breach, and were of the kind to arise and flow from such breach.

**FOR A FOURTH CAUSE OF ACTION**  
**(Fraud / Misrepresentation / Spoliation)**

63. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

64. The Defendants, through deception, artifice and circumvention, successfully defrauded Irene Ramsey, who trustingly submitted to Defendants' care and on the basis of explicit and implicit representations:

- a. That the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure Irene Ramsey received safe and adequate care;
- b. That the Defendants would adequately staff the long-term care facility and Irene Ramsey would be served by adequately trained employees;
- c. That the Defendants would provide high quality professional care and would accurately and truthfully document the condition of Irene Ramsey and the care rendered to her;
- d. Such other misrepresentations as are set forth more fully above in this Complaint or may be ascertained through further discovery or proven at trial.

65. At the time of Irene Ramsey's admission to care, the Defendants promoted and disseminated the above representations and information which would lead Irene Ramsey, her family, and other similarly situate consumers to believe the above representations were true.

66. The Defendants purposefully disseminated such representations and promotions in order to induce Irene Ramsey, her family and others like them into placement of themselves and/or of their relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.
67. The Defendants fraudulently concealed Defendants' inability to care for Irene Ramsey according to acceptable standards required by law and represented by the Defendants, and the representations made were false.
68. The representations made and concealments done by the Defendants were material to Irene Ramsey and her family.
69. At the time the Defendants made such representations, they knew such affirmative claims of service were false.
70. Irene Ramsey and her family were unaware of the falsity of the representations made by the Defendants.
71. Irene Ramsey and her family had a right to rely on the representations and concealments made by the Defendants.
72. As a result of the Defendants' fraud, misrepresentations, and concealments, Irene Ramsey subsequently suffered damages and injuries while living at Defendants' facility.
73. As a proximate cause of the Defendants' fraud and misrepresentation, Irene Ramsey suffered physical injuries, pain and suffering as previously alleged.

**FOR A FIFTH CAUSE OF ACTION**  
**(Violation of the South Carolina Unfair Trade Practices Act)**

74. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.
75. Irene Ramsey and Defendants are "persons" within the meaning of Section 39-5-10(a), Code of Laws of South Carolina, 1976, as amended.

76. The Defendants, by conducting business in the State of South Carolina, is engaged in commerce within the meaning of Code Section 39-5-10(b).

77. The Defendants' actions described in this Complaint constitute unfair and deceptive practices within the meaning of Code Section 39-5-20(a), including but not limited to:

- a. Representing to the general public and to Irene Ramsey and her family that the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure Irene Ramsey received safe and adequate care; that the Defendants would adequately staff the long-term care facility and Irene Ramsey would enjoy adequately trained employees; that they would provide high quality professional care and would accurately and truthfully document the condition of Irene Ramsey and the care rendered to her; and such other particulars as are set forth above in this Complaint or may be shown through discovery or at trial;
- b. Further, at the time of Irene Ramsey's admission to care, the Defendants promoted and disseminated the above representations and information which would lead Irene Ramsey, her family, and other similar situated consumers to believe the above representations were true. The Defendants purposefully disseminated such representations and promotions in order to induce Irene Ramsey, her family and others like them into placing [prompt, decedent a himself or herself] or her relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.

- c. The Defendants fraudulently concealed their inability to care for Irene Ramsey according to acceptable standards required by law and represented by the Defendants, and the representations made were false.
  - d. The representations made and concealments done by Defendants were material to Irene Ramsey and her family.
  - e. At the time the Defendants made such representations, he/she/they knew such affirmative claims of service were false.
  - f. Irene Ramsey and her family were unaware of the falsity of the representations made by Defendants.
  - g. Irene Ramsey and her family had a right to rely on the representations and concealments made by the Defendants.
  - h. As a result of the Defendants' fraud, misrepresentations and concealments and deceptive and unfair representations, Irene Ramsey subsequently suffered damages and injuries while a patient/resident at Defendants' facility.
78. The Defendants' acts are capable of repetition and, upon information and belief, have been repeated with other residents.
79. The Defendants' conduct adversely affects the public interest of South Carolina.
80. The Defendants knew or reasonably should have known Defendants' conduct violated the Unfair Trade Practices Act.
81. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive practices, Irene Ramsey suffered an ascertainable loss of money, physical injuries, death, and pain and suffering as previously alleged.

82. The Plaintiff is entitled to recover actual damages, which amount should be tripled, pursuant to South Carolina law, together with interest and attorneys' fees.

**FOR A SIXTH CAUSE OF ACTION**  
**(Elder Abuse)**

83. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

84. Pursuant to §45-35-10(11) of the South Carolina Omnibus Adult Protection Act, 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.

85. Given Irene Ramsey's age and health, the latter of which included, but is not limited dementia and previous falls with injuries, at the time she was under the supervision and care of the Defendant(s), Irene Ramsey met the classification for "vulnerable adult" under the South Carolina Omnibus Protection Act §45-35-10(11).

86. Pursuant to §45-35-10(2) of the South Carolina Omnibus Protection Act a "caregiver" is defined as a person who provides care to a vulnerable adult, with or without compensation, on a temporary or permanent or full or part-time basis and includes, but is not limited to day care personnel, adult foster home sponsor, and personnel of a public or private institution or facility.

87. The Defendant(s) were and are caregivers under the South Carolina Omnibus Adult Protection Act §45-35-10(2) and were responsible for the Decedent's care and well-being.

88. Under the South Carolina Omnibus Adult Protection Act §45-35-10(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 and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.
89. The Defendant(s) as caregiver(s), neglected Irene Ramsey within the meaning of the South Carolina Omnibus Adult Protection Act §45-35-10(6). The neglect of Irene Ramsey was negligent, reckless, and malicious. The Defendant(s) knew or should have known Irene Ramsey’s advanced age required an increased level of care.
90. Defendant(s) knew or should have known that a heightened level of observation was necessary and critical to Irene Ramsey’s well-being, health and prognosis.
91. The Defendant(s) knew or should have known that the patient care environment lacked the number of qualified staff necessary for proper observation and care critical to Irene Ramsey’s health and recovery.
92. The Defendants’ knew or should have known that Irene Ramsey’s was left in a patient care environment where the resources that were critical for recovery and to prevent injury were unavailable constituting neglect under South Carolina Omnibus Adult Protection Act §45-35-10(6).
93. The neglect caused serious personal injuries resulting in conscious pain and suffering, and ultimately an untimely death.
94. The Defendants’ negligent, reckless, and malicious acts were a direct and proximate result of the damages herein.

95. As a result, punitive damages and attorneys' fees are appropriate pursuant to South Carolina Omnibus Adult Protection Act §43-35-80(A), which allows for private civil causes of action to be brought against a person or facility based on an action or failure to act that otherwise constitutes abuse, neglect or exploitation.

**FOR A SEVENTH CAUSE OF ACTION**  
**(Corporate Negligence)**

96. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

97. That Defendants entities 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.

98. That the facility was negligently managed by Defendants, who were working together to manage and operate the facility.

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

100. 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 Irene Ramsey. 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 Irene Ramsey, 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, Irene Ramsey;
- d. Failing to provide sufficient numbers of qualified personnel including nurses, nurses assistants, medication aides, and/or orderlies to meet the total needs of Irene Ramsey;
- e. Failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
- f. Failing to hire a sufficient number of trained and competent staff;
- g. Failing to follow the licensing and regulatory rules of the State of South Carolina;
- h. Failing to develop and follow an appropriate Plan of Care;
- i. Failing to properly train employees to deal with residents who were unable to care for themselves;
- j. Failing to follow physicians' orders;
- k. Failing to prevent decubitus ulcers from developing and/or failing to provide necessary and proper treatment of the ulcers;
- l. Failing to properly monitor Irene Ramsey;

- m. Failing to appropriately diagnose Irene Ramsey's condition;
  - n. Failing to provide Irene Ramsey with appropriate care and interventions to prevent falls;
  - o. Failing to ensure that fall precautions and/or preventions were in place;
  - p. Failing to update the written plan of care to include necessary interventions to prevent falls;
  - q. Failing to include necessary interventions to monitor for signs and/or symptoms that would heighten Irene Ramsey's risk for falls;
  - r. Failing to assist Irene Ramsey with her meals in order to maintain her highest practicable level of physical well-being;
  - s. Failing to keep Irene Ramsey properly hydrated and nourished;
  - t. Failing to keep Irene Ramsey's chart free of fraudulent documentation;
  - u. Failing to prevent Irene Ramsey's multiple hospitalizations;
  - v. Failing to monitor and assess Irene Ramsey's adequately for pain and discomfort;
  - w. Failing to treat Irene Ramsey with dignity and respect;
  - x. Failing to exercise due care; and
  - y. By other negligent acts and/or omissions yet to be determined or defined.
101. That as a result, Irene Ramsey experienced prolonged conscious pain and suffering, mental anguish, incurred substantial medical bills, and eventually death.

102. That the aforesaid acts and delicts were a contributing cause of Irene Ramsey's damages, injuries and death, and were the sole and proximate cause of the damage and injuries sustained by the wrongful death beneficiaries.

**FOR AN EIGHTH CAUSE OF ACTION**  
**(Breach of Fiduciary Duty)**

103. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

104. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Irene Ramsey was considered a vulnerable adult.

105. That Plaintiff and/or Irene Ramsey trusted in, confided in and relied upon Defendants to use their expertise and discretion for Irene Ramsey's care.

106. That Defendants accepted Plaintiff and/or Irene Ramsey's trust and reliance and so became responsible for Irene Ramsey's health while residing at Defendants' facility.

107. That as a result of aforementioned reliance and trust upon Defendants, Plaintiff and/or Irene Ramsey suffered physical, mental and emotional health, which was placed in the hands of Defendants.

108. That Defendants breached this fiduciary relationship by allowing Irene Ramsey's physical, mental and emotional health to deteriorate during her residency at Defendants' facility and eventual death as a result of Defendants' acts and/or omissions.

**FOR A NINTH CAUSE OF ACTION**  
**(Unjust Enrichment)**

109. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.
110. That Defendants received funds both the state and federal government which were intended and required to be used to properly care for Irene Ramsey.
111. That Defendants became unjustly enriched by receiving such funds.
112. That as a result of aforementioned misuse of funds by Defendants, Irene Ramsey suffered physically, mentally and emotionally, and the wrongful death beneficiaries were damaged as stated herein above.

**FOR A TENTH CAUSE OF ACTION**  
**(Alter Ego/Piercing the Corporate Veil)**

113. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.
114. That upon information and belief, Defendants' facility, is/ was dominated and controlled by Defendants, before and during Irene Ramsey's residency. These Defendants siphoned profits from the nursing homes chain through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries, death and suffering, including that of Irene Ramsey at Defendants' facility.

**FOR A ELEVENTH CAUSE OF ACTION**  
**(Amalgamation of Interests)**

115. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.
116. That the Defendants are and have been operating as an amalgamation of interest creating a blurred corporate identity through an integrated enterprise and/or joint venture
117. That upon information and belief, Defendants share a common internet website and intranet site.
118. That upon information and belief, the Defendants share a common location; common headquarters; common policies and procedures; and common in-house counsel.
119. That the Defendants share a common executives and officers.
120. That the Defendants participate in the commingling of funds and revenue and file one tax return for all Defendant entities.

**FOR A TWELTH CAUSE OF ACTION**  
**(Conversion)**

121. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.
122. That Rita St. Aubin is the appointed Personal Representative, and has been granted full authority to, among other duties, obtain copies of Irene Ramsey's medical treatment records.
123. That these records belong to Irene Ramsey's Estate, not to Defendants, and Rita St. Aubin and/or the Estate has a right to obtain a copy of these records.

124. That Rita St. Aubin hired Anastopoulo Law Firm (“Firm”) to represent Irene Ramsey’s Estate in a lawsuit.
125. That Firm required medical records from Defendants in order to prosecute the lawsuit.
126. That Rita St. Aubin executed a HIPAA release giving Defendants permission to release the records to Firm.
127. That Firm requested the records, in writing, and offered to pay the costs of copying and mailing the records.
128. That upon information and belief, the Firm presented Defendants with a copy of the Certificate of Appointment.
129. That Defendants’ facility failed to provide a complete and accurate copy of the records at her request.
130. That Defendants assumed and exercised the unauthorized right of ownership over the medical records of Irene Ramsey to the exclusion of Plaintiff’s rights.
131. That as a result of Defendants’ conversion of Plaintiff’s medical file, Plaintiff has suffered:
- a. The loss of use of these records for impending litigation;
  - b. Consequential and incidental damages;
  - c. Aggravation;
  - d. Inconvenience; and

e. Embarrassment.

132. That Defendants' conduct, as described above evidences a flagrant disregard of legal rights as to warrant the imposition of actual and punitive damages.

**FOR A THIRTEENTH CAUSE OF ACTION**  
**(Survival Action S.C. Code Ann. § 15-5-90)**

133. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

134. That as a consequence of the events set forth in this Complaint, and as a direct and proximate cause of the negligence of the Defendants as aforesaid, Decedent was caused to sustain great conscious pain and suffering prior to her death, which injuries are compensable under South Carolina Code of Laws, Section 15-5-90.

135. That Decedent was painfully and seriously injured as a result of the negligence of the Defendant, for which a claim is hereby made by her estate and administrators for full and complete compensation for her pain and suffering.

**FOR A FOURTEENTH CAUSE OF ACTION**  
**(Wrongful Death S.C. Code Ann. § 15-51-10)**

136. Plaintiff restates and re-alleges every allegation set forth above as if stated herein verbatim.

137. That Defendant(s) knew or should have known that Irene Ramsey would suffer foreseeable injury, including death, as a result of Defendants' failure to exercise ordinary care as set forth more fully above.

138. That as a direct and proximate cause of the Defendants' conduct, as aforesaid, Irene Ramsey for whom this action is brought, lost her life, and as a result Plaintiff has experienced pecuniary loss, mental shock and suffering, wounded feelings, grief and sorrow, loss of

companionship, and deprivation of the use and comfort of Irene Ramsey's society, and are entitled to relief for the same.

**WHEREFORE**, the Plaintiff prays for judgment against the Defendants, on behalf of the Estate and Decedent's statutory beneficiaries, for an amount to be ascertained by the jury at the trial of this action, for all damages, punitive and actual, for the cost and disbursements of this action, and both prejudgment and post judgment interest, and for such other and further relief, in law or in equity, as this court may deem just and proper.

**ANASTOPOULO LAW FIRM, LLC**

/s/ Stefan B. Feidler  
Stefan B. Feidler, Esquire  
S.C. Bar No.: 101918  
Roy T. Willey, IV, Esquire  
S.C. Bar No.: 101010  
Eric M. Poulin, Esquire  
S.C. Bar No.: 100209  
32 Ann Street  
Charleston, South Carolina 29403  
(843) 614-8888

Dated at Charleston, South Carolina

This 10 day of September, 2019.

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF SPARTANBURG )

RITA ST. AUBIN AS )  
 PERSONAL REPRESENTATIVE )  
 OF THE ESTATE OF IREN ) TRANSCRIPT OF RECORD  
 RAMSEY, ) 2019-CP-42-03236  
 )  
 PLAINTIFF, ) DECEMBER 18, 2019  
 ) SPARTANBURG, SOUTH CAROLINA

-vs-

THI OF SOUTH CAROLINA )  
 AT CAMP CARE, LLC, )  
 D/B/A LAKE EMORY POST )  
 ACUTE CARE; THI OF )  
 SOUTH CAROLINA, LLC; )  
 HUNT VALLEY HOLDINGS, )  
 LLC; THI OF BALTIMORE, )  
 INC; AND CASEY CADDELL )  
 AS OFFICER/MANAGER OF )  
 THI OF SOUTH CAROLINA )  
 AT CAMP CARE, LLC, )  
 D/B/A LAKE EMORY POST )  
 ACUTE CARE, )

DEFENDANTS. )

B E F O R E:

THE HONORABLE GRACE GILCHRIST KNIE, JUDGE.

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

STEFAN B. FEIDLER, ESQUIRE  
 ATTORNEY FOR THE PLAINTIFF

RUSSELL G. HINES, ESQUIRE  
 ATTORNEY FOR THE DEFENDANT

MICHAEL R. WATTS  
 CIRCUIT COURT REPORTER

|    |                       |      |
|----|-----------------------|------|
| 1  | INDEX                 |      |
| 2  |                       |      |
| 3  | WITNESSES             | PAGE |
| 4  | (NO WITNESSES CALLED) |      |
| 5  |                       |      |
| 6  |                       |      |
| 7  |                       |      |
| 8  |                       |      |
| 9  |                       |      |
| 10 |                       |      |
| 11 |                       |      |
| 12 |                       |      |
| 13 |                       |      |
| 14 |                       |      |
| 15 |                       |      |
| 16 |                       |      |
| 17 |                       |      |
| 18 |                       |      |
| 19 |                       |      |
| 20 |                       |      |
| 21 |                       |      |
| 22 |                       |      |
| 23 |                       |      |
| 24 |                       |      |
| 25 |                       |      |

|    |                      |             |     |     |
|----|----------------------|-------------|-----|-----|
| 1  | EXHIBITS             |             |     |     |
| 2  | NO.                  | DESCRIPTION | ID. | EV. |
| 3  | (NO EXHIBITS MARKED) |             |     |     |
| 4  |                      |             |     |     |
| 5  |                      |             |     |     |
| 6  |                      |             |     |     |
| 7  |                      |             |     |     |
| 8  |                      |             |     |     |
| 9  |                      |             |     |     |
| 10 |                      |             |     |     |
| 11 |                      |             |     |     |
| 12 |                      |             |     |     |
| 13 |                      |             |     |     |
| 14 |                      |             |     |     |
| 15 |                      |             |     |     |
| 16 |                      |             |     |     |
| 17 |                      |             |     |     |
| 18 |                      |             |     |     |
| 19 |                      |             |     |     |
| 20 |                      |             |     |     |
| 21 |                      |             |     |     |
| 22 |                      |             |     |     |
| 23 |                      |             |     |     |
| 24 |                      |             |     |     |
| 25 |                      |             |     |     |

1 (PROCEEDINGS, DECEMBER 18, 2019)

2 THE COURT: The next matter is Ramsey versus THI,  
3 is that correct?

4 MR. FEIDLER: Yes, Your Honor.

5 THE COURT: Thank you all. Please make yourselves  
6 comfortable. Thank you for your patience.

7 Okay, counsel, if you all will be so kind as to  
8 identify yourselves for the record.

9 MR. HINES: Your Honor, I'm Russ Hines here on  
10 behalf of -- well, Jay Davis. You won't see my name, I  
11 don't believe, on your docket, but I work with Jay and I'm  
12 standing in on behalf of the moving party in his stead.

13 THE COURT: Okay. Thank you, sir.

14 Yes, sir.

15 MR. FEIDLER: And, Your Honor, my name is Stefan  
16 Feidler and I represent the plaintiff, which is the Estate  
17 of Irene Ramsey, and I also have a copy of our memorandum  
18 which was filed yesterday for you and your clerk, if you  
19 would like a physical copy, Your Honor.

20 THE COURT: Okay. That's fine. And while you are  
21 gathering that up, I am going to pull this case up, okay?

22 MR. HINES: Your Honor, I have got -- well, like  
23 Mr. Feidler, I have got a hard copy of our memo. If I may  
24 approach to give that to you?

25 THE COURT: Yes, sir, you all can hand that

1 information to our deputy.

2 All right. Thank you both very much.

3 I now have the matter before me and there are  
4 actually five motions, is that correct?

5 MR. FEIDLER: I believe so, Your Honor, but I  
6 believe just the motion to compel or to dismiss and compel  
7 arbitration would essentially answer the rest of those.

8 THE COURT: Is that correct?

9 MR. HINES: Your Honor, I think that is  
10 essentially correct, because the motions -- forgive me. I  
11 just want to make sure. There is -- the primary motion is  
12 the motion to compel arbitration.

13 There are a number of other motions that I believe  
14 we have on your docket that are motions to stay and those  
15 motions sort of tag along with the motion to compel  
16 arbitration.

17 Is there any other motions? Forgive me for asking  
18 that you show on your docket that's not either that motion  
19 to compel arbitration or a motion to stay?

20 THE COURT: I have four motions that were filed on  
21 October the 28th and it appears that there are three motions  
22 to stay and the motion to compel, and then there was a  
23 motion filed this month, on December the 9th, and that was  
24 on -- that was on behalf of Casey Caddell?

25 MR. HINES: Okay.

1 THE COURT: And so it looks like the other motion,  
2 the motions to compel and stay, were on behalf of THI.

3 MR. HINES: So I believe then, Your Honor, that  
4 essentially the way they work is that the motions to compel  
5 arbitration would be on behalf of the facility, what I'll  
6 call the facility, which is the full title THI of South  
7 Carolina Camp Care, LLC, d/b/a Lake Emory Post acute Care,  
8 and that's the facility, and Ms. Caddell.

9 THE COURT: It's Ms. Caddell?

10 MR. HINES: Well, I'm just --

11 THE COURT: Okay. And you all are representing  
12 Ms. Caddell as well?

13 MR. HINES: That's right, we represent all of  
14 these defendants.

15 THE COURT: Okay. All right.

16 MR. HINES: So it's Ms. Caddell and the facility  
17 that was seeking to compel arbitration; that the other ones  
18 is just a stay in conjunction with the arbitration question,  
19 a stay pending the resolution of arbitration; and that's  
20 why, I think as Mr. Feidler said, the -- well, with the real  
21 focus of today's argument is whether or not we have an  
22 enforceable arbitration agreement. And if you would like to  
23 hear from me, I'd be happy to.

24 THE COURT: Yes, sir, and I think we are ready. I  
25 have got hard copies and --

1 Well, is there anything else that -- is there  
2 anything that you all have handed to me today that is not  
3 filed with the court?

4 MR. HINES: No, Your Honor.

5 MR. FEIDLER: No, Your Honor, but just for  
6 clarity, we do take the position that Mr. -- or Casey  
7 Caddell is not a party to the arbitration agreement, only  
8 the LLC, the THI of South Carolina Camp Care, LLC. That's  
9 our position.

10 We also take the position that an affidavit was  
11 filed yesterday and is not part of the record. According to  
12 Rule 6(d), that the affidavit was not filed with the motion  
13 as required and was not served on me as plaintiff's counsel  
14 two days prior to today's hearing. And so we will -- we  
15 would move to strike that pursuant to Rule 6(d), Your Honor.

16 THE COURT: And that's in regards to Darlene Rice,  
17 is that correct?

18 MR. HINES: Yes, Your Honor, it is. I think it's  
19 titled the Declaration of Darlene Rice, but it's -- that's  
20 what counsel is referring to, as I understand it, and I can  
21 address his objection to that.

22 THE COURT: Yes, sir. So I -- thank you for  
23 letting us know that ahead of time and so Mr. Hines can  
24 address that at the same time that he addresses the other  
25 motions.

1                   Yes, sir.

2                   MR. HINES: Your Honor, I'll do this, I think this  
3 makes sense to do for an efficiency standpoint, the  
4 objection to Ms. Caddell being included in the -- also the  
5 motions to compel arbitration. The basis for that is  
6 textual and it's right in the arbitration agreement.

7                   In the materials that I handed to you, you might  
8 see -- you should see a tab B. If you flip to that, that is  
9 the arbitration agreement at issue. The first sentence of  
10 it reads this agreement is made between just the name of the  
11 facility, its agents, employees and servants, and continues  
12 on. And so as Ms. Caddell is named in this suit as office  
13 manager of the facility and she would be embraced, I think,  
14 really -- well, candidly, I think quite obviously within  
15 that language.

16                  Now, that obviously, just to put the cart before  
17 the horse in the sense that I was trying to go ahead and get  
18 that out of the way and certainly Mr. Feidler can make his  
19 argument as to why she might not the come within that  
20 language, but that's the basis for her being within that  
21 language, although I suppose even if she's not -- well, the  
22 idea would be that she ought to be -- the matter ought to be  
23 stayed as to her, just like all the other defendants who  
24 have not been through arbitration, pending the resolution of  
25 the arbitration question.

1           Now, as far as arbitration hearing, Your Honor,  
2           this is one where my hope is that it's a little more  
3           straightforward than you have heard me argue before. This  
4           is one where there is our return duly recorded.

5           This is, again, just briefly, because I don't mean  
6           to get ahead of myself, we are dealing here with a case  
7           where this facility is a skilled nursing facility. This is  
8           a case that arises out of an allegation of negligence in  
9           respect to the resident, who is Ms. Ramsey. She  
10          essentially, very briefly, the allegation is that  
11          appropriate precautions and interventions weren't in place  
12          to keep her from suffering a fall and she fell and the  
13          allegation is that that was tortuous and the circumstances  
14          of that happening and ultimately that caused her wrongful  
15          death.

16          The suit is brought by Rita St. Aubin as her  
17          personal representative.

18          Ms. St. Aubin -- this is tab A -- excuse me, Your  
19          Honor, I think I got it exactly backwards.

20          THE COURT: You did, but I understood it. It's  
21          okay.

22          MR. HINES: Tab A is where the agreement is and B  
23          where the power is.

24          THE COURT: Yes.

25          MR. HINES: And the power was recorded at the time

1       that Ms. Ramsey was admitted to our facility, and the power,  
2       it's a general durable power of attorney.

3               I know plaintiff has filed a memo in opposition to  
4       our motion hearing, and, at least implicitly, Your Honor,  
5       nowhere in this memo is there any challenge to the  
6       enforceability -- or a challenge to the authority that was  
7       conferred by virtue of that power on MS. St. Aubin to sign  
8       these documents, most importantly the arbitration agreement  
9       that's in Exhibit A to our memo.

10              So I suppose to going any further with that, what  
11     I might do is to keep moving and addressing the points that  
12     the plaintiffs made in opposition. And to the extent there  
13     is some sort of challenge, which I'm not aware of to the  
14     authority here based on the power, then I'll come back  
15     around, if you will allow me some moments in reply, but  
16     essentially, Your Honor, the only real question here is not  
17     whether or not Ms. Aubin could sign this by virtue of being  
18     a deterring fact for Ms. Ramsey, that the arguments that  
19     have been raised are a violation of federal -- well,  
20     basically federal regulations, the argument being that the  
21     arbitration agreement constitutes involuntary pre-condition  
22     to admission to the defendant's facility; that it's  
23     unconscionable that it lacks additional consideration and  
24     that it doesn't have all the material terms that are needed  
25     for a valid contract, and I can address those now in turn

1           First off, the sort of lynchpin of this first  
2 argument respectfully is just fatally flawed. The first  
3 argument says that federal regulations do not allow the  
4 facility to charge, solicit, accept, or receive in addition  
5 to any amount otherwise required to be paid under the state  
6 plan. Any other consideration is a pre-condition of  
7 admitting or expediting the admission of the individual to  
8 the facility or as a requirement fully individual's  
9 consenting stay, meaning that they are taking the position  
10 that if this were required, the arbitration agreement, then  
11 what it would amount to is additional consideration so that  
12 those facilities who are receiving reimbursements from  
13 Medicare and Medicaid are limited by this regulation to  
14 accepting the Medicare and Medicaid reimbursement as full  
15 payment. They can't charge anything else on top of that.  
16 Well, the problems with the argument here is that just plain  
17 language that the argument requires that the -- for it to be  
18 correct, it would have to be a case that the arbitration  
19 agreement is a pre-condition and requirement of admission.  
20 It is not. And the argument that the plaintiff makes, and I  
21 would note in the minimum opposition, there is no evidence  
22 that they have cited to it is. What they cite is to the  
23 admission agreement and some language in it, which says  
24 residents not being admitted until such time as all  
25 agreements required by law and the facility have been

1 properly executed. Now, that point is not particularly  
2 controversial, residents not being admitted until all  
3 agreements required by law and facility have been properly  
4 executed. That says nothing to the effect that the  
5 arbitration agreement is required. It's not required. I  
6 mean, what the plaintiff is coming here is to with this  
7 argument, it hinges on the idea that this is a requirement.  
8 Quite simply it's not. And in plaintiff's brief they have  
9 not presented anything, other than some speculation,  
10 respectfully, Your Honor, as to even trying to -- trying to  
11 get to that point.

12 Now, this is made clear in Darlene Rice's  
13 affidavit, and I'll mention that, and I know there was an  
14 objection to it. Your Honor, it's absolutely true that this  
15 was filed yesterday by Ms. Rice. It says so right here on  
16 the front of it. The point of -- and in this affidavit --

17 And, Your Honor, to the extent that you determine  
18 this affidavit is not appropriately considered, obviously,  
19 you can -- you certainly can do that and excise, you know,  
20 from the record from your consideration of it, of the  
21 affidavit.

22 I would make the point that this does, number one,  
23 this is not essential to our motion. It is supplementary  
24 and it provides, I guess, explicit evidence of what we  
25 already know to be true and what plaintiff really doesn't

1 seriously argue against is that this document is not a  
2 requirement of admissions. It's presented as an option at  
3 the time of admission, but it doesn't have to be signed and  
4 there is absolutely no evidence before you.

5 We've presented evidence to affirmatively rebut  
6 what the plaintiff is saying that is a requirement of  
7 admission. That's Ms. Rice's affidavit. But even in the  
8 absence of that there is no evidence that it is a  
9 requirement of admission. It is not, and it's a separate  
10 document. It's one page.

11 Now, the thing about whether or not you ought to  
12 consider this is that -- certainly it was just filed  
13 yesterday. I think Rule 6, however, Your Honor, allows the  
14 court the discretion to receive or not receive this  
15 information. And I think that the idea of what the  
16 interests of justice are and in deciding cases upon -- or  
17 legal issues, motions, or whatnot, on the record possible in  
18 the interests of the most correct and just decision supports  
19 allowing this affidavit and with the court allowing  
20 plaintiff the appropriate amount of time to say otherwise by  
21 virtue of some other affidavit.

22 Now, I submit to you, Your Honor, that that would  
23 be an appropriate way of handling the situation, although  
24 what Ms. Rice says in the affidavit I think is entirely  
25 uncontroversial in respect to this point, but I'm completely

1       unaware of any evidence in this case, or any other, this  
2       document is required, and I would be quite surprised if the  
3       plaintiff could put forth any evidence that it was. And  
4       that's why, as this memo continues on, and oddly enough it  
5       seems as though the plaintiff has put the fall-back position  
6       up front in his argument, because they take the position,  
7       again, it's based upon the idea that this a requirement for  
8       admission, and, therefore, constitutes consideration to --  
9       that it's improper on account of the federal regulations.  
10      But, again, they presented on that argument, respectfully  
11      they would need to actually be correct about it being  
12      required, and they have nothing but -- well, they have  
13      nothing substantive at all to say about that. For instance,  
14      they say, one of their main points, aside from Ms. Landers  
15      and the admission agreement would not be required not to be  
16      entirely executed, which, again, says nothing of -- that  
17      language does not at all say the arbitration agreement is a  
18      required document. They say well, it doesn't say that it is  
19      voluntary in it. It doesn't say that it's not a  
20      pre-condition to admission. Now, there is no requirement  
21      for the document to say that. I mean, and, furthermore, I  
22      mean, what that essentially is doing, and the plaintiff does  
23      admit in its memo that's this is an FAA contract, Federal  
24      Arbitration Act. So they're essentially asking the court to  
25      impose upon this arbitration agreement some sort of magic

1 words or essentially a requirement that it's not required  
2 other contracts. The main point of the Federal Arbitration  
3 Act is to ensure that arbitration agreements are placed on  
4 equal footing with other contracts.

5 So, again, the absence of language and it's saying  
6 that it's voluntary is -- well, essentially it doesn't  
7 amount to anything.

8 And, again, Ms. Rice with this declaration, which  
9 is based on -- well, obviously she is -- she is, by the way,  
10 the director of admissions. As a -- she is giving us -- I  
11 want to be clear. She is giving us something we don't need  
12 in the sense that it affirmatively rebuts showing that they  
13 have not made.

14 THE COURT: All right.

15 And so, first, let me just say with regard to Ms.  
16 Rice's declaration that was filed on yesterday, I will not  
17 include that in the information that I am reviewing for the  
18 purposes of your motions. However, it has been filed and I  
19 know that you both are aware of that, okay, but I will  
20 not -- I will be excluding that from my consideration, all  
21 right, out of fairness.

22 MR. HINES: Your Honor, would you like to -- there  
23 is some more arguments that I need to address.

24 THE COURT: Yes, sir. And so I -- I just didn't  
25 want to forget, okay, to tell you all that.

1                   Okay, Mr. Hines, yes, sir, please continue.

2                   MR. HINES: The next -- the next question that's  
3                   raised is this idea of unconscionability.

4                   Your Honor, I'll try to move along a little bit  
5                   quicker and I appreciate your indulgence and comment very  
6                   much.

7                   Unconscionability, Your Honor, is -- there is two  
8                   prongs to it. Number one is the absence of meaningful  
9                   choice, and number two is -- both have to be present for a  
10                  contract to be determined unconscionable. It has to be  
11                  terms that are so oppressive as is -- you know, is to be  
12                  completely reasonable, that no party in good faith, you  
13                  know, would even accept them. Your Honor, you don't have  
14                  either one of these here.

15                  Again, sort of this goes in with the hand of  
16                  dismay as far as there being an absence of meaningful  
17                  choice, in addition to the fact that this document, this  
18                  admission agreement, was not required to be entered into --  
19                  or, excuse me, arbitration agreement was not required to be  
20                  entered into to gain admission. It says right here in this  
21                  second paragraph "it's understood by resident's  
22                  representative of he/she in not required to use the  
23                  aforesaid facility for resident's health care needs and that  
24                  there are numerous other health providers in the state where  
25                  the facility is located that are qualified to provide such

1 care to resident."

2 So not only could the admission be accomplished  
3 without signing this document at all, it's expressly  
4 acknowledged in this document that they didn't even have to  
5 use this facility at all. So, Your Honor, I don't think the  
6 first prong is even met there.

7 But then looking at the second prong, if we -- if  
8 it's necessary on the oppressiveness of the terms, Your  
9 Honor, this is a straightforward arbitration agreement.  
10 Mutual promises to arbitrate.

11 I have always been confused as to how the  
12 unconscionability argument could even be made as to this  
13 type of an arbitration clause when the law under both the  
14 federal and state decisions says it favors arbitration.

15 There is a line earlier in the legal standard part  
16 of plaintiff's memo that says something about arbitration  
17 agreements being narrowly construed unless -- it doesn't  
18 actually say this. It says waivers of a jury trial.  
19 Respectfully, I have looked at the two decisions that were  
20 cited in support of that and I didn't see that proposition  
21 of evidence in either of them. What I can cite to you is  
22 that Landers v. FDIC, 2013 S.C. Supreme Court states,  
23 that -- reiterates that arbitration agreements are liberally  
24 construed in favor of arbitration. The heavy presumption of  
25 arbitrability requires that when the scope of the

1 arbitration clause is open to question, the court must  
2 decide in favor of arbitration. Unless it may be so with  
3 positive assurance the arbitration clause is not susceptible  
4 to interpretation that covers the dispute the, arbitration  
5 must be generally ordered.

6 The point of me saying that, Your Honor, again, I  
7 know we are not specifically talking here about the scope of  
8 the clause, but all of the jurisprudence is to the effect  
9 that we are in favor of arbitration.

10 And even in the Simpson case, and I could get into  
11 it if was necessary, but Simpson did find that arbitration  
12 clause in that case, Simpson v. MSA Myrtle Beach to be  
13 unconscionable. Of course, it was sporadically different.  
14 In fact, it highlights why this arbitration clause is  
15 unconscionable -- excuse me, is not unconscionable.

16 In Simpson there were the problems because they  
17 were -- actually let me -- I'll let the court speak for  
18 itself.

19 All we have here in this arbitration clause is the  
20 loss of the right to a jury trial for both sides, and the  
21 Simpson court actually says that's not the problem. The  
22 loss of the right to a jury trial is an obvious result of  
23 arbitration, meaning, of course, that's the whole point of  
24 arbitration. However, Ms. White had a problem before this  
25 particular clause also required Simpson to forego certain

1 remedies that were otherwise required by statute. And it  
2 goes on to talk about how the clause then had purported to  
3 waive double and treble damages it would be required to be  
4 awarded under the Dealers Act and the Unfair Trade Practices  
5 Act. It violated Magnuson Moss because it was a car sale.

6 The point is Simpson is a great case in terms of  
7 learning about unconscionability and the way our courts view  
8 it and it was fairly unique in the sense that it actually --  
9 well, they did a nice job of giving us an example of what  
10 could be an unconscionable arbitration clause and what we  
11 suggested what wouldn't be one, which is exactly what we  
12 have here, which is what that court says is the focus in  
13 determining arbitrability. It's generally -- excuse me,  
14 unconscionability. It's generally on whether the clause is  
15 geared towards achieving unbiased decision by a neutral  
16 decision maker. There's absolutely nothing about this that  
17 suggests that it's anything other than that.

18 I think the plaintiff uses this in a couple  
19 different places, too, where they talk about that requiring  
20 the plaintiff to pay the arbitration fees should be deemed  
21 unconscionable. Your Honor, I can't -- I mean, I suppose I  
22 could understand, you know -- well, I have a hard time  
23 understanding how that argument could possibly prevail.  
24 This doesn't say anything about the way that the costs will  
25 be borne. However, it does refer specifically to South

1 Carolina ADR Rules, under which under Rule 13,  
2 the arbitrator -- 13(b) the arbitrator shall set up the  
3 arbitration hearing. The arbitrator shall find and describe  
4 the following to the parties and it includes the costs of  
5 the arbitration hearing. Well, the point of me saying that  
6 is to mention one more context that they argue that it's a  
7 lack of a definite -- lack of an essential term, but there  
8 are certain costs involved, whether you are talking about  
9 litigation or arbitration. Even the plaintiff in their memo  
10 acknowledges that arbitration can be a cost effective and  
11 expedient alternative to litigation. That's why it's  
12 considered to be in furtherance of public policy at the  
13 state and federal -- at the state and federal levels. So  
14 this motion of the plaintiff perhaps having certain costs,  
15 again, we don't even know what costs. I mean, this doesn't  
16 say that the plaintiff -- or excuse me, the resident will  
17 certainly bear the costs of arbitration. It's likely  
18 entrusted to the discretion of the arbitrator. So, I mean,  
19 you know, you have a neutral decision maker who is actually  
20 going to be equipped to handle that, based on the equities  
21 of the case. So there is not even any guarantee that the  
22 plaintiff will claim in this case will have to bear costs,  
23 but, in any event, there are costs associated with either  
24 side.

25 Furthermore, if they look exclusively to the idea

1 of the fact that costs might be incurred in arbitration, if  
2 that were to be a material fact that would allow for a  
3 finding of unconscionability, it would essentially -- I  
4 don't know how we wouldn't say that every arbitration  
5 agreement is unconscionable, or darn close to it, because,  
6 yes, there is going to be costs involved potentially borne  
7 by either party or by both parties. But, again, there is  
8 discretion that's given to the arbitrator in terms of how  
9 that would happen.

10 Also, to say that's the reason for it to be  
11 unconscionable, you know, there's significant costs that are  
12 involved in litigation in court. You know, for instance,  
13 this is a medical malpractice case. The idea that the  
14 plaintiff would look to the costs of a relatively short  
15 arbitration and say that that is a deal breaker, when who  
16 knows what the costs of the expert witnesses that they --  
17 where the party obtained expert witnesses in this case, you  
18 know, at least one to file an affidavit I think is  
19 disingenuous, Your Honor, to suggests that all the two days  
20 of arbitration, whatever it is going to be, it would  
21 certainly be less than the jury trial would be is -- that  
22 that rises to the level of unconscionability.

23 And also it's -- you know, it's not been balanced  
24 at all against the idea of how much more efficient  
25 arbitration proceedings would be, which is a savings in both

1 costs and certainly time and a quicker resolution.

2 Now, the last couple arguments they say lacks  
3 valuable consideration. Noteworthy, they argue that there  
4 is not valuable additional consideration for this  
5 arbitration agreement. And then they cite two cases, and  
6 this is on page nine, "our courts have held that where there  
7 is a mutual promise to arbitrate, there must be additional  
8 consideration."

9 Now, Your Honor, I can only assume this is  
10 inadvertence, but there is two cases that are cited. The  
11 first one is called Reesman Corp. V. Gerash (phonetic). The  
12 second is called O'Neil v. Hilton Head Hospital. I looked  
13 at the those cases, because as written, well, doggone it,  
14 that's a -- that's a good argument, meaning that -- and by  
15 additional what they mean there is something more than  
16 mutual promises to arbitrate.

17 My argument to you, Your Honor, is that mutual  
18 promises to arbitrate are absolutely sufficient  
19 consideration. And, in fact, to hold otherwise would be a  
20 violation of the FAA, because it would treat arbitration  
21 clauses not on equal footing with others. But there is the  
22 language.

23 Our courts have held that where there is a mutual  
24 promise to arbitrate, there must be additional  
25 consideration, and that concerned me. And I looked at this

1 first case cited, it doesn't say anything at all to that  
2 effect. In fact, it's a very short decision from the  
3 Supreme Court and the holding is "we now hold that the  
4 covenant not to compete may be enforced where the  
5 consideration is based solely upon the at-will employment  
6 itself."

7 So anything, not only does it not say what it was  
8 cited for, it says something -- on balance it would be more  
9 what I'm suggesting. In fact, it says even when there is an  
10 at-will employment in a covenant not to execute in  
11 accordance, or involved there, that you don't need  
12 additional consideration beyond employment to enforce the  
13 covenant not to execute, which is -- well, absolutely  
14 supported that what I'm arguing this one is even more on  
15 point.

16 The second case, O'Neil v. Hilton Head, again, it  
17 does not at all say there must be additional consideration.  
18 In fact, it says "a mutual promise to arbitrate constitutes  
19 sufficient consideration for this arbitration." It is  
20 entirely the opposite of what is represented to the court.

21 Now, actually, Your Honor, there is this idea that  
22 there are vague and indefinite terms. One of them is sort  
23 of baffling to me is the suggestion that there is a problem  
24 with this because it doesn't say -- excuse me.

25 (Off the record).

1 (Back on the record).

2 MR. HINES: Yeah, it says "the choice of the panel  
3 and who pays for arbitration." Well, actually both of those  
4 things I suppose I have to say are baffling to me, but,  
5 number one, right here in the plain language, "the parties  
6 shall select an arbitrator from a panel having experience  
7 and knowledge of the health care industry."

8 Now, assuming they are suggesting that this is  
9 problematic because it doesn't say what the panel shall  
10 consist of, we all know that the Supreme Court, I think  
11 the -- whatever it is, the division on certification or  
12 specialization has, and I think this is actually referenced  
13 in the ADR rules --

14 Let me see what the language. The language is in  
15 the ADR Rules. Forgive me.

16 THE COURT: Yes, sir, take your time.

17 MR. HINES: Thank you, Your Honor.

18 Yeah, the roster. This is under the ADR Rules,  
19 Rule 2, Rule 2(j), the official list of certified neutrals  
20 maintained and published by the South Carolina Supreme Court  
21 Board of Arbitration or Arbiter in Mediation Certification.  
22 So we have I think quite a good idea as to where the  
23 resource would be to find the panel of those that have the  
24 requisite experience and knowledge. But even if we didn't,  
25 even if there was a dispute over the panel, we couldn't even

1 figure out who we were going to, you know, sort of body of  
2 arbitrators, the next sentence clears it all up. "If the  
3 parties cannot reach a mutual decision on the selection of  
4 an arbitrator, the parties agree that an arbitrator shall be  
5 selected by an order."

6 So the worst case scenario -- and I submit it's  
7 disingenuous to suggests that there is any material  
8 uncertainty as to this panel of arbitrators to choose from.  
9 It doesn't even -- it's mooted by the next sentence, meaning  
10 they say it means one thing, we say it means something else.  
11 We are at loggerheads. The court is going to solve that  
12 problem by virtue of the plain language.

13 Again, Your Honor, I think it's absolutely --  
14 well, it does not involve or constitute a material defect in  
15 the statement of the essential terms.

16 Likewise, again, the other point they made is on  
17 the costs. This doesn't say anything in here about costs.  
18 It does say that this shall be according to South Carolina  
19 ADR Rules. Again, the ADR Rules, in Rule 13 talk about the  
20 mediators powers, including the costs of the arbitration  
21 hearing. I mean, that's --

22 Your Honor, respectfully this has all the  
23 essential terms of the agreement. Again, it was signed by  
24 the attorney, in fact; was duly recorded; the power of  
25 attorney at the time of the document; and the arguments that

1 have been made about this supposed additional consideration  
2 are -- well, Your Honor, candidly without merit.

3 I'll sit and listen.

4 THE COURT: Thank you.

5 Okay, counsel, I'm happy to hear from you.

6 MR. FEIDLER: Thank you, Your Honor, if it may  
7 please the court.

8 With our first argument that this agreement,  
9 arbitration agreement, well, at least it's our position as  
10 presented it's an involuntary pre-condition to Ms. Irene  
11 Ramsey's admission into this facility. And the reason we  
12 say that is because coupled with the admission agreement and  
13 the specific language that says the resident is not deemed  
14 admitted until such time as all agreements required by law  
15 and facility have been properly executed.

16 She was presented, or at least Ms. Rita St. Aubin  
17 was presented with the admission agreement, with that  
18 language, as well as the arbitration agreement. And if you  
19 look at the arbitration agreement, which is obviously the  
20 most import document in this whole argument, there is no  
21 language in it that says that it is voluntary.

22 There is also no language that says that it is not  
23 a pre-condition to admission into this facility. But what  
24 it does present to someone who has reasonable knowledge and  
25 in this scenario is that if I do not sign all these

1 documents the facility is presenting to me, that my loved  
2 one will not be deemed admitted into this facility. In  
3 fact, I think it gets even more interesting, when it does  
4 say an admission for the arbitration agreement where  
5 basically says it is understood by the resident or her  
6 representative that they are not required to come to this  
7 facility, they are not required to be admitted into this  
8 facility and if they want to go to another facility, that's  
9 fine and dandy. But here is an arbitration agreement that  
10 we are presenting in front of you. And, judge, without any  
11 testimony or any other evidence to consider, we do take the  
12 position that this was presented as an involuntary  
13 pre-condition to my admission to this facility, which is  
14 clearly in violation of federal law, because it is a legal  
15 document or a legal contract.

16 Also, Your Honor, kind of flipping arguments going  
17 to valuable consideration, because -- and we do concede in  
18 our argument that this is guided by the FAA. And while the  
19 FAA does say, yes, we do -- we do like arbitration. It is a  
20 good idea to pursue with arbitration, it also notes that the  
21 court must understand the important principle of the  
22 contract law, and that is an offer, that is acceptance and  
23 it has valuable consideration. We take the position that  
24 arbitration agreement in and of itself has no consideration  
25 in it. There is -- you have to go look at the four corners

1 of this arbitration agreement and there is zero  
2 consideration for agreeing to this.

3 We had similar arguments with Judge Goodstein, as  
4 well as Judge Buckner. I have presented those as exhibits  
5 to our memorandum, where essentially we have this same  
6 argument. Where is the consideration? Of course, they say  
7 well, consideration is just basically agreeing to --  
8 agreeing to this arbitration agreement, agreeing to waive  
9 your jury trial, a right to a jury trial, and we believe  
10 that that is not consideration. In fact, that's simply a  
11 person losing their Constitutional Right to a jury trial.

12 Now, I think another important thing that the  
13 court to consider is the vagueness of this arbitration  
14 agreement. I don't know this for a fact, but I would assume  
15 that this facility may have a revised arbitration agreement  
16 with certain language in it, but the arbitration agreement  
17 is a contract. It's a financial contract. To me when I  
18 think of financial contracts, I think of buying a house  
19 where I know who my agent is. I know who my closing  
20 attorney is, and I know exactly what I'm paying for and/or  
21 what the seller and buyer is paying for. That's not  
22 provided within the four corners of this agreement.

23 Counsel respectfully argued that you have to go  
24 look at the South Carolina ADR Rules, you have to go look at  
25 this, you have to let the arbitrator decide who pays for

1        what, but it says "the parties shall select an arbitrator  
2        from a panel who has experience and knowledge of the health  
3        care industry." It doesn't say where we are going to get  
4        that panel from. It doesn't say how many people have to be  
5        on that panel. It doesn't say what the -- you know, I have  
6        been in these arguments before where it said you can have  
7        two arbitrators that are not knowledgeable or not have prior  
8        experience in the health care industry and at least one that  
9        does. It is very unclear by this, judge. And if you do  
10       say, you know, I'm going to grant this motion, then we have  
11       to go outside of the four corners of the agreement just to  
12       get to arbitration, and I have to say, well, now I'm  
13       contracting for that state to agree to decide on this panel,  
14       to agree to decide on how many members will be on that panel  
15       and exactly what their backgrounds will be. Of course, it  
16       says if the parties cannot reach a mutual decision on the  
17       selection of the arbitrator, then we will be in front of  
18       possibly Your Honor, at least the court to decide that  
19       issue, but we don't even get there, judge, because the  
20       arbitration agreement is unclear on that.

21                It's also very unclear on who pays for these. I  
22       think requiring a resident, an elderly resident who is  
23       admitted into the facility under Irene Ramsey's condition,  
24       who I'll remind the court did and is alleged in the  
25       complaint did die from a fall at this facility, so the

1 family is taking this very serious, but to have them have to  
2 pay, according to this ambiguous language in this agreement,  
3 it is just not -- it's just not in line with what I would  
4 say public policy, judge.

5 And so it would be hard for us to move forward to  
6 arbitration because the agreement is not on point exactly  
7 how we can proceed with it, who is going to pay for it,  
8 because we never get to the arbitrator who decides on who is  
9 going to pay for what in arbitration.

10 So we do take the position that, first of all,  
11 this does violate the federal law and is obviously, or in  
12 our position, an illegal agreement. We do take the position  
13 that there was no valuable consideration, and we kind of  
14 take the position that this is basically a financial  
15 contract where the court can only look into the four corners  
16 of this one page. And we also take the argument that this  
17 contract is void, because it is so ambiguous and there are  
18 material terms that are missing from this particular  
19 document. Thank you, judge.

20 THE COURT: Thank you.

21 Anything in reply?

22 MR. HINES: Your Honor, as quickly as I possibly  
23 can be, I'll try to make it quickly.

24 Number one, this whole business of this being  
25 presented as an involuntary pre-condition, you know, what's

1 good for the goose is good for the gander, Your Honor.

2 There was an objection to Ms. Rice's declaration. I  
3 understand that, but this whole business of how this was  
4 presented to her in this way, her being Ms. St. Aubin, there  
5 is no evidence of that, Your Honor. That's all the argument  
6 of counsel. There is no affidavit from Ms. St. Aubin. That  
7 would have to be clucked from thin air, Your Honor. That  
8 would be speculation.

9 I mean, in addition to being just wrong, because,  
10 again, at least as I understand it, you have got two basis  
11 premises or two points that they urge on this being some  
12 sort of a -- that this was actually required, when, in fact,  
13 it was not required, is that, one, it doesn't say it wasn't  
14 required. Well, Your Honor, that would have to be found on  
15 some sort of contractual -- some sort of general contract  
16 law of South Carolina that would essentially make that  
17 language that it wasn't required, that would make it  
18 required, that it was mandatory language. There is no such  
19 language. And, of course, they have not cited any. And to  
20 apply any sort of special rules in the context of  
21 arbitration agreements would violate the FAA by treating  
22 arbitration agreements unequally with a contract. But,  
23 again, this whole idea is, well, she was presented this in a  
24 way that it made it seem like, that's completely -- as a  
25 basis for your decision, there is no evidence to that

1 effect. Simply the argument. Ms. St. Aubin is not here, no  
2 affidavit, no nothing; how it was presented to her, what she  
3 thought about it. We don't even have so much as Ms. Aubin's  
4 personal opinion that I thought this was what I was getting.  
5 We don't have that. And any evidence, any sort of way that  
6 this constitutes evidence.

7 Now, on the consideration, mutual promises, and I  
8 was confused by this, the four corners of this, Your Honor,  
9 and this made me think about this and I jotted this down.  
10 Every contract, which included this one, there is an implied  
11 covenant of good faith and fair dealing so that neither side  
12 will try to deny they owe the benefit of their agreement.

13 The arguments that you are hearing about this  
14 thing being some sort of wildly ambiguous and incomplete  
15 document are absolutely inconsistent with the covenant of  
16 good faith and fair dealing. It has to be knowingly --  
17 well, obtuse, Your Honor, to suggest that, my goodness, Your  
18 Honor, we can't even figure out how we are going to find a  
19 panel, when it refers to specifically mediation arbitration  
20 as provided under the rules. The rules give us a lot of  
21 good information about how we might be able to find somehow  
22 some way somebody to be appropriate. There's absolutely  
23 nothing in this that says anything about, well, what we are  
24 looking for is some sort of somebody who is, you know, in  
25 the tank for the facility. You are not going to get a

1 neutral decision from an unbiased decision maker. That  
2 would be absurd.

3 This idea of taking from somebody their  
4 Constitutional Right to a jury, it's somebody willingly  
5 making a decision to have -- to pursue alternatives to  
6 resolution. And inasmuch as the from the resident's side,  
7 there is a loss of a right to a jury trial. There is also  
8 one from the facility's side.

9 , And this has to be -- well, I think that the  
10 rhetoric. For instance, the fact that this has to do with a  
11 wrongful death claim, as if that should lend any credence to  
12 the plaintiff's position respectfully is misplaced. I mean,  
13 this has to be evaluated as if the court -- essentially the  
14 court doesn't know anything, other than the claim comes from  
15 within the scope of the agreement. The fact that it's a  
16 wrongful death claim versus a claim that does not involve  
17 something as serious it shouldn't bear upon this.

18 And the four corners, again, it clearly references  
19 the ADR Rules, you know.

20 And -- oh, there was a mention of Judge Goodstein.  
21 Your Honor, this was provided to you. I think it was in  
22 reference, though, to the consideration. I mean, you know,  
23 and I know that in these types of hearings you get bombarded  
24 with a lot with other trial court orders that probably a lot  
25 of them have some age on them, but here is one from Judge

1 Goodstein. I have -- I will just mention it to you. This  
2 is in case 2017-CP-10-4964 where she found "this court also  
3 finds that the arbitration agreement at issue is sufficient  
4 ground for consideration so it to render it enforceable.  
5 It's well settled in South Carolina law that mutual and  
6 concurrent promises support sufficient and legal  
7 consideration for the support of each other." That's what  
8 we have here, mutual promises.

9 I hate to end with a whimper, Your Honor, but I  
10 thank I said my list.

11 THE COURT: Okay. Thank you.

12 And I know that it's unusual, but if you feel that  
13 you need to add something else, I'm happy to hear from you.

14 MR. FEIDLER: Your Honor, I think I'm good. Thank  
15 you very much.

16 THE COURT: All right.

17 And so I would like to request that counsel submit  
18 to me your proposed orders. And in doing that, I'm not  
19 asking that you create a new document or do a lot more  
20 research. What I'm asking is that you convert the document  
21 that you have submitted and worked so hard on already to a  
22 proposed order in Word format and send that to my law clerk  
23 via e-mail. Okay. Don't e-file it, okay, because I'm  
24 inundated right now with all sorts of protection orders. I  
25 don't want -- I don't want to inadvertently sign something

1       that was meant for me to have under advisement or for it to  
2       go into the wrong cue, okay? And so if y'all will send that  
3       via e-mail, I would appreciate it. And if you could do  
4       that --

5               MR. HINES: Well, I could do it. Most  
6       ambitiously, Your Honor, I could try to get it to you by  
7       Friday. If I could have until the very first of next week  
8       as a fallback, I would really appreciate it, but I can -- I  
9       will certainly do my best to get it to you by Friday.

10              THE COURT: Sure. Why don't we just say January  
11       the 1st?

12              MR. HINES: Oh, that's even better.

13              THE COURT: Okay. All right. I know y'all are  
14       busy. Y'all are very good at what you do and that means you  
15       are really busy.

16              MR. FEIDLER: Judge, we appreciate it and I hope  
17       y'all have a Merry Christmas and a Happy New Year.

18              (END OF REQUESTED TRANSCRIPT OF RECORD)

19  
20  
21  
22  
23  
24  
25

## CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Seventh 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 the evidence introduced in the trial of the captioned case in the Court of Common Pleas for Spartanburg County, South Carolina, on the 18th day of December, 2019.

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

APRIL 24, 2020

A handwritten signature in cursive script, reading "Michael R. Watts", is written over a horizontal line.

Michael R. Watts  
Circuit Court Reporter

|                                       |   |                                         |
|---------------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS            |
|                                       | ) |                                         |
| COUNTY OF SPARTANBURG                 | ) | SEVENTH JUDICIAL CIRCUIT                |
|                                       | ) |                                         |
| RITA ST. AUBIN, as Personal           | ) | CASE NO. 2019-CP-42-03236               |
| Representative of the ESTATE OF IRENE | ) |                                         |
| RAMSEY,                               | ) |                                         |
|                                       | ) |                                         |
| PLAINTIFF,                            | ) |                                         |
|                                       | ) |                                         |
| vs.                                   | ) |                                         |
|                                       | ) |                                         |
| THI OF SOUTH CAROLINA AT CAMP         | ) | <b>DEFENDANTS THI OF SOUTH</b>          |
| CARE, LLC d/b/a LAKE EMORY POST       | ) | <b>CAROLINA AT CAMP CARE, LLC D/B/A</b> |
| ACUTE CARE; THI OF SOUTH              | ) | <b>LAKE EMORY POST ACUTE CARE'S</b>     |
| CAROLINA, LLC; HUNT VALLEY            | ) | <b>MOTION TO STAY ACTION AND</b>        |
| HOLDINGS, LLC; THI OF                 | ) | <b>COMPEL ARBITRATION</b>               |
| BALTIMORE, INC.; and CASEY            | ) |                                         |
| CADDELL, as Officer/Manager of THI    | ) |                                         |
| OF SOUTH CAROLINA AT CAMP             | ) |                                         |
| CARE d/b/a LAKE EMORY POST            | ) |                                         |
| ACUTE CARE                            | ) |                                         |
|                                       | ) |                                         |
| DEFENDANTS.                           | ) |                                         |

---

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV. ESQUIRE, AND STEFAN B. FEIDLER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (hereinafter referred to as “this Defendant” or “the Facility”), by and through their 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 and compelling 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. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Irene Ramsey’s admission to the Facility. (See Arbitration Agreement attached as

**Exhibit A).** The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff's claims be submitted to arbitration.

This Defendant further requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any motions or discovery filed or served by Plaintiff while the current motion is pending. This Motion is 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.

YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.  
D. Jay Davis, Jr.  
Matthew O. Riddle  
Gaillard T. Dotterer, III  
P.O. Box 993, Charleston, SC 29402  
(843) 720-5406; [jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)

*Attorneys for the Defendant THI of South Carolina  
at Camp Care, LLC d/b/a Lake Emory Post Acute  
Care*

Charleston, South Carolina

Dated: October 28, 2019

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE  
ARBITRATION AGREEMENT

This Agreement is made between Lake Emma Rest Acute Care ("Facility"), its agents, employees and servants, and Irene Ramsey ("Resident") or ("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.

Rita St. Aubin 2/6/17  
Resident/Representative Signature Date

Rita St. Aubin  
Printed Name of Resident/Representative

Darlene Lindbay 2/6/17  
Authorized Agent of Facility Date

Darlene Lindbay CRD  
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

**Acknowledgement of Receipt of the Notice of Privacy Practices**

By my signature below, I acknowledge that I received a copy of the Notice of Privacy Practices.

\_\_\_\_\_  
Signature of Patient/Resident

\_\_\_\_\_  
Date

\_\_\_\_\_  
Print Name

OR

*Rita St. Aubin*  
\_\_\_\_\_  
Legal Representative

\_\_\_\_\_  
Date

*Rita St. Aubin*  
\_\_\_\_\_  
Print Name

If the patient/resident or the legal representative is unable to sign this acknowledgement, state why below:

*Lauren Lombay*  
\_\_\_\_\_  
Signature of Facility Representative

|                                       |   |                                       |
|---------------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS          |
|                                       | ) |                                       |
| COUNTY OF SPARTANBURG                 | ) | SEVENTH JUDICIAL CIRCUIT              |
|                                       | ) |                                       |
| RITA ST. AUBIN, as Personal           | ) | CASE NO. 2019-CP-42-03236             |
| Representative of the ESTATE OF IRENE | ) |                                       |
| RAMSEY,                               | ) |                                       |
|                                       | ) |                                       |
| PLAINTIFF,                            | ) |                                       |
|                                       | ) |                                       |
| vs.                                   | ) |                                       |
|                                       | ) |                                       |
| THI OF SOUTH CAROLINA AT CAMP         | ) |                                       |
| CARE, LLC d/b/a LAKE EMORY POST       | ) |                                       |
| ACUTE CARE; THI OF SOUTH              | ) | <b>DEFENDANT HUNT VALLEY</b>          |
| CAROLINA, LLC; HUNT VALLEY            | ) | <b>HOLDINGS, LLC'S MOTION TO STAY</b> |
| HOLDINGS, LLC; THI OF                 | ) |                                       |
| BALTIMORE, INC.; and CASEY            | ) |                                       |
| CADDELL, as Officer/Manager of THI    | ) |                                       |
| OF SOUTH CAROLINA AT CAMP             | ) |                                       |
| CARE d/b/a LAKE EMORY POST            | ) |                                       |
| ACUTE CARE,                           | ) |                                       |
|                                       | ) |                                       |
| DEFENDANTS.                           | ) |                                       |
|                                       | ) |                                       |

---

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV. ESQUIRE, AND STEFAN B. FEIDLER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant Hunt Valley Holdings, LLC, hereinafter referred to as “this Defendant”, by and through its undersigned attorneys, *subject to and without waiving its objections to personal jurisdiction*, 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 Camp Care, LLC d/b/a Lake Emory Post Acute Care (“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.

Matthew O. Riddle

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; [jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)

*Attorneys for the Defendant Hunt Valley Holdings,  
LLC*

Charleston, South Carolina

Dated: October 28, 2019

|                                       |   |                                    |
|---------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS       |
|                                       | ) |                                    |
| COUNTY OF SPARTANBURG                 | ) | SEVENTH JUDICIAL CIRCUIT           |
|                                       | ) |                                    |
| RITA ST. AUBIN, as Personal           | ) | CASE NO. 2019-CP-42-03236          |
| Representative of the ESTATE OF IRENE | ) |                                    |
| RAMSEY,                               | ) |                                    |
|                                       | ) |                                    |
| PLAINTIFF,                            | ) |                                    |
|                                       | ) |                                    |
| vs.                                   | ) |                                    |
|                                       | ) |                                    |
| THI OF SOUTH CAROLINA AT CAMP         | ) |                                    |
| CARE, LLC d/b/a LAKE EMORY POST       | ) |                                    |
| ACUTE CARE; THI OF SOUTH              | ) | <b>DEFENDANT THI OF BALTIMORE,</b> |
| CAROLINA, LLC; HUNT VALLEY            | ) | <b>INC.'S MOTION TO STAY</b>       |
| HOLDINGS, LLC; THI OF                 | ) |                                    |
| BALTIMORE, INC.; and CASEY            | ) |                                    |
| CADDELL, as Officer/Manager of THI    | ) |                                    |
| OF SOUTH CAROLINA AT CAMP             | ) |                                    |
| CARE d/b/a LAKE EMORY POST            | ) |                                    |
| ACUTE CARE,                           | ) |                                    |
|                                       | ) |                                    |
| DEFENDANTS.                           | ) |                                    |

---

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV. ESQUIRE, AND STEFAN B. FEIDLER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of Baltimore, Inc., hereinafter referred to as “this Defendant”, by and through its undersigned attorneys, *subject to and without waiving its objections to personal jurisdiction* 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 Camp Care, LLC d/b/a Lake Emory Post Acute Care (“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 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.

Matthew O. Riddle

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; [jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)

*Attorneys for the Defendant THI of Baltimore, Inc.*

Charleston, South Carolina

Dated: October 28, 2019

|                                       |   |                                       |
|---------------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA               | ) | IN THE COURT OF COMMON PLEAS          |
|                                       | ) |                                       |
| COUNTY OF SPARTANBURG                 | ) | SEVENTH JUDICIAL CIRCUIT              |
|                                       | ) |                                       |
| RITA ST. AUBIN, as Personal           | ) | CASE NO. 2019-CP-42-03236             |
| Representative of the ESTATE OF IRENE | ) |                                       |
| RAMSEY,                               | ) |                                       |
|                                       | ) |                                       |
| PLAINTIFF,                            | ) |                                       |
|                                       | ) |                                       |
| vs.                                   | ) |                                       |
|                                       | ) |                                       |
| THI OF SOUTH CAROLINA AT CAMP         | ) |                                       |
| CARE, LLC d/b/a LAKE EMORY POST       | ) |                                       |
| ACUTE CARE; THI OF SOUTH              | ) | <b>DEFENDANT THI OF SOUTH</b>         |
| CAROLINA, LLC; HUNT VALLEY            | ) | <b>CAROLINA, LLC'S MOTION TO STAY</b> |
| HOLDINGS, LLC; THI OF                 | ) |                                       |
| BALTIMORE, INC.; and CASEY            | ) |                                       |
| CADDELL, as Officer/Manager of THI    | ) |                                       |
| OF SOUTH CAROLINA AT CAMP             | ) |                                       |
| CARE d/b/a LAKE EMORY POST            | ) |                                       |
| ACUTE CARE,                           | ) |                                       |
|                                       | ) |                                       |
| DEFENDANTS.                           | ) |                                       |
|                                       | ) |                                       |

---

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV. ESQUIRE, AND STEFAN B. FEIDLER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that Defendant THI of South Carolina, 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 Camp Care, LLC d/b/a Lake Emory Post Acute Care (“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 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.

Matthew O. Riddle

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; [jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)

*Attorneys for the Defendant THI of South Carolina,  
LLC*

Charleston, South Carolina

Dated: October 28, 2019

|                               |   |                                  |
|-------------------------------|---|----------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS     |
|                               | ) |                                  |
| COUNTY OF SPARTANBURG         | ) | SEVENTH JUDICIAL CIRCUIT         |
|                               | ) |                                  |
| RITA ST. AUBIN AS PERSONAL    | ) | CASE NO. 2019-CP-42-03236        |
| REPRESENTATIVE OF THE ESTATE  | ) |                                  |
| OF IRENE RAMSEY ,             | ) |                                  |
|                               | ) |                                  |
| PLAINTIFF,                    | ) |                                  |
|                               | ) |                                  |
| vs.                           | ) |                                  |
|                               | ) |                                  |
| THI OF SOUTH CAROLINA AT CAMP | ) |                                  |
| CARE, LLC D/B/A LAKE EMORY    | ) | <b>DEFENDANT CASEY CADDELL'S</b> |
| POST ACUTE CARE; THI OF SOUTH | ) | <b>MOTION TO STAY ACTION AND</b> |
| CAROLINA, LLC; HUNT VALLEY    | ) | <b>COMPEL ARBITRATION</b>        |
| HOLDINGS, LLC; THI OF         | ) |                                  |
| BALTIMORE, INC.; AND CASEY    | ) |                                  |
| CADDELL AS OFFICER/MANAGER    | ) |                                  |
| OF THI OF SOUTH CAROLINA AT   | ) |                                  |
| CAMP CARE, LLC D/B/A LAKE     | ) |                                  |
| EMORY POST ACUTE CARE ,       | ) |                                  |
|                               | ) |                                  |
| DEFENDANTS.                   | ) |                                  |

---

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV. ESQUIRE, AND STEFAN B. FEIDLER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Casey Caddell (hereinafter referred to as “this Defendant”) by and through her 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 and compelling 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. This Motion is based on the terms and provisions of a valid and binding Arbitration Agreement executed at the time of Irene Ramsey’s admission to the above-named skilled nursing facility THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care, where this Defendant is employed as Administrator and was so employed at all times relevant

to the allegations contained in the Plaintiff's Complaint. (See Arbitration Agreement attached as **Exhibit A**). The Arbitration Agreement is expressly binding on all parties and requires that Plaintiff's claims be submitted to arbitration.

This Defendant further 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 is 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.

YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.  
D. Jay Davis, Jr.  
Matthew O. Riddle  
Gaillard T. Dotterer, III  
P.O. Box 993, Charleston, SC 29402  
(843) 720-5406; [jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)  
[mriddle@ycrlaw.com](mailto:mriddle@ycrlaw.com); [gdotterer@ycrlaw.com](mailto:gdotterer@ycrlaw.com)  
*Attorneys for Casey Caddell*

Charleston, South Carolina  
Dated: December 9, 2019

|                               |   |                                         |
|-------------------------------|---|-----------------------------------------|
| STATE OF SOUTH CAROLINA       | ) | IN THE COURT OF COMMON PLEAS            |
|                               | ) |                                         |
| COUNTY OF SPARTANBURG         | ) | SEVENTH JUDICIAL CIRCUIT                |
|                               | ) |                                         |
| RITA ST. AUBIN AS PERSONAL    | ) | CASE NO. 2019-CP-42-03236               |
| REPRESENTATIVE OF THE ESTATE  | ) |                                         |
| OF IRENE RAMSEY ,             | ) |                                         |
|                               | ) |                                         |
| PLAINTIFF,                    | ) |                                         |
|                               | ) |                                         |
| vs.                           | ) |                                         |
|                               | ) |                                         |
| THI OF SOUTH CAROLINA AT CAMP | ) | <b>DEFENDANT THI OF SOUTH</b>           |
| CARE, LLC D/B/A LAKE EMORY    | ) | <b>CAROLINA AT CAMP CARE, LLC D/B/A</b> |
| POST ACUTE CARE; THI OF SOUTH | ) | <b>LAKE EMORY POST ACUTE CARE'S</b>     |
| CAROLINA, LLC; HUNT VALLEY    | ) | <b>MEMORANDUM IN SUPPORT OF</b>         |
| HOLDINGS, LLC; THI OF         | ) | <b>MOTION TO STAY ACTION AND</b>        |
| BALTIMORE, INC.; AND CASEY    | ) | <b>COMPEL ARBITRATION</b>               |
| CADDELL AS OFFICER/MANAGER    | ) |                                         |
| OF THI OF SOUTH CAROLINA AT   | ) |                                         |
| CAMP CARE, LLC D/B/A LAKE     | ) |                                         |
| EMORY POST ACUTE CARE ,       | ) |                                         |
|                               | ) |                                         |
| DEFENDANTS.                   | ) |                                         |

---

TO: ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV. ESQUIRE, AND STEFAN B. FEIDLER, ESQUIRE, ATTORNEYS FOR PLAINTIFF:

The Defendant, THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post-Acute Care (hereinafter "Lake Emory", "the facility", of "this Defendant"), by and through its undersigned counsel, hereby respectfully submits this Memorandum in Support of its Motion to Dismiss and Compel Arbitration and Stay Court Proceedings. For the reasons set forth below, a valid, binding agreement for arbitration exists, and the Court must enter an Order compelling this matter to arbitration in accordance with the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*

### **FACTUAL BACKGROUND**

Irene Ramsey was admitted to Defendant's Facility on February 6, 2017 for skilled nursing care after sustaining a fall at home that resulted in a left femur fracture. Ms. Ramsey was admitted

with the assistance and aid of her daughter Rita St. Aubin, the named Plaintiff in this matter. Ms. Ramsey was 87 years old at the time of admission. In addition to her femur fracture, she suffered from a number of other medical problems including constipation, cough, difficulty in walking, muscle weakness (generalized), vitamin D deficiency, hypertension, gastro-esophageal reflux disease without esophagitis, and dementia.

Upon admission, the Plaintiff executed an Arbitration Agreement on behalf of Ms. Ramsey. **(Arbitration Agreement attached hereto as Exhibit A)**. The Plaintiff held a General Durable Power of Attorney over her mother, which had been duly executed and filed in Spartanburg County on November 3, 2012. **(General Durable Power of Attorney attached hereto as Exhibit B)**. Without question, pursuant to the Power of Attorney, Plaintiff possessed actual legal authority to act as her mother's agent in all affairs, including with regard to the execution of the instant Arbitration Agreement.

The Facility presented the Arbitration Agreement to Plaintiff and her mother separately from all other admission paperwork. The Arbitration Agreement is a one-page, stand-alone document that clearly identifies the parties and delineates each party's various rights and obligations under the Agreement. The first line of the Agreement at the top of the page states in large, bold, and italicized font, ***"PLEASE READ CAREFULLY."*** A stand-alone paragraph within the body of the agreement states in bold font that both parties **"understand and agree that [they] are waiving [their] right to a jury trial."**

The Plaintiff and the Facility contemporaneously executed the Arbitration Agreement. The Plaintiff signed the Agreement as the "Representative" of her mother, and the Facility's Admissions Coordinator Darlene Lindsay signed the Agreement as an "Authorized Agent" of the

Facility. Regarding the Plaintiff's authority to sign on behalf of her mother, 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 Agreement outlines governing law, sets forth how an arbitrator will be chosen, and details the type of claims that must be submitted to arbitration. Specifically, the relevant provisions of the Arbitration Agreement state:

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.

During Ms. Ramsey's approximately three month stay at the Facility, she accepted the benefits of the contracts the Plaintiff signed on her behalf, including admission to the Facility and receipt of the skilled nursing care provided therein. Until now, the Plaintiff has never challenged the validity of the Arbitration Agreement, nor has she contested, questioned, or raised a single concern regarding this Agreement or any other binding contract she entered into with the Facility on behalf of her mother.

On September 10, 2019, the Plaintiff instituted the instant lawsuit asserting claims related to Ms. Ramsey's stay at the Facility and to the Facility's provision of care to Ms. Ramsey, all of which fall squarely within the scope of the Arbitration Agreement. On October 28, 2019, this Defendant filed the instant Motion to enforce the terms of the Arbitration Agreement. For the reasons set forth below, the Court must grant this Defendant's Motion and submit Plaintiff's claims to arbitration pursuant to the valid and binding Arbitration Agreement that Plaintiff executed on her mother's behalf upon admission to the Facility.

### **ARGUMENT AND CITATION TO AUTHORITY**

#### **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 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).

## 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. A; *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 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 binding and enforceable written agreement to arbitrate disputes exists in this case, and therefore Plaintiff's claims should be dismissed and compelled to arbitration.

### **III. BINDING PRECEDENT FROM THE UNITED STATES SUPREME COURT REQUIRES ENFORCEMENT OF THE ARBITRATION AGREEMENT**

In *Kindred*, the United States Supreme Court, under facts substantially similar to the present case, held that arbitration agreements executed on behalf of residents being admitted to skilled nursing facilities were binding against those residents when the person who executed the document on the resident's behalf had a durable power of attorney for the admitting resident. 137 S. Ct. 1421, 1429, 197 L. Ed. 2d 806 (2017). In that case, two individuals, each holding powers of attorney, checked family members into a nursing home. *Id.* at 1425. As part of the admissions process, both individuals executed separate arbitration agreements. *Id.* After the family members died, the individuals filed suits in state court. *Id.* Subsequently, the nursing home moved to dismiss the case, seeking enforcement of the arbitration agreements. *Id.* The trial court denied the nursing home's motions and both the Court of Appeals and Supreme Court of Kentucky affirmed. *Id.*

The United States Supreme Court reversed, finding that the Supreme Court of Kentucky erroneously held that one of the arbitration agreements was unenforceable despite the fact that the individual who signed the agreement was acting pursuant to a power of attorney. Furthermore, the Supreme Court held that the Kentucky Court's ruling violated the FAA, noting that it "fail[ed] to put arbitration agreements on an equal plane with other contracts," as required by the FAA. *Id.* at 1426-1427. Along similar lines, the Court noted that the Supreme Court of

Kentucky’s “reasoning would allow States to pronounce any attorney-in-fact incapable of signing an arbitration agreement—even if a power of attorney specifically authorized her to do so.” *Id.* at 1428. According to *Kindred*, an arbitration agreement signed by a power of attorney holder on behalf of a resident is valid and enforceable, and cannot be treated as anything other than a contract under the FAA.

As such, a decision in the instant case not to enforce the Arbitration Agreement would run afoul of the Supreme Court’s holding in *Kindred*, as well as the substantial state and federal policy in favor of arbitration. In this case, like in *Kindred*, Plaintiff held a Power of Attorney when she admitted her mother to Lake Emory. Unquestionably, Plaintiff possessed the power and authority to bind her mother to the terms of the Arbitration Agreement, and did in fact bind her mother to its terms once she signed the Agreement as her valid and durable power of attorney. Accordingly, this Court should grant this Defendant’s Motion and compel this matter to arbitration pursuant to the valid and enforceable contract between the parties.

#### **IV. THE ARBITRATION AGREEMENT IS SUPPORTED BY VALID, LEGAL CONSIDERATION AND CONTAINS COMPLETE MUTUALITY OF REMEDIES**

To the extent Plaintiff argues the contrary, the Arbitration Agreement possesses valid, legal consideration because the parties exchanged mutual promises to arbitrate by voluntarily assenting to the provision that both parties’ right to a jury trial would be waived.

Indeed, 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). Notably, other cases from the federal and state courts within the Fourth Circuit

and beyond have echoed this very same principle. *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 545 (4th Cir. 2005)(applying Maryland law); *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 120, 516 S.E.2d 879, 882, writ denied, review denied, 350 N.C. 832, 539 S.E.2d 288 (1999); *Williams-Jackson v. Innovative Senior Care Home Health of Edmond, LLC*, 727 F. App'x 965, 968 (10th Cir. 2018)(applying Oklahoma law); *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 309 (Tex. App. 2009); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001); *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013); *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658, 661 (Fla. Dist. Ct. App. 2008).

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) (holding a mutual promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement); *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999) (citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration).

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both the Defendant and Ms. Ramsey and representatives (and her heirs, personal representatives, etc.). See **Exhibit A** ("It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving claims through or on behalf of Resident."). Accordingly, the Arbitration Agreement contains adequate consideration in the form of mutual promises to arbitrate, and any claims to the contrary should be disregarded.

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, this Court cannot deny enforcement of the Arbitration Agreement on grounds of lack of consideration.

**II. THE ARBITRATION AGREEMENT IS CLEAR AND UNAMBIGUOUS WITH RESPECT TO THE INTENT OF THE PARTIES AND CONTAINS ALL ESSENTIAL AND MATERIAL TERMS**

To the extent Plaintiff attempts to argue the contrary, the Arbitration Agreement is clear, unambiguous, and represents an unequivocal understanding between the Defendant and Plaintiff with respect to its essential and material terms such that enforcement is required. The Arbitration Agreement includes specific, explicit provisions regarding how an arbitrator is chosen, what rules will govern the arbitration itself, and what types of claims must be submitted to arbitration. Indeed, the Agreement expressly denotes that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which itself contains exacting details such as the location of the arbitration, how evidentiary rulings should be made, when subpoenas can be issued, rules for confidentiality of the proceedings, compensation of arbitrators, and nearly every conceivable aspect of the arbitration itself. Moreover, the lack of a specifically delineated arbitrator is not evidence against the enforceability of the Arbitration Agreement. To the contrary, the terms of the agreement promote a cooperative process wherein the parties attempt to mutually agree upon an arbitrator before seeking court assistance. Furthermore, arbitration agreements that are substantially similar to the one here have been held to be enforceable and were not void because they lacked certain terms that the Plaintiff may

assert are required. *See THI of S.C. at Columbia, LLC v. Wiggins*, No. CA 3:11-888-CMC, 2011 WL 4089435, at \*7 (D.S.C. Sept. 13, 2011); *See also THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185, at \*3 (D.S.C. Mar. 19, 2015).

#### **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.

“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. Any argument suggesting the Plaintiff lacked sophistication or played no part in drafting the agreement is not sufficient to demonstrate procedural unconscionability. *Id.* Any notion that the Plaintiff was forced to sign the Arbitration Agreement without option is demonstrably false.

The fact that the Plaintiff is an individual and this Defendant is a commercial entity is not sufficient grounds, standing alone, to prove the absence of a meaningful choice. While disparity in bargaining power and relative sophistication are factors to be considered under *Simpson*, the fact that Lake Emory, a skilled nursing facility, unilaterally drafted this agreement and presented it to the Plaintiff for consideration cannot justify a finding of unconscionability. *See, Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360, 365 n. 5 (2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”).

Furthermore, the Arbitration Agreement was not “forced” or mandatory. To the contrary, this Admission Agreement was not a pre-condition for admission. The Arbitration Agreement was, in fact, a separate agreement from the admissions agreement. Additionally, by executing and consenting to the Arbitration Agreement, the Plaintiff expressly acknowledged that she “[was] not required to use the aforesaid facility for [her mother’s] healthcare needs and that there are numerous other health care providers in the State where [Defendant] is located that are qualified to provide such care to [her.]” Plaintiff cannot cite to any limitation or restriction upon where Ms. Ramsey could have been admitted to ensure that she was properly provided care and treatment.

The Plaintiff 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 document. The waiver of Ms. Ramsey's right to a jury trial was presented as a separate contract, and the Plaintiff was expressly instructed to read carefully before executing the Arbitration Agreement.

Nonetheless, even if Plaintiff could demonstrate that there was an absence of meaningful choice, a finding of unconscionability would still not be warranted in the present case, as Plaintiff must still show that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to jointly select a third party arbitrator "from a panel having experience and knowledge of the health care industry." If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. 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, and the Arbitration Agreement therefore cannot be deemed unconscionable.

Lastly, the District Court of South Carolina has repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these

agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575, at \*3 (D.S.C. Dec. 15, 2011) (Norton, C.J.); *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at \*6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson v. THI of S.C. at Lake Emory at Spartanburg, LLC*, C.A. 7:11-2613-HMH. 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 to the clear precedent under *Kindred* and the FAA that arbitration agreements must be placed on equal footing with all other contracts. Accordingly, to the extent Plaintiff asserts that the Arbitration Agreement is unconscionable, such argument is unfounded.

#### **V. NO WAIVER OF ARBITRATION RIGHTS HAS OCCURRED**

This Defendant immediately asserted its arbitration rights in response to the Plaintiff initiating the present suit and therefore has not waived its rights under the Arbitration Agreement. As set forth above, “[t]he 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.’” *Dean*, 408 S.C. at 387, 759 S.E.2d at 736 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)). Accordingly, “*there is a presumption against finding that a party has waived its right to compel arbitration[.]*” *Id.*, 408 S.C. at 388, 759 S.E.2d at 736. (emphasis added). To overcome this presumption, “the party seeking to avoid arbitration ‘must show prejudice through an undue burden caused by delay in demanding arbitration.’” *Id.* (quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749,

753 (Ct. App. 1999)). “Mere inconvenience to an opposing party is not sufficient to establish prejudice.” *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003)(citing *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct.App.2003)). South Carolina “follow[s]the approach adopted by the federal courts of the Fourth Circuit and other jurisdictions which require a showing of actual prejudice before finding waiver.” *Rich v. Walsh*, 357 S.C. 64, 71, 590 S.E.2d 506, 509 (Ct. App. 2003)

In the present case, there has been no delay in this Defendant’s demand for arbitration, and the Plaintiff cannot demonstrate any prejudice whatsoever. The Plaintiff served her Notice of Intent to File Suit on this Defendant on December 26, 2018. Thereafter, this Defendant notified the Plaintiff of its intent to enforce the Arbitration Agreement immediately or at the very latest at pre-suit mediation on July 29, 2019. Additionally, participation in the NOI process alone is not grounds for waiver of arbitration, and under South Carolina law, there is no obligation to seek enforcement upon service of the NOI. *See Dean, supra*, at 388 (“We find that Appellants did not delay in filing their demand for arbitration. Rather, Appellants participated in the statutorily required mediation process, and after Respondent filed her formal complaint, Appellants moved to compel arbitration at their first opportunity.”)

Here, upon service of the Summons and Complaint, this Defendant timely answered, asserted relevant affirmative defenses based upon its arbitration rights, and contemporaneously filed a motion to compel arbitration. Under binding South Carolina precedent, this conduct cannot amount to a waiver.

**VI. SHOULD THE COURT DECLINE TO GRANT THIS DEFENDANT'S MOTION, THE PARITES SHOULD BE PERMITTED TO CONDUCT LIMITED DISCOVERY RELEVANT TO THE ISSUES RAISED HEREIN**

If the Court is not inclined to grant the instant motion on the grounds contained in this memorandum or asserted at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised herein or at the hearing, and in particular, the Plaintiff's execution of the Arbitration Agreement and other circumstances surrounding the admissions process. In a case involving whether a similar arbitration agreement was a valid contract, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a signatory's authority to execute an Arbitration Agreement on behalf of the resident in connection with his admission to a skilled nursing facility. *See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. Al*, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018). Critical to the court's decision in that case was whether the son's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the son to an arbitration agreement. The court permitted limited discovery on issues related to whether the arbitration agreement was a valid contract. After considering the testimony of several individuals who were deposed, the court found there was evidence to support a finding of apparent agency that the parties entered a valid contract. Here, as in *Boyd*, if the Court determines the record is insufficient to grant this Defendant's Motions before it, additional discovery should be permitted as necessary to further establish the circumstances surrounding the Plaintiff's execution of the Arbitration Agreement.

**CONCLUSION**

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order staying the pending action and compelling arbitration. Alternatively, and if the Court is

not inclined to grant the instant motion on any of the grounds asserted above or at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery on the issues raised above. Defendant also requests permission to be heard after such discovery is conducted and requests that it be permitted to submit supplemental memorandum along with any additional evidence procured.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Matthew O. Riddle

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

(843) 720-5406; jdavis@ycrlaw.com

*Attorneys for THI of South Carolina at Camp Care,  
LLC d/b/a Lake Emory Post Acute Care*

Charleston, South Carolina

Dated: December 13, 2019

DEE/01--ZPG229

STATE OF SOUTH CAROLINA

GENERAL DURABLE

POWER OF ATTORNEY

COUNTY OF SPARTANBURG

I, **IRENE P. RAMSEY** ("Principal"), a resident of the state and county aforesaid, hereby appoint my daughter, **RITA ST. AUBIN** ("Agent") as my Agent to exercise the powers set forth below. If for any reason she shall be unable or unwilling to serve or continue to serve, then I hereby appoint my daughter-in-law, **BRENDA RAMSEY**, as substitute or successor Agent to serve with the same powers. By this instrument, I intend to create a durable power of attorney under the laws of the State of South Carolina, 1976, as amended.

I hereby revoke all powers of attorney, general and/or limited, heretofore granted by me as principal and terminate all agency relationships created thereunder, including those of all successor agents named therein, if any, except that powers granted by me on forms provided by financial institutions granting the right to write checks on, deposit funds to and withdraw funds from accounts to which I am a signatory or granting access to a safe deposit shall not be revoked but shall continue in full force and effect.

#### ARTICLE I - ASSET POWERS

My Agent shall have complete authority to manage and control all of my property and my affairs, including (but not limited to) the following powers:

A. To maintain any financial accounts, including (but not limited to) any checking, savings, or credit union accounts presently in my name, and to establish new financial accounts in my name, and to deposit money into, withdraw money from, and draw checks on these accounts.

B. To receive, endorse, and collect any currency or commercial paper, including (but not limited to) any checks or drafts payable to me.

C. To invest and reinvest any or all of my funds in any type of investment, including (but not limited to) corporate obligations of every kind, preferred or common stocks, securities of any regulated investment trust, partnership interests, and U.S. bonds redeemable at par in payment of federal estate tax liabilities (for which my Agent will not be liable to anyone for losses resulting from the good-faith purchase of such bonds).

DEE-2012-49576  
Recorded 9 Pages on 11/7/2012 11:32:26 AM  
Recording Fee: \$20.00 Documentary Stamps: \$0.00  
Office of Register of Deeds, Spartanburg, S.C.  
Dorothy Earle, Register



ROA 114

**DEFENDANT'S  
EXHIBIT**

**B**

D. To move any of my property to any place, whether or not within the United States.

E. To buy, receive, lease as lessor, accept or otherwise acquire; to sell, convey, mortgage, grant options upon, hypothecate, pledge, transfer, exchange, quitclaim, or otherwise encumber or dispose of; or to contract or agree for the acquisition, disposal, or encumbrance, of any of my property, real, personal, or mixed, tangible or intangible, including any property I may hereafter acquire or receive and my personal residence, for cash or credit and upon such terms, considerations, and conditions as my Agent deems advisable, and to execute deeds, mortgages, and any other instruments and to give and require any warranties or indemnifications that my Agent deems advisable, and no person dealing with my Agent shall be bound to see to the application of any monies paid.

F. To participate in the operation of any business or other enterprise, including voting any stock, and to incorporate, dissolve, or otherwise change the form of such business.

G. To borrow and lend money on such terms, including (but not limited to) interest rates, security, and loan duration, as my Agent deems advisable.

H. To apply for and own any policies of insurance on my life, on any of my property, and against any liabilities or damages my Agent deems advisable, to pay any premiums or other charges required to maintain such policies, and to exercise any incident of ownership over such policies, including (but not limited to) any right to change beneficiaries, cancel the policy, borrow against any cash values, or make any elections with respect to the policies.

I. To improve, develop, manage, lease, or abandon any of my property.

J. To hold any of my property in the name of any trustee, custodian or nominee, without disclosing this relationship, but my Agent will be responsible for the acts of any such trustee, custodian or nominee.

K. To apply for or transfer any certificate of title on any motor vehicle and to represent that such vehicle is free and clear of all liens and encumbrances not otherwise noted in the transfer documents.

L. To prosecute or defend any action for my protection or that of my property, or for my Agent's protection in the performance of my Agent's duties as my Agent, or both, and to pay, contest, or settle any claim by or against me or my Agent in the performance of my Agent's duties as my Agent.

M. To employ persons, even if they are associated with my Agent, to advise or assist my Agent in the performance of my Agent's duties as my Agent.

N. To prepare, sign, and file any returns of tax, refund claims, requests for extension of time to file or pay, petition to any court with respect to any tax, offers, waivers, consents, powers of attorney, and other documents relating to any type of federal, state, local, or foreign tax, and to execute any elections I may have under any such tax laws. I waive any privileges I may have against disclosure of any confidential tax information to my Agent.

O. To transfer any of my assets to any revocable trust I have created under which I am a primary income and principal beneficiary during my lifetime, to be administered under the terms of such trust, even if my Agent is a trustee.

P. To disclaim all or part of any transfers of property to me, if my Agent deems it probable that no gift taxes will be imposed on me on account of such disclaimer.

Q. To enter my existing safe-deposit boxes, close them out, and open any new safe-deposit boxes in my name.

R. To support and/or continue to support any person whom I have undertaken to support or to whom I may owe an obligation of support, in the same manner and in accordance with the same standard of living as I may have provided in the past, adjusted if necessary by circumstances and inflation.

S. To continue payments incidental to my membership or affiliation in any church, club, society, order, or other organization or to continue contributions thereto.

T. To consent to the splitting of gifts under Section 2513 of the Internal Revenue Code and any successor sections thereto and/or similar provisions of any state or local gift tax laws if my Agent deems it probable that no gift taxes will be imposed on me on account of such consent.

U. To do any other thing which my Agent deems advisable, necessary, or desirable for the management of my affairs or for my health, comfort, or welfare, and if necessary to make all necessary arrangements, contractual or otherwise, for me at any hospital, nursing home, convalescent home or similar establishment.

## ARTICLE II - HEALTH CARE POWERS

My Agent is authorized in my Agent's sole and absolute discretion from time to time at any time to exercise the powers granted herein relating to matters involving my health and medical care. In exercising such powers, my Agent should first try to discuss with me the specifics of any proposed decision regarding my medical care and treatment if I am able to communicate in any manner, however rudimentary. My Agent is further instructed that if I am unable to give an informed consent to a proposed medical treatment, my Agent shall give or withhold such consent for me based upon any treatment choices that I have expressed while competent, whether under this instrument or otherwise. If my Agent cannot determine the treatment choice I would want made under the circumstances, then my Agent should make such choice for me based upon what my Agent believes to be in my best interests. Accordingly, my Agent is authorized as follows:

A. To make all health care decisions for me and on my behalf, including consenting, refusing to consent or withdrawing consent to any care, treatment, service or procedure to maintain, diagnose or treat my mental or physical condition. No physician, hospital, or their agent or employee will be liable to me or my estate for recognizing this power I have granted my Agent.

B. To receive from any physicians, surgeons, or their employees or agents, any privileged or confidential medical information regarding me, and to waive on my behalf any physician - patient or other privilege, if my Agent deems it advisable for any reason.

C. To employ and discharge medical personnel including physicians, psychiatrists, dentists, nurses, and therapists as my Agent shall deem necessary for my physical, mental, and emotional well-being and to pay them (or cause to be paid to them) reasonable compensation.

**ARTICLE III - DURABILITY**

This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders the principal incapable of managing the principal's own estate. It is my intent that the authority conferred herein shall be exercisable notwithstanding my physical disability or mental incompetence.

**ARTICLE IV - AMENDMENT AND REVOCATION**

This power of attorney may be revoked or amended by me at any time and from time to time, including the removal of any Agent herein and the appointment of another Agent, but such revocation or amendment shall not be effective as to third persons dealing with my Agent without notice of such amendment unless such amendment shall have been recorded in the public records of the county aforesaid.

**ARTICLE V - RESIGNATION & POWER TO APPOINT SUCCESSOR AGENT**

My Agent and any alternate agent may resign by the execution of a written resignation delivered to me or, if I am mentally incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me or in the case of an alternate agent, by delivery to such alternate agent. Upon such resignation, my Agent shall thereupon be divested of all authority under this power of attorney.

If at any time there is no successor agent named in this instrument who is willing and able to serve as my Agent, then my Agent is authorized and empowered to appoint a substitute agent to act and serve as my Agent in the event my Agent resigns, dies or becomes mentally incapacitated during my lifetime. Such appointment shall be made in a written instrument that shall be (i) signed by my Agent, (ii) delivered to my substitute agent, and (iii) attached to this instrument.

**ARTICLE VI - EXCULPATION**

My Agent and my Agent's heirs, successors and assigns, acting in good faith, are hereby released and forever discharged from any and all liability (civil, criminal, administrative or disciplinary) and from all claims or demands of all kinds whatsoever by me or by

my heirs and assigns arising out of the acts or omissions of my Agent, except for willful misconduct or actual fraud.

#### **ARTICLE VII - COMPENSATION**

My Agent shall be entitled to reimbursement for all reasonable costs and expenses actually incurred and paid by my Agent on my behalf pursuant to any provision herein and shall be entitled to receive as compensation for services rendered hereunder such amounts as may be agreed upon between me and my Agent in writing signed by us. If there is no such agreement outstanding at any time, then my Agent is entitled to reasonable compensation based upon the responsibilities assumed and the effort expended by my Agent hereunder. If two (2) or more Agents shall serve concurrently under this instrument, the compensation paid hereunder shall be divided among or between them in such manner as they shall agree, or if they fail to agree, then such compensation shall be determined by a court of competent jurisdiction.

#### **ARTICLE VIII - RELIANCE BY THIRD PERSONS**

The powers herein conferred may be exercised by Agent alone and the signature or act of Agent on my behalf may be accepted by third persons as fully authorized by me and with the same force and effect as if done under my hand and seal and as if I were present in person, acting on my own behalf and competent. No person who in good faith may act in reliance upon the representations of Agent for the scope of authority granted to Agent shall incur any liability to me or to my estate as a result of permitting Agent to exercise any power, nor shall any person dealing with Agent be responsible to determine or ensure the proper application of funds or property. Any party dealing with any person named as Agent may rely upon as conclusively correct an affidavit of such Agent that (i) my Agent's powers are then in effect, (ii) the action my Agent desires to take is within the scope of my Agent's authority granted under this instrument, (iii) I was competent at the time this instrument was executed, (iv) this instrument has not been revoked, and/or (v) my Agent continues to serve as my Agent. Any party dealing with any person named as substitute attorney hereunder may rely upon as conclusively correct an affidavit of such substitute attorney that the person named as prior Agent is no longer serving.

**ARTICLE IX - COUNTERPARTS**

Any person may rely fully, completely and equally on (1) the original of this power of attorney, (2) a duly executed counterpart of this power of attorney, or (3) a copy certified by my Agent to be a true copy of the original power of attorney.

**ARTICLE X - APPOINTMENT OF ANCILLARY AGENT**

If at any time my Agent deems it necessary or desirable in my Agent's discretion to appoint one (1) or more Agents to act in another jurisdiction under this Power of Attorney (such Agent or Agents being hereinafter referred to in the aggregate as my "Ancillary Agent"), my Agent from time to time and at any time may appoint one (1) or more such Ancillary Agents. In making such appointment, my Agent may sign, execute, deliver, acknowledge, and make declarations in any instruments (including Living Wills, Declarations of Desire for a Natural Death, Health Care Declarations or Powers of Attorney) as may be necessary, desirable, convenient or proper in order to effectuate any such ancillary appointment, and my Agent may grant to any Ancillary Agent some or all of the powers and duties and authorities granted them hereunder, but may not grant to any such Ancillary Agent powers which are inconsistent with or different from those powers granted to my Agent hereunder.

**ARTICLE XI - LIMITATIONS ON AGENT'S AUTHORITY**

Notwithstanding any provision herein to the contrary, my Agent:

(1) shall have no power or authority whatsoever with respect to any interest in or incidents of ownership in any policy of insurance I may own on the life of my Agent.

(2) shall have no power or authority whatsoever with respect to (a) any irrevocable trust created by my Agent as to which I am a trustee or a beneficiary or (b) any asset given to me by my Agent.

(3) shall be prohibited from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to cause such assets to pass in any one calendar year directly or

DEED 01 - Z PG 236

indirectly to my Agent or his or her estate, (c) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others (excluding those whom I am legally obligated to support).

(4) shall be prohibited from exercising any fiduciary powers that I now hold or may hereafter acquire.

#### ARTICLE XII - MISCELLANEOUS

A. Governing Law. This power of attorney shall be governed by and construed according to the laws of the State of South Carolina, and to the extent permitted by law shall be applicable to all property of mine, real, personal, intangible or mixed, wherever and in whatever state of the United States or foreign country the situs of such property is at any time located and whether such property is now owned by me or hereafter acquired by me or for me by my Agent.

B. Headings. The headings in this power of attorney are inserted for convenience only and are not a part of this instrument.

C. Gender and Number. Whenever the context of this power of attorney requires, the masculine gender includes the feminine or neuter, and vice versa, and the singular number includes the plural, and vice versa.

IN WITNESS WHEREOF, as Principal, I have executed this power of attorney as of this 3 day of November, 2012.

Irene P. Ramsey  
IRENE P. RAMSEY

(SEAL)

DEED 01 - Z PG 237

STATE OF SOUTH CAROLINA )

COUNTY OF SPARTANBURG )

## ATTESTATION

The foregoing Power of Attorney was this 3<sup>rd</sup> day of November, 2012, signed, sealed, published and declared by the Principal as the Principal's appointment and empowerment of an attorney-in-fact, in the presence of us who at the Principal's request and in the Principal's presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

Karen S. Hamrick of Cowpens, S.C.  
Wm. H. H. of Cowpens, SC

\* \* \* \* \*

STATE OF SOUTH CAROLINA )

COUNTY OF SPARTANBURG )

## PROBATE

Personally appeared deponent and made oath that deponent saw the within named Principal sign, seal and as the Principal's act and deed deliver the within power of attorney and that deponent, with the other witness whose name is subscribed above, witnessed the execution thereof.

Karen S. Hamrick

SWORN to and subscribed  
 before me this 3 day  
 of November, 2012.

Wm. H. H. (SEAL)  
 Notary Public for South Carolina  
 My Commission Expires: 06/16/16

IN THE STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS  
FOR THE 7TH JUDICIAL CIRCUIT  
CASE NO: 2019-CP-42-03236\_\_\_\_\_

RITA ST. AUBIN as Personal  
Representative of the ESTATE OF IRENE  
RAMSEY,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CAMP  
CARE, LLC d/b/a LAKE EMORY POST  
ACUTE CARE; THI OF SOUTH  
CAROLINA, LLC; HUNT VALLEY  
HOLDINGS, LLC; THI OF  
BALTIMORE, INC.; and CASEY  
CADDELL as Officer/Manager of THI OF  
SOUTH CAROLINA AT CAMP CARE,  
LLC d/b/a LAKE EMORY POST ACUTE  
CARE,

Defendant(s).

**PLAINTIFF'S RESPONSE IN  
OPPOSITION TO DEFENDANT THI OF  
SOUTH CAROLINA AT CAMP CARE,  
LLC'S MOTION TO DISMISS AND  
COMPEL ARBITRATION**

The Defendant, THI of South Carolina At Camp Care, LLC d/b/a Lake Emory Post Acute Care (hereinafter "Defendant"), Motion to Dismiss and Compel Arbitration should be denied because:

- **The Arbitration Agreement violates federal law where it appears to be involuntary and a precondition to admission to Defendant's facility.**
- **The Arbitration Agreement is unconscionable where there was no bargaining power by Plaintiff, appeared to be an involuntary pre-condition to admission, and if enforceable, would require Plaintiff to pay for arbitration.**
- **The Arbitration Agreement lacks additional, valuable consideration.**
- **Material terms in the Arbitration Agreement are ambiguous and the Arbitration Agreement should be deemed unenforceable.**

In opposing this motion, Plaintiff would show that the Arbitration Agreement is unenforceable for the reasons set forth below.

### **BRIEF SUMMARY OF ARGUMENTS**

- I. The Arbitration Agreement violates Federal law where it appears to have been involuntary and a required precondition to admission to Defendant's Facility.**
  - a. The Arbitration Agreement is unenforceable as it violates Federal law.**
  - b. The Arbitration Agreement is unenforceable due to the doctrine of unconscionability.**
- II. Assuming the Arbitration Agreement was optional and not required, it is nonetheless invalid because it lacks additional valuable consideration and the terms are ambiguous.**
  - a. The Arbitration Agreement lacks additional, valuable consideration.**
  - b. The Arbitration Agreement is ambiguous and material terms are vague and/or indefinite.**
- III. The Arbitration Agreement does not apply to the remaining Defendants**

### **INTRODUCTION**

This is a professional negligence case involving Irene Ramsey (hereinafter "Ms. Ramsey") who was admitted into Defendant's facility for rehabilitative purposes after suffering a fall at home resulting in a fractured femur. After admission, Ms. Ramsey suffered an additional fall at Defendant's facility which caused Ms. Ramsey's death as alleged in Plaintiff's Complaint. On admission, Rita St. Aubin executed the Arbitration Agreement [See Exhibit A] and Admission Agreement [See Exhibit B] and on Irene Ramsey's behalf.

The Admission Agreement was also executed by Rita St. Aubin. It states in part that the "*Resident is not deemed admitted until such time as all agreements required by law and Facility have been properly executed.*" [See Exhibit B]. One such agreement was the Arbitration Agreement. The Admission Agreement further states that:

I/we acknowledge that I/we have read this page and all preceding pages and acknowledges that this [Admission] 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.

Id.

The Admission Agreement also provides an opt-out option where either party may terminate the Admission Agreement. Id. The Admission Agreement does not reference the Arbitration Agreement.

On the other-hand, the Arbitration Agreement does not state it is voluntary and not a precondition to admission. [See Exhibit A]. The Arbitration Agreement also does not have an opt-out option, nor specifically addresses who shall pay for arbitration and/or who shall pick the panel of arbitrators. Put frankly, the Arbitration Agreement is an ambiguous contract that should be deemed unenforceable. Id.

### **LEGAL STANDARD**

First, it is important to note that the Arbitration Agreement is governed by the Federal Arbitration Act (hereinafter “FAA”). [See Exhibit A]. While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration agreements are enforceable. Where the FAA does apply, the Arbitration Agreement is subject to the same defenses applicable to all other contracts as discussed below. Rent-A-Center, West , Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) (i.e. consideration).

Furthermore, 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 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”). The FAA looks to state law to decide the threshold questions of contract formation. Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. 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.

## **ARGUMENT**

### **I. The Arbitration Agreement violates Federal law where it appears to have been involuntary and a required precondition to admission to Defendant's Facility.**

The Arbitration Agreement at issue does not provide language that the Arbitration Agreement was voluntary and/or optional and not a precondition to admission to Defendant's facility. Instead, it was presented as part of the admission process in such a way as to suggest that it was a pre-condition to admission, and that failure to agree to the Arbitration Agreement would result in a rejection of Ms. Ramsey's admission. [See Exhibit B]. If true, this renders the Arbitration Agreement unenforceable both because the demand for this precondition violates federal law and is *per se* unenforceable, and because the Arbitration Agreement violates state law principles of unconscionability.

#### **a. The Arbitration Agreement is unenforceable as it violates Federal law.**

An illegal contract is unenforceable. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993). "The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution." Id. Federal regulations require Medicare and Medicaid certified facilities to accept Medicare/Medicaid reimbursement rates as payment in full. See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15. Moreover, such facilities, in the case of an individual who is entitled to medical assistance, must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under 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). This is exactly the reason that we often see arbitration agreements and similar requests in documents separate and apart from the admission

agreement, and why facilities take pains to state that the agreements are voluntary and not a pre-condition to admission.

It is undisputed that Ms. Ramsey was not a self-pay admission to Defendant's facility, but rather that the facility did bill Medicare/Medicaid for her stay. As such, Defendant is prohibited from soliciting, accepting, or receiving her agreement to waive the right to a jury trial as a precondition of her admission. However, the Arbitration Agreement fails to state it is voluntary and not a pre-condition to admission. [See Exhibit A]. Indeed, even as to this Defendant, it apparently recognized this, as the Admission Agreement explicitly gives residents the option to "terminate this Agreement at any time" and appears to be a separate contract from the Arbitration Agreement. [See Exhibit B]. However, the Admission Agreement states "*Resident is not deemed admitted until such time as all agreements required by law and Facility have been properly executed.*" Id. Consequently, the Admission Agreement itself states that all agreements required by the facility, including the Arbitration Agreement, must be executed for the resident to be deemed admitted.

Additionally, the Arbitration Agreement does not state it is voluntary and fails to state it is not a pre-condition to admission. [See Exhibit A]. The Arbitration Agreement further fails to provide an opt-out provision, all of which collectively would infer the Arbitration Agreement was required as a pre-condition to admission. Id. Even if federal law did not prohibit Defendant's from requiring Ms. Ramey to agree to the Arbitration Agreement as a precondition for admission, such a requirement would be unenforceable under South Carolina law as unconscionable.

**b. The Arbitration Agreement is unenforceable due to the doctrine of unconscionability.**

Generally, an adhesion contract is a standard form contract offered on a take-it or leave-it basis with terms that are not negotiable. Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 498 S.E.2d 898 (Ct.App.1998). While an adhesion contract is not *per se* unconscionable, it represents an absence of meaningful choice. See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 472 S.E.2d 242 (1996) (unconscionability is 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).

Here, it is apparent that the Arbitration Agreement is one sided. [See Exhibit A]. First, there was no bargaining between the parties. The Arbitration Agreement was presented as a take-it or leave it, since there appears to be no language in the Arbitration Agreement that states it was voluntary. Id. Second, it is assumed the Arbitration Agreement was required as a pre-condition to admission since there is no language stating otherwise and it presented with the other admission paperwork. Finally, unlike the Admission Agreement there is no opt-out option. [See Exhibit B]. Finally, the Arbitration Agreement is unclear as to who has to pay for arbitration. In fact, no such language exists. Id. Requiring Plaintiff to pay the arbitration fees should be deemed unconscionable considering trial by jury is free outside of filing fees and such an agreement would be clearly unconscionable.

The facts of this case are similar to those found in Estate of Vera Brown, where Judge Dianne Goodstein found an arbitration agreement was unconscionable. [See, Exhibit C].

**II. Assuming the Arbitration Agreement was optional and not required, it is nonetheless invalid because it lacks additional valuable consideration and the terms are ambiguous.**

In order to cure the deficiencies noted above, it is expected Defendant will argue that the Arbitration Agreement was negotiable, voluntary, and not a pre-condition to admission. Indeed, this is the way most skilled nursing facilities attempt to force such restrictive provisions upon their residents. However, due to the language of the Arbitration Agreement this argument would not alter the outcome.

**a. The Arbitration Agreement lacks additional, valuable consideration.**

It is axiomatic that every contract in South Carolina must be supported by mutual consideration in order to be valid and enforceable. Here, if Defendant concedes (as its must) that the Arbitration Agreement was not made in consideration of admission, there must exist some other consideration to make the clause enforceable. However, there is none.

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

The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) “Valuable consideration to

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

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, this courts must assess whether the Arbitration Agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. [See Exhibit A].

In the case at hand, assuming Mrs. St. Aubin had authority, there is was no consideration in agreeing to the Arbitration Agreement. Id. The one-page agreement contains no benefit or detriment to the parties and the court cannot consider those outside the four-corners of the Arbitration Agreement. Admission alone is not consideration, and if argued, violates federal law and should be deemed unenforceable. A typical argument for finding consideration in an arbitration agreement is that arbitration is quicker and less costly than litigation. While this may or may not be true (often it is not), the Arbitration Agreement is unclear on who pays for

arbitration and the procedural process to follow. Id. Therefore, there is no rational argument that can be made that a person waiving his/her right to trial by jury enjoys some benefit.

Because Plaintiff reaps no benefit from the Arbitration Agreement, and because Defendants suffer no loss, the Arbitration Agreement is not supported by valuable (or any) consideration.. As such, the Arbitration Agreement should be stricken as unenforceable. The facts of this case are similar to those found in Estate of Vera Brown, where Judge Dianne Goodstein found an arbitration agreement lacked valuable consideration. [See, Exhibit C]. Additionally, Judge Perry M. Buckner, III, determined the same in Estate of David Holmes. [See, Exhibit D].

**b. The Arbitration Agreement is ambiguous and material terms are vague and/or indefinite.**

The Arbitration Agreement at issue is, at best, ambiguous, and material terms are vague and indefinite requiring the court to find this agreement unenforceable. In Grant v. Magnolia Manor, our South Carolina Supreme Court spoke to the proof required to establish an enforceable agreement to arbitrate:

Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. Dowling v. Home Buyers Warranty Corp., II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). **In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract.** Player vs. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). **An agreement that omits material terms may be determined to be unenforceable for indefiniteness.** Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997); Ellis v. Taylor, 449 S.E.2d (S.C. App. 1994).

An agreement which neglects material terms may be found unenforceable for indefiniteness. Lindsay v. Lindsay, supra. “Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced.” Id. In this particular case, even if the contract was validly executed, there was not a “meeting of the minds” as to the “essential terms” of arbitration, specifically the choice of the panel and who pays for arbitration. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Without a “meeting of the minds” between the parties as to choice of arbitrators, there can be no contract to arbitrate. An agreement that omits material terms may be determined to be unenforceable for indefiniteness. The parties cannot now arbitrate this dispute without the presence of panel of arbitrators. As a result, the promise that the dispute “shall be resolved by arbitration, as

If, in fact, Defendant seeks to argue that the Arbitration Agreement was voluntary and negotiable, there is nothing within the Arbitration Agreement itself to reflect that. Instead, the Arbitration Agreement appears to be a one-page, non-negotiable pre-condition to admission. This is further illustrated when compared to the Admission Agreement which provides an opt out provision.

The Arbitration Agreement is also ambiguous as to who actually pays for arbitration. The South Carolina Supreme Court has held that “[a] contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire agreement and who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or practice. Williams v.

GEICO, App. Case No. 2011-196449, 2014 WL 4087598, at \*3(S.C. Aug. 20, 2014) (quoting Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)).

Finally, the Arbitration Agreement is unclear as to who chooses the panel for the parties to select an arbitrator from. Regardless, where ambiguity does exist, the terms should be construed against the drafter. If such construction were applied against the Defendant here, the Motion would necessarily have to be denied based on its ambiguity. Who decides on the panel of arbitrators to choose from is a material term that is omitted. This omission makes the Arbitration Agreement unenforceable.

Normally 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. In this particular case, even if the contract was validly executed, there was not a “meeting of the minds” as to the “essential terms” of arbitration. Specifically, who pays for arbitration and who decides on the panel. The choice of an arbitrator (or panel) is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Put frankly, there was no “meeting of the minds” in this case; thus, there is no contract to arbitrate and the court should deem the Arbitration Agreement unenforceable.

Please see Judge Roger L. Couch’s Order denying motion to compel arbitration based on material terms being vague and indefinite. [See Exhibit E].

### **III. The alleged waiver does not apply to the remaining Defendants.**

As a final matter, the remaining Defendants are not parties to the Arbitration Agreement. Accordingly, even if the Arbitration Agreement were to be enforced against the parties, it would not preclude Plaintiff’s right to a jury trial against the remaining Defendants.

**CONCLUSION**

For all the foregoing reasons, Plaintiff would show that Defendant's Motion should be denied.

Respectfully Submitted,

**ANASTOPOULO LAW FIRM, LLC**

/s/ Stefan B. Feidler

Eric M. Poulin

SC Bar No.: 100209

Roy T. Willey, IV

SC Bar No.: 101010

Stefan B. Feidler

SC Bar No.: 101918

32 Ann Street

Charleston, South Carolina 29403

(843) 614-8888

**ATTORNEYS FOR THE PLAINTIFF**

Charleston, South Carolina

12/17, 2019

IN THE STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT  
CASE NO: 2017-CP-10-5984

VICTOR RAWL as Personal  
Representative of the ESTATE OF VERA  
BROWN,

Plaintiff,

v.

WEST ASHLEY REHABILITATION  
AND NURSING CENTER-  
CHARLESTON, SC, LLC d/b/a  
HEARTLAND OF WEST ASHLEY  
REHAB AND NURSING CENTER,

Defendant.

ORDER DENYING DEFENDANT'S MOTION  
TO DISMISS AND COMPEL ARBITRATION

This matter came before the court on March 21, 2018 on Defendant's Motion to Dismiss and Compel Arbitration. For the reasons set forth below, Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

### **BACKGROUND FACTS**

Vera Brown was admitted to Defendant's facility on August 25, 2014. Upon admission, Ms. Brown was asked to sign admission paperwork as well as the Arbitration Agreement, which was separate from the admission paperwork. The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement. Ms. Brown passed away approximately four (4) days after her admission into Defendant's facility, while under Defendant's care.

### **LEGAL ANALYSIS**

While there is a presumption in favor of arbitration agreements, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v.

Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 D.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreement. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 (“general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.”).

**A. The Arbitration Agreement lacks valuable consideration and is unenforceable where there was no additional consideration in Plaintiff's agreement to the Arbitration Agreement and future promises are not valuable consideration.**

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

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Riedman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986); see also O'Neil v. Hilton Head Hosp., 115 F.3d 272, 274-5 (4th Cir. 1997). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)). Therefore, our courts must assess whether the arbitration agreement itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate.

In the case at hand, it is clear that the Arbitration Agreement lacks valuable consideration. Paragraph 3 of the Arbitration Agreement states that the FAA applies to the Agreement. Therefore, we must look at state law to decide the threshold question of contract formation and whether consideration exists. Munoz, 343 S.C. at 542 S.E.2d 360, 364; Towles, 338 S.C. at 37, 524 S.E.2d at 844; Rent-A-Center, West, Inc., 561 U.S. at 130 S. Ct. at 2776, 177 L.Ed.2d 403; Simpson, 373 S.C. at 14, 644 S.E.2d at 663. Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement. In fact, the Arbitration Agreement states “[t]he patient will receive services in this center whether or not this agreement is signed.” Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party,

when agreeing to the Arbitration Agreement. *Id.* Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

**B. Plaintiff's agreement to the Arbitration Agreement was unconscionable in the absence of meaningful choice on part of Plaintiff due to the one-sided contract provisions, the relative disparity in the parties' bargaining power, and the Defendants relative sophistication over Plaintiff's decedent.**

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann. § 36-2-302(1) (2003).

In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General

Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was “tainted by an absence of meaningful choice,” *id.* at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.* at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) (“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” (quoting 17A Am.Jur.2d Contracts § 279 (2004))).

In the case at hand, it is clear that the Arbitration Agreement is unconscionable because Vera Brown lacked absence of meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms. Vera Brown was admitted into Defendants' facility on August 25, 2014. She passed away at Defendants' facility four (4) days later on August 29, 2014. Upon admission the standard Arbitration Agreement form was presented to an ill Vera Brown on a take-it-or leave it basis. Ms. Brown did not contribute to the drafting of the Arbitration Agreement or possess the bargaining power to negotiate the terms of the Arbitration Agreement. See Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. Lackey, 330 S.C. at 395, 498 S.E.2d at 902.

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). In determining whether there

is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id.

In the case at hand, there was an inherent disparity in bargaining power between the parties as this was a transaction between an ill patient who died four (4) days after executing the Arbitration Agreement and a commercial entity. Vera Brown was transferred from the hospital via ambulance to Defendants' facility with diagnosis that included chronic kidney disease, Anemia, dementia, urinary tract infection, upper respiratory disease, acute kidney failure, congestive heart failure, hypertension, weakness, and difficulty in walking. She was also marked as a fall risk.

Furthermore, the arbitration agreement was inconspicuously buried in the admission paperwork and "hastily" presented to Ms. Brown for her signature. This is evident by the "x's" where Ms. Brown was asked to print and sign her name, and date. Moreover, Vera Brown's injuries include death as this is a wrongful death claim.

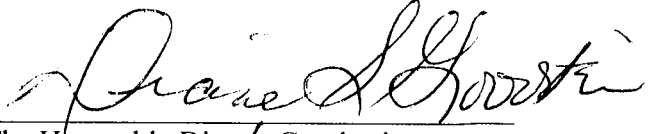
Moreover, we must also consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Vera Brown to forego certain remedies that were otherwise required by statute. While certain phrases are in bold, the arbitration clauses in their entirety are written in the standard small print, and embedded in paragraphs one (1) through fourteen (14). The Court cannot ignore the inconspicuous nature of these provisions, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Ms. Brown by law.

Therefore, this Court denies Defendant's Motion to Dismiss and Compel Arbitration where the Arbitration Agreement is guided under the FAA and principles of contract law because the Arbitration Agreement lacks valuable consideration and was unconscionable.

**IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss and Compel Arbitration is **DENIED**.

**IT IS SO ORDERED!**

Dated this 27 day of April 2018

  
The Honorable Diane Goodstein  
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
Robert Abrams, )  
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. )

IN THE COURT OF COMMON PLEAS

C.A.#: 10-CP-42-6861

**ORDER DENYING  
ARBITRATION**

Date of Hearing: July 21, 2011  
Presiding Judge: Honorable Roger L. Couch  
Attorneys for Plaintiff: Raymond P. Mullman, Jr. and Gary W. Poliakoff  
Attorneys for Defendants: William Howard and D. Jay Davis, Jr.  
Court Reporter: Pamela Faucette

**I. RELEVANT AND UNDISPUTED FACTS**

A hearing was held on Defendants' Motion to Compel Arbitration and for a Stay of this matter on July 21, 2011. The allegations in this case involve negligence, gross negligence, and assault in the care and treatment of Robert Abrams at Defendants' nursing home. Plaintiff entered Defendants' facility, Magnolia Manor – Inman, on November 23, 2008. He was discharged from the facility on January 23, 2009. The testimony in the record to date shows that, during his admission, Defendants did not ask Mr. Abrams to sign the admissions paperwork. The day after his admission, on November 24, 2008, Mr. Abrams's wife, Rebecca Abrams, was brought into the administrative office and given various paperwork to complete for her husband's admission,

including an arbitration clause. Defendants concede that Plaintiff's wife did not have power of attorney or other legal authority. Further, Mrs. Abrams states that she had no legal training, did not know what arbitration was, and was not given an opportunity to consult with an attorney prior to signing. Further, various documentation from Defendants' facility shows that Mr. Abrams was alert, oriented, and had mental capacity.

## **II. BURDEN OF PROOF**

Defendants carry 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.

## **III. SIGNATORY LACKED AUTHORITY**

Defendants have not shown that Rebecca Abrams had that legal authority to bind Plaintiff, nor have Defendants produced any evidence indicating that Rebecca Abrams had legal authority to waive Plaintiff's right to a jury trial or enter into a contract on behalf of Plaintiff. Moreover, Defendants have failed to provide any evidence beyond Rebecca Abrams's signature that she was Plaintiff's agent. Robert Abrams did not lack the capacity to contract for himself and was capable of making such a decision or demonstrating such an intention.

It is clear that Rebecca Abrams did not have legal authority, regardless of how she, the agent may have behaved. It is undisputed that Mr. Abrams was not in the room when Mrs. Abrams signed the paperwork. It is a basic tenet of agency law that either the principal must intend to cause the third

person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such a belief. It is the duty of one dealing with an alleged agent to use due care to ascertain the scope of the alleged agent's authority. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Defendants, as sophisticated business people, were aware of the elements of a power of attorney, were aware that Rebecca Abrams did not have such authority to sign away her husband's rights, and allowed Mrs. Abrams to sign for her husband anyway. The fact that Mrs. Abrams signed documents so that her husband could be admitted to the facility and receive medical care in no way indicates a manifestation of authority. Robert Abrams did not manifest any form of consent that established Rebecca Abrams as his agent.

Defendants have produced no evidence indicating that Plaintiff knew or should have known that Plaintiff was waiving his right to a jury trial by entering into Defendants' facility. 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."

#### IV. PLAINTIFF CANNOT BE COMPELLED TO ARBITRATE AGAINST NON SIGNATORY DEFENDANTS

The Arbitration Agreement explicitly specifies that it is an agreement "made between MM – Inman, its agents, employees and servants, and Robert J. Abrams or Rebecca Abrams." However, Plaintiff has alleged negligent acts against parties that are not bound by this agreement such as Fundamental Long-Term Care Holdings, LLC (or "FLTCH"), and governing body members as Lyles, Robert Crooks, and Carol Clark. Therefore, Plaintiff can not be bound to arbitrate any claims arising against FLTCH or the governing body members for the facility. None of these entities are signatories and cannot be compelled to arbitrate, nor can Plaintiff be compelled to arbitrate against these other Defendants. If Plaintiff were forced to try issues against the facility in arbitration and go

to trial against the other Defendants, Plaintiff would be greatly prejudiced, and inconsistent verdicts would be possible. Judicial economy would not be served.

#### **V. NO ARBITRABLE DISPUTE EXISTS**

There is no arbitrable “dispute” between the Defendants and the Plaintiff. The question of whether a particular issue is arbitrable is for the court. Here, Plaintiff’s allegations include intentional acts which could not have been foreseen by Plaintiff or his wife. The asserted claims of intentional abuse fall well beyond the reasonable expectations of the Plaintiff. Portions of the alleged “dispute” in this case are not within the scope of the Agreement or the reasonable expectations of the parties. As such, it cannot be asserted to cover Plaintiff’s claims. Plaintiff’s claims include intentional abuse and infliction of emotional distress by Defendants’ agents, servants and employees. Therefore, even if this Court were to find that the Agreement is enforceable, the dispute here is outside the scope of that clause and Defendants’ Motion should still be denied.

#### **VI. MATERIAL TERMS ARE VAGUE AND INDEFINITE**

The choice of arbitrator is a material term that is omitted. This omission makes the contract indefinite and unenforceable. An agreement which neglects material terms may be found unenforceable for indefiniteness. 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. In this particular case, even if the contract was validly executed, there was not a “meeting of the minds” as to the “essential terms” of arbitration, specifically the choice of arbitral forum. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Without a “meeting of the minds” between the parties as to choice of arbitrators, there can be no contract to arbitrate.

## VII. THE ARBITRATION CLAUSE VIOLATES SCUAA

The arbitration provision fails to comply with the South Carolina Arbitration Act. Our Supreme Court has repeatedly ruled that this statute means exactly what it says. There is no substantial compliance exception and the statute must be strictly construed. See Zabinski v. Bright Acres Associates, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Here, there is no compliance with the provision requiring the specified notice. None of the required font and style notices designed to alert the resident were present, and Defendants concede that the provisions fail if construed under the South Carolina Act.

Defendants' Arbitration Clause also violates even the most minimum standards of The South Carolina Uniform Arbitration Act as codified at South Carolina Code Ann., Section 15-48-10 *et seq.*, which provides that a contract is subject to binding arbitration only if such notice shall be typed and underlined in capital letters or rubber stamped prominently on the first page of the contract.

Defendants contend that the Federal Arbitration Act preempts the South Carolina state statute. Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law. For the Federal Act to preempt the South Carolina Arbitration Act, the commerce involved in the contract must be interstate or foreign. Thus, the Court must first determine whether the contract giving rise to the transaction between the parties involves interstate commerce. Nothing in the admission contract mentions or refers to interstate commerce. None of the allegations in Plaintiff's Complaint relate in any manner to interstate commerce. The Court disagrees that the FAA preempts South Carolina statute because interstate commerce is not substantially affected by the contract between Plaintiff and Defendants, which pertains to admission to a nursing facility in Spartanburg County, South Carolina. There is

no substantial nexus between the health care provided by Defendants and interstate commerce. The admission contract containing the arbitration clause does not involve interstate commerce. Therefore, the FAA would not preempt state law or apply to this action.

In Timms v. Greene,<sup>1</sup> plaintiff sought damages for personal injuries occurring at a nursing home facility. Defendants in Timms supported their motion to compel arbitration with an affidavit from the nursing home administrator which attested to the fact that the nursing home purchased supplies from out of state and received Medicare reimbursement from out of state for patient care provided. Even though defendants in Timms argued that the nursing home engaged in interstate commerce due to out of state supplies and Medicare payments, the Supreme Court of South Carolina held that the action applied to personal injuries at a nursing home and did not implicate a transaction involving interstate commerce.

The South Carolina Supreme Court in rejecting the federal preemption of the FAA in nursing home admission contracts held as follows:

**In respondent's personal injury action, the contract for patient-residential service with the Center is obscure, if not devoid, of any basis for holding that commerce was involved in the transaction between the parties.** Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law. [cite omitted]. To activate application of the Federal Act, the commerce involved in the contract must be interstate or foreign. [cite omitted]. (Emphasis added.)

The case at hand is analogous to the situation in Timms. Here, interstate commerce was not involved in the transaction or relationship between the parties. Plaintiff, a South Carolina resident, agreed to receive services from Defendants in South Carolina. No transactions beyond the Plaintiff's

---

<sup>1</sup> 427 S.E.2d 642 (S.C. 1993)

care in South Carolina occurred and all of those transactions occurred entirely within South Carolina. Interstate commerce is simply not involved in the controversy at hand: a personal injury resulting from alleged acts of negligence and gross negligence allegedly committed by Defendants' agents, servants, or employees, and all occurring within the State of South Carolina and resulting in alleged injuries which also all occurred in South Carolina.

There is no more evidence of interstate involvement in Plaintiff's case than was present in Timms. Defendants' argument that because it is subject to federal reimbursement and services, interstate commerce is involved and the FAA applies, fails as Defendants have cited no legal authority whatsoever to support this argument. As in Timms, the controversy in this case involves alleged personal injury of a South Carolina resident, who was injured in South Carolina, caused by alleged negligence of Defendants, located and doing business in South Carolina. Nothing about Plaintiff's Complaint or injury arises from or even remotely involves interstate commerce.

#### VIII. CONCLUSION

The invalidity of the Agreement the Defendants seek to enforce is patently clear. Rebecca Abrams lacked the legal authority to bind her husband to any contract which removed her husband's rights under the law and the Constitution. That the Defendants thought that Rebecca Abrams was a sufficient signatory is irrelevant. Mrs. Abrams lacked such authority, and the determination of agency is based upon the intentions and representations of the principal, not the agent, and Robert Abrams did not display any such intentions or make any such representations.

Defendants argued that the arbitration clause contained in the admission contract signed by Jill Johnson for Magnolia Manor - Inman was enforceable against Plaintiff. The Court disagrees. Based upon careful consideration of the memoranda submitted, arguments presented by counsel at

the hearing in this matter and application of South Carolina law, I hereby deny Defendants' Motions because:

- 1) The signatory on the contract did not have the authority to bind the Plaintiff to arbitration or waive his right to a jury trial;
- 2) Pursuant to South Carolina common law relating to contract, the Arbitration clause is unenforceable due to indefiniteness, vagueness, and unconscionability;
- 3) Plaintiff cannot be compelled to arbitrate against non signatory Defendants;
- 4) The arbitration clause omits material terms making it vague and indefinite and therefore unenforceable;
- 5) Plaintiff's allegations involve abuse and intentional torts and no breach of contract claim exists, therefore no arbitrable dispute exists;
- 6) The arbitration clause does not comply with the SCUAA;
- 7) FAA does not preempt because no interstate commerce is affected;
- 8) Defendants' argument as to apparent agency and equitable estoppel are without merit.

For the above reasons, the Court denies Defendants' Motion to Compel Arbitration and for a Stay. Defendants are ordered to proceed with litigation and fully and appropriately respond to Plaintiff's outstanding discovery requests within ten (10) days of the date of this order.

**IT IS SO ORDERED.**

August 25, 2011

*S/ Roger L. Couch*  
 Judge Roger L. Couch  
 Seventh Judicial Circuit

A CERTIFIED COPY

*M. Hope Blackley*

CLERK OF COURT  
 SPARTANBURG COUNTY  
 BY: *Pat Holcomb* D.C.  
 DATED 8/25/11

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
Robert Abrams, )  
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. )

IN THE COURT OF COMMON PLEAS

C.A.#: 10-CP-42-6861

**ORDER DENYING  
ARBITRATION**

Date of Hearing: July 21, 2011  
Presiding Judge: Honorable Roger L. Couch  
Attorneys for Plaintiff: Raymond P. Mullman, Jr. and Gary W. Poliakoff  
Attorneys for Defendants: William Howard and D. Jay Davis, Jr.  
Court Reporter: Pamela Faucette

**I. RELEVANT AND UNDISPUTED FACTS**

A hearing was held on Defendants' Motion to Compel Arbitration and for a Stay of this matter on July 21, 2011. The allegations in this case involve negligence, gross negligence, and assault in the care and treatment of Robert Abrams at Defendants' nursing home. Plaintiff entered Defendants' facility, Magnolia Manor – Inman, on November 23, 2008. He was discharged from the facility on January 23, 2009. The testimony in the record to date shows that, during his admission, Defendants did not ask Mr. Abrams to sign the admissions paperwork. The day after his admission, on November 24, 2008, Mr. Abrams's wife, Rebecca Abrams, was brought into the administrative office and given various paperwork to complete for her husband's admission,

including an arbitration clause. Defendants concede that Plaintiff's wife did not have power of attorney or other legal authority. Further, Mrs. Abrams states that she had no legal training, did not know what arbitration was, and was not given an opportunity to consult with an attorney prior to signing. Further, various documentation from Defendants' facility shows that Mr. Abrams was alert, oriented, and had mental capacity.

## II. BURDEN OF PROOF

Defendants carry 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.

## III. SIGNATORY LACKED AUTHORITY

Defendants have not shown that Rebecca Abrams had that legal authority to bind Plaintiff, nor have Defendants produced any evidence indicating that Rebecca Abrams had legal authority to waive Plaintiff's right to a jury trial or enter into a contract on behalf of Plaintiff. Moreover, Defendants have failed to provide any evidence beyond Rebecca Abrams's signature that she was Plaintiff's agent. Robert Abrams did not lack the capacity to contract for himself and was capable of making such a decision or demonstrating such an intention.

It is clear that Rebecca Abrams did not have legal authority, regardless of how she, the agent may have behaved. It is undisputed that Mr. Abrams was not in the room when Mrs. Abrams signed the paperwork. It is a basic tenet of agency law that either the principal must intend to cause the third

person to believe the agent is authorized to act for him, or he should realize his conduct is likely to create such a belief. It is the duty of one dealing with an alleged agent to use due care to ascertain the scope of the alleged agent's authority. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Defendants, as sophisticated business people, were aware of the elements of a power of attorney, were aware that Rebecca Abrams did not have such authority to sign away her husband's rights, and allowed Mrs. Abrams to sign for her husband anyway. The fact that Mrs. Abrams signed documents so that her husband could be admitted to the facility and receive medical care in no way indicates a manifestation of authority. Robert Abrams did not manifest any form of consent that established Rebecca Abrams as his agent.

Defendants have produced no evidence indicating that Plaintiff knew or should have known that Plaintiff was waiving his right to a jury trial by entering into Defendants' facility. 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."

#### IV. PLAINTIFF CANNOT BE COMPELLED TO ARBITRATE AGAINST NON SIGNATORY DEFENDANTS

The Arbitration Agreement explicitly specifies that it is an agreement "made between MM – Inman, its agents, employees and servants, and Robert J. Abrams or Rebecca Abrams." However, Plaintiff has alleged negligent acts against parties that are not bound by this agreement such as Fundamental Long-Term Care Holdings, LLC (or "FLTCH"), and governing body members Lyles, Robert Crooks, and Carol Clark. Therefore, Plaintiff can not be bound to arbitrate any claims arising against FLTCH or the governing body members for the facility. None of these entities are signatories and cannot be compelled to arbitrate, nor can Plaintiff be compelled to arbitrate against these other Defendants. If Plaintiff were forced to try issues against the facility in arbitration and go

to trial against the other Defendants, Plaintiff would be greatly prejudiced, and inconsistent verdicts would be possible. Judicial economy would not be served.

#### **V. NO ARBITRABLE DISPUTE EXISTS**

There is no arbitrable “dispute” between the Defendants and the Plaintiff. The question of whether a particular issue is arbitrable is for the court. Here, Plaintiff’s allegations include intentional acts which could not have been foreseen by Plaintiff or his wife. The asserted claims of intentional abuse fall well beyond the reasonable expectations of the Plaintiff. Portions of the alleged “dispute” in this case are not within the scope of the Agreement or the reasonable expectations of the parties. As such, it cannot be asserted to cover Plaintiff’s claims. Plaintiff’s claims include intentional abuse and infliction of emotional distress by Defendants’ agents, servants and employees. Therefore, even if this Court were to find that the Agreement is enforceable, the dispute here is outside the scope of that clause and Defendants’ Motion should still be denied.

#### **VI. MATERIAL TERMS ARE VAGUE AND INDEFINITE**

The choice of arbitrator is a material term that is omitted. This omission makes the contract indefinite and unenforceable. An agreement which neglects material terms may be found unenforceable for indefiniteness. 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. In this particular case, even if the contract was validly executed, there was not a “meeting of the minds” as to the “essential terms” of arbitration, specifically the choice of arbitral forum. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, and to say otherwise undermines the purpose of the arbitration process. Without a “meeting of the minds” between the parties as to choice of arbitrators, there can be no contract to arbitrate.

## VII. THE ARBITRATION CLAUSE VIOLATES SCUAA

The arbitration provision fails to comply with the South Carolina Arbitration Act. Our Supreme Court has repeatedly ruled that this statute means exactly what it says. There is no substantial compliance exception and the statute must be strictly construed. See Zabinski v. Bright Acres Associates, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Here, there is no compliance with the provision requiring the specified notice. None of the required font and style notices designed to alert the resident were present, and Defendants concede that the provisions fail if construed under the South Carolina Act.

Defendants' Arbitration Clause also violates even the most minimum standards of The South Carolina Uniform Arbitration Act as codified at South Carolina Code Ann., Section 15-48-10 *et seq.*, which provides that a contract is subject to binding arbitration only if such notice shall be typed and underlined in capital letters or rubber stamped prominently on the first page of the contract.

Defendants contend that the Federal Arbitration Act preempts the South Carolina state statute. Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law. For the Federal Act to preempt the South Carolina Arbitration Act, the commerce involved in the contract must be interstate or foreign. Thus, the Court must first determine whether the contract giving rise to the transaction between the parties involves interstate commerce. Nothing in the admission contract mentions or refers to interstate commerce. None of the allegations in Plaintiff's Complaint relate in any manner to interstate commerce. The Court disagrees that the FAA preempts South Carolina statute because interstate commerce is not substantially affected by the contract between Plaintiff and Defendants, which pertains to admission to a nursing facility in Spartanburg County, South Carolina. There is

no substantial nexus between the health care provided by Defendants and interstate commerce. The admission contract containing the arbitration clause does not involve interstate commerce. Therefore, the FAA would not preempt state law or apply to this action.

In Timms v. Greene,<sup>1</sup> plaintiff sought damages for personal injuries occurring at a nursing home facility. Defendants in Timms supported their motion to compel arbitration with an affidavit from the nursing home administrator which attested to the fact that the nursing home purchased supplies from out of state and received Medicare reimbursement from out of state for patient care provided. Even though defendants in Timms argued that the nursing home engaged in interstate commerce due to out of state supplies and Medicare payments, the Supreme Court of South Carolina held that the action applied to personal injuries at a nursing home and did not implicate a transaction involving interstate commerce.

The South Carolina Supreme Court in rejecting the federal preemption of the FAA in nursing home admission contracts held as follows:

**In respondent's personal injury action, the contract for patient-residential service with the Center is obscure, if not devoid, of any basis for holding that commerce was involved in the transaction between the parties.** Interstate commerce is a necessary basis for application of the Federal Act, and a contract or agreement not so predicated must be governed by State Law. [cite omitted]. To activate application of the Federal Act, the commerce involved in the contract must be interstate or foreign. [cite omitted]. (Emphasis added.)

The case at hand is analogous to the situation in Timms. Here, interstate commerce was not involved in the transaction or relationship between the parties. Plaintiff, a South Carolina resident, agreed to receive services from Defendants in South Carolina. No transactions beyond the Plaintiff's

---

<sup>1</sup> 427 S.E.2d 642 (S.C. 1993)

care in South Carolina occurred and all of those transactions occurred entirely within South Carolina. Interstate commerce is simply not involved in the controversy at hand: a personal injury resulting from alleged acts of negligence and gross negligence allegedly committed by Defendants' agents, servants, or employees, and all occurring within the State of South Carolina and resulting in alleged injuries which also all occurred in South Carolina.

There is no more evidence of interstate involvement in Plaintiff's case than was present in Timms. Defendants' argument that because it is subject to federal reimbursement and services, interstate commerce is involved and the FAA applies, fails as Defendants have cited no legal authority whatsoever to support this argument. As in Timms, the controversy in this case involves alleged personal injury of a South Carolina resident, who was injured in South Carolina, caused by alleged negligence of Defendants, located and doing business in South Carolina. Nothing about Plaintiff's Complaint or injury arises from or even remotely involves interstate commerce.

#### VIII. CONCLUSION

The invalidity of the Agreement the Defendants seek to enforce is patently clear. Rebecca Abrams lacked the legal authority to bind her husband to any contract which removed her husband's rights under the law and the Constitution. That the Defendants thought that Rebecca Abrams was a sufficient signatory is irrelevant. Mrs. Abrams lacked such authority, and the determination of agency is based upon the intentions and representations of the principal, not the agent, and Robert Abrams did not display any such intentions or make any such representations.

Defendants argued that the arbitration clause contained in the admission contract signed by Jill Johnson for Magnolia Manor - Inman was enforceable against Plaintiff. The Court disagrees. Based upon careful consideration of the memoranda submitted, arguments presented by counsel at

the hearing in this matter and application of South Carolina law, I hereby deny Defendants' Motions because:

- 1) The signatory on the contract did not have the authority to bind the Plaintiff to arbitration or waive his right to a jury trial;
- 2) Pursuant to South Carolina common law relating to contract, the Arbitration clause is unenforceable due to indefiniteness, vagueness, and unconscionability;
- 3) Plaintiff cannot be compelled to arbitrate against non signatory Defendants;
- 4) The arbitration clause omits material terms making it vague and indefinite and therefore unenforceable;
- 5) Plaintiff's allegations involve abuse and intentional torts and no breach of contract claim exists, therefore no arbitrable dispute exists;
- 6) The arbitration clause does not comply with the SCUAA;
- 7) FAA does not preempt because no interstate commerce is affected;
- 8) Defendants' argument as to apparent agency and equitable estoppel are without merit.

For the above reasons, the Court denies Defendants' Motion to Compel Arbitration and for a Stay. Defendants are ordered to proceed with litigation and fully and appropriately respond to Plaintiff's outstanding discovery requests within ten (10) days of the date of this order.

**IT IS SO ORDERED.**

August 25, 2011

*S/ Roger L. Couch*  
 Judge Roger L. Couch  
 Seventh Judicial Circuit

A CERTIFIED COPY

*M. Hope Blackley*

CLERK OF COURT  
 SPARTANBURG COUNTY  
 BY: *Pat Holcomb* D.C.  
 DATED 8/25/11

**From:** [Stefan Feidler](#)  
**To:** [Knie, Grace Law Clerk \(Meghan Gasser\)](#)  
**Cc:** [Feidler/Hodge](#); [Hines, Russell](#)  
**Subject:** Proposed order for Judge Knie's consideration - Estate of Irene Ramsey v. Lake Emory Post Acute Care  
**Date:** Tuesday, December 31, 2019 2:15:14 PM  
**Attachments:** [Estate of Irene Ramsey - Proposed Order denying Defendant's Motion to Dismiss and Compel Arbitration.docx](#)

---

Good afternoon Ms. Gasser,

I hope this email finds you well. Per Judge Knie's instructions, I have attached a proposed order for her Honor's consideration in Word doc format. Please let me know if you have any questions or need any additional information. Defense counsel is Cc'd on this email.

Have a wonderful day and Happy New Year!

--

**Best,**

***Stefan B. Feidler, Esq.***

**Professional and Products Liability Division**

**Anastopoulos Law Firm, LLC**

32 Ann Street | Charleston, SC 29403

Tel: 843-614-8888 | Fax: 843-853-2291 | Direct Line: 843-973-8595

[www.akimlawfirm.com](http://www.akimlawfirm.com) | [Stefan@akimlawfirm.com](mailto:Stefan@akimlawfirm.com) | [PPLD@googlegroups.com](mailto:PPLD@googlegroups.com)

Office Locations: Charleston | N. Charleston | Florence | Columbia | Greenville |

Myrtle Beach | Raleigh, NC

**By Appointment Only: Wilmington, NC**

"The arc of the moral universe is long, but it bends towards justice." - Dr. Martin Luther King

Admitted to practice in South Carolina and Georgia.

---

NOTICE: This email contains information belonging to Anastopoulos Law Firm, LLC. This message is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential or otherwise exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately reply to this message or notify us by telephone at [800-313-2546](tel:800-313-2546) and delete the message.

IN THE STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS  
FOR THE 7TH JUDICIAL CIRCUIT  
CASE NO: 2019-CP-42-03236

RITA ST. AUBIN as Personal  
Representative of the ESTATE OF IRENE  
RAMSEY,

Plaintiff,

v.

THI OF SOUTH CAROLINA AT CAMP  
CARE, LLC d/b/a LAKE EMORY POST  
ACUTE CARE; THI OF SOUTH  
CAROLINA, LLC; HUNT VALLEY  
HOLDINGS, LLC; THI OF  
BALTIMORE, INC.; and CASEY  
CADDELL as Officer/Manager of THI OF  
SOUTH CAROLINA AT CAMP CARE,  
LLC d/b/a LAKE EMORY POST ACUTE  
CARE,

Defendant(s).

**ORDER DENYING THI OF SOUTH  
CAROLINA AT CAMP CARE, LLC  
d/b/a LAKE EMORY POST ACUTE  
CARE'S MOTION TO DISMISS AND  
COMPEL ARBITRATION**

This matter came before me upon Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care's ("Defendant") Motion to Dismiss and Compel Arbitration (the "Motion"). The hearing was held on December 18, 2019, in Spartanburg County. Present on behalf of Plaintiff Rita St. Aubin as Personal Representative of the Estate of Irene Ramsey ("Plaintiff") was Stefan B. Feidler, Esq. Present on behalf of the Defendant was Russell G. Hines, Esq. For the reasons set forth herein, the Defendant's Motion is **DENIED**.

**BACKGROUND**

This is a professional negligence case involving Irene Ramsey (hereinafter "Ms. Ramsey"), who was admitted to Defendant's facility for rehabilitative purposes after suffering a fall at home resulting in a fractured femur. After admission, Ms. Ramsey suffered an additional fall at Defendant's facility. Plaintiff alleges that this fall was caused by Defendant's negligence and

proximately caused Ms. Ramsey's death. Plaintiff filed this action shortly thereafter. Defendant subsequently filed the present Motion to Dismiss and Compel arbitration.

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

### **LEGAL ANALYSIS AND FINDINGS**

The Arbitration Agreement that is the subject of this Motion is governed by the FAA. There is a presumption in favor of the enforcement of arbitration agreements. However, this presumption only applies where there is a valid arbitration agreement. EEOC v. Waffle House, 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 D.E.2d 581 (2003). Where the FAA does apply, the Arbitration Agreement is subject to the same defenses applicable to all other contracts as discussed below. Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010).

This Court also interprets jury trial waivers narrowly and construes contract ambiguities against the Defendant as the drafter of the Arbitration Agreement. See WDI Meredith & Co. v. 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. The South Carolina Supreme Court has stated “[a]lthough we are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.” Chassereau v. Global Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718, 720-21 (2007). Where the FAA looks to state law to decide the threshold questions of contract formation, the Arbitration Agreement is subject to the same defenses applicable to other contracts. Consequently, this Court’s inquiry included an examination of contractual defects such as lack of mutual assent, consideration, ambiguity, vagueness, and unconscionability to determine the enforceability of the Arbitration Agreement.

As a threshold matter, this Court notes that Plaintiff first argued the Arbitration Agreement was an involuntary precondition to admission in violation of federal law, because of language in the Admission Agreement coupled with the failure to state in the Arbitration Agreement that the agreement was voluntary and not a pre-condition to admission. Berkebile v. Outen, 311 S.C. 50, 53 n. 2, 426 S.E.2d 760, 762 n. 2 (1993); See 42 C.F.R. § 489.30; 42 C.F.R. § 447.15; 42 U.S.C. § 1396r(c)(5)(A)(iii). The Court finds this argument unpersuasive.

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

The Court finds the Arbitration Agreement at issue is, at best, ambiguous. Moreover, material terms of the Arbitration Agreement are vague and indefinite, and in some respects completely omitted, requiring this Court to find the Arbitration Agreement unenforceable. Indeed, an agreement that omits material terms may be determined to be unenforceable for indefiniteness.

In Grant v. Magnolia Manor-Greenwood, Inc., our South Carolina Supreme Court spoke to the proof required to establish an enforceable agreement to arbitrate:

Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. Dowling v. Home Buyers Warranty Corp., II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). **In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract.** Player vs. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). **An agreement that omits material terms may be determined to be unenforceable for indefiniteness.** Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997); Ellis v. Taylor, 449 S.E.2d (S.C. App. 1994).

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

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

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

cannot reach a mutual decision on the selection of an arbitrator, the parties agree that an arbitrator shall be selected by the Court. The process for doing so is vague and indefinite.

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

Simply put, the parties cannot be bound to act on a promise that does not exist. If the Court found the Arbitration Agreement enforceable, the parties would then have to make arrangements and additional agreements outside of the Arbitration Agreement to begin the arbitration process or ask the Court to create those terms. Due to the vagueness and indefiniteness of the Arbitration Agreement’s provisions and the lack of a “meeting of the minds” as to these essential terms, there is no enforceable contract.

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

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

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

While federal law preempts state laws that would invalidate arbitration agreements on most public policy grounds, the FAA looks to state law to decide the threshold questions of contract formation. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”). Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts. Rent-A-Center, West, Inc., 561 U.S. at 130 S. Ct at 2776; Simpson, 373 S.C at 14, 644 S.E.2d at 663 (“general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.”). The necessary elements of a contract are an offer, acceptance, and valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003) “Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v.

Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998)). Where a contract lacks valuable consideration, the contract will be deemed unenforceable.

Our courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. See Reidman Corp. v. Jarosh, 290 S.C. 252, 253, 349 S.E.2d 44, 405 (1986). However, in determining whether adequate consideration exists in a contract, or arbitration agreement under the FAA guided by principles of contract law, our courts must examine and stay within the confines of the four corners of the instrument. State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (internal citations omitted). Ms. St. Aubin was asked to sign the Admission paperwork upon Ms. Ramsey's presentation to the facility. Ms. St. Aubin was also asked to sign the separate Arbitration Agreement. Having already signed the admission paperwork, there was no additional consideration in agreeing to the Arbitration Agreement itself. Therefore, neither party gained a right, interest, profit, or benefit by agreeing to the Arbitration Agreement. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other party when agreeing to the Arbitration Agreement. Finally, viewing the Arbitration Agreement itself within its four corners, there is no mention of consideration. Therefore, after analyzing the four corners of the Arbitration Agreement itself, this Court finds no valuable consideration exists. As such, the Arbitration Agreement is unenforceable.

### **CONCLUSION**

For the reasons set forth above, **IT IS ORDERED** that Defendant's THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care Motion to Dismiss and Compel Arbitration is **DENIED**.

**IT IS FURTHER ORDERED** that Defendants THI Of South Carolina, LLC, Hunt Valley Holdings, LLC, THI of Baltimore, Inc., and Casey Caddell as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care's Motion to Stay are **DENIED**, as those Motions are now moot.

**AND IT IS SO ORDERED.**

---

The Honorable Grace G. Knie

January \_\_\_\_\_, 2020

**From:** [Hines, Russell](#)  
**To:** ["Knie, Grace Law Clerk \(Meghan Gasser\)"](#)  
**Cc:** [Stefan Feidler](#)  
**Subject:** RE: Irene Ramsey v. THI of South Carolina at Camp Care, LLC, et al (2019CP4203236)  
**Date:** Thursday, January 2, 2020 1:59:00 PM  
**Attachments:** [St. Aubin v. THI \(Case No. 2019-CP-42-03236\) -- Defendants" Proposed Order.docx](#)  
[image002.png](#)  
[image003.png](#)

---

Meghan,

My proposed order is attached.

Thank you for your patience—and again, please accept my apologies for trying it.

If you need anything further from me, please just let me know.

Russ

Russell G. Hines  
YOUNG CLEMENT RIVERS, LLP  
[www.ycrlaw.com](http://www.ycrlaw.com)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
Phone: (843) 720-5488  
Fax: (843) 579-1327  
Email: [rhines@ycrlaw.com](mailto:rhines@ycrlaw.com)



---

**From:** Knie, Grace Law Clerk (Meghan Gasser) <gknielc@sccourts.org>  
**Sent:** Thursday, January 2, 2020 12:07 PM  
**To:** Hines, Russell <RHines@ycrlaw.com>  
**Cc:** Stefan Feidler <stefan@akimlawfirm.com>  
**Subject:** RE: Irene Ramsey v. THI of South Carolina at Camp Care, LLC, et al (2019CP4203236)

Mr. Hines,

Thank you!

Meghan Gasser

---

**From:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>

**Sent:** Thursday, January 2, 2020 12:05 PM

**To:** Knie, Grace Law Clerk (Meghan Gasser) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>

**Cc:** Stefan Feidler <[stefan@akimlawfirm.com](mailto:stefan@akimlawfirm.com)>

**Subject:** RE: Irene Ramsey v. THI of South Carolina at Camp Care, LLC, et al (2019CP4203236)

**\*\*\* EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. \*\*\*

Megan,

Thank you for your email, and please accept my sincere apologies.

I am finishing up the order now and will send it to you shortly.

Russ

Russell G. Hines

YOUNG CLEMENT RIVERS, LLP

[www.ycrlaw.com](http://www.ycrlaw.com)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29401

P.O. Box 993 (29402)

Phone: (843) 720-5488

Fax: (843) 579-1327

Email: [rhines@ycrlaw.com](mailto:rhines@ycrlaw.com)



---

**From:** Knie, Grace Law Clerk (Meghan Gasser) <[gknielc@sccourts.org](mailto:gknielc@sccourts.org)>

**Sent:** Thursday, January 2, 2020 12:03 PM

**To:** Hines, Russell <[RHines@ycrlaw.com](mailto:RHines@ycrlaw.com)>

**Cc:** Stefan Feidler <[stefan@akimlawfirm.com](mailto:stefan@akimlawfirm.com)>

**Subject:** Irene Ramsey v. THI of South Carolina at Camp Care, LLC, et al (2019CP4203236)

Counselor:

I wanted to remind you that the proposed order requested by Judge Knie at the hearing held on December 18<sup>th</sup>, 2019 for the above listed case was due yesterday. Please email that proposed order to me as soon as possible. Have a great day!

Sincerely,

*Meghan A. Gasser*

Meghan Gasser  
Law Clerk to the Honorable Grace Gilchrist Knie  
Seventh Judicial Circuit  
180 Magnolia Street  
Spartanburg, South Carolina 29306  
Ph: (864) 596-2285  
Fax: (864) 562-4234  
[gknielc@sccourts.org](mailto:gknielc@sccourts.org)

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

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

This matter is before the Court primarily on motions of Defendant THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (the “Facility”) and Casey Caddell, as Officer/Manager of THI of South Carolina at Camp Care, LLC d/b/a Lake Emory Post Acute Care (“Ms. Caddell”), to compel arbitration (the “Motions to Compel Arbitration”).<sup>1 2</sup> For the reasons set forth below, the Subject Motions are GRANTED.

---

<sup>1</sup> Also before the Court are motions by Defendants THI of South Carolina, LLC; Hunt Valley Holdings, LLC; and THI of Baltimore, Inc. to stay this action until the arbitrability issue (i.e., the issue raised by the Motions to Compel Arbitration) has been finally determined and any/all arbitration proceedings are completed (the “Motions to Stay”). Collectively, the Motions to Compel Arbitration and the Motions to Stay are the “Subject Motions.”

<sup>2</sup> The Subject Motions were heard on December 18, 2019, at the Spartanburg County Courthouse. All parties appeared via their respective legal counsel.

## **BACKGROUND**

Plaintiff, Rita St. Aubin (“Plaintiff” or “Ms. St. Aubin”), is the daughter of the late Irene Ramsey (“Ms. Ramsey”). She has brought this action in her capacity as personal representative of her mother’s estate, asserting a number of claims for damages arising out of alleged deficiencies in the care/treatment provided to Ms. Ramsey while she was a resident of the Facility.<sup>3</sup>

In the last years of Ms. Ramsey’s life (more precisely, from November 2012 on), Ms. St. Aubin was her mother’s attorney-in-fact.<sup>4</sup> Accordingly, when Ms. Ramsey was admitted to the Facility on February 6, 2017, Ms. St. Aubin signed a number of documents on her behalf, including an Arbitration Agreement.<sup>5</sup> The Motions to Compel Arbitration seek enforcement of this Arbitration Agreement.

## **ANALYSIS**

The Court concludes that, yes, the Arbitration Agreement is enforceable. The Court’s reasoning is as follows.

### **1. The Arbitration Agreement is governed by the FAA<sup>6</sup>.**

Unless the parties specifically contract otherwise, the FAA applies whenever an arbitration agreement involves interstate commerce. *Allied–Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273–77 (1995). The Arbitration Agreement expressly states that the FAA applies:

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

---

<sup>3</sup> The Facility is a skilled nursing facility.

<sup>4</sup> Ms. Ramsey executed a General Durable Power of Attorney (the “Power of Attorney”) in favor of Ms. St. Aubin on November 3, 2012. It was recorded in Spartanburg County on November 7, 2012.

<sup>5</sup> The Arbitration Agreement is “between [the Facility], its agents, employees and servants, and [Ms. Ramsey] . . .” Ms. Caddell is covered by the Arbitration Agreement as an agent or employee of the Facility.

<sup>6</sup> The “FAA” is the Federal Arbitration Act, 9 U.S.C §§ 1–16.

subject to the South Carolina Uniform Arbitration Act and shall be governed by the [FAA], notwithstanding any contrary provision of this Agreement or contrary state law.

Moreover, our state Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014). The Arbitration Agreement is clearly governed by the FAA.<sup>7</sup>

**2. The Arbitration Agreement must be placed on equal footing with all other contracts.**

“[T]he basic purpose of the [FAA] is to overcome courts’ refusals to enforce agreements to arbitrate”<sup>8</sup> and “ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement.” *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). “By its terms, the [FAA] 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) (emphasis added); *see also* 9 U.S.C. § 4 (“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.*”) (emphasis added). While a court may invalidate an arbitration agreement based on “generally applicable contract defenses,” it may not do so based 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 (2017) (citing *AT & T Mobility LLC v.*

---

<sup>7</sup> Indeed, all parties agree that the Arbitration Agreement is governed by the FAA.  
<sup>8</sup> *Allied-Bruce*, 513 U.S. at 270.

*Concepcion*, 563 U.S. 333, 339 (2011)); *see also* 9 U.S.C. § 2 (providing that an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”). The FAA requires that the Court place the Arbitration Agreement “on *equal footing with other contracts . . .*” *Concepcion* at 339 (emphasis added).

### **3. Plaintiff’s claims are within the scope of the Arbitration Agreement.**

In pertinent part, the Arbitration Agreement reads as follows:

It is . . . 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.

This plain language clearly embraces the subject matter of Plaintiff’s claims against the Facility and Ms. Caddell. Moreover, even were there “any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . .” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) (quoting *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273–74 (4th Cir. 1997)) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)) (internal quotation marks omitted); *see also 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.”).

**4. The Arbitration Agreement was properly signed by Ms. St. Aubin for Ms. Ramsey pursuant to the authority granted Ms. St. Aubin under the Power of Attorney; therefore, the Arbitration Agreement is valid and enforceable.**

A person possessing contractual capacity, acting as grantor, can authorize another to contract on the grantor's behalf under the specific terms of a power of attorney. *See Gaddy v. Douglass*, 359 S.C. 329, 344–45, 597 S.E.2d 12, 20 (Ct. App. 2004); *see also Watson v. Underwood*, 407 S.C. 443, 454, 756 S.E.2d 155, 161 (Ct. App. 2014) (“A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal. The written authorization itself is the power of attorney.”) (quoting *In re Thames*, 344 S.C. 564, 569, 544 S.E.2d 854, 856 (Ct. App. 2001)) (internal quotation marks omitted). “[T]he holder of [the] power of attorney steps into the shoes of the grantor and is basically the alter ego of the grantor.” *Bennett v. Carter*, 421 S.C. 374, 382, 807 S.E.2d 197, 201 (2017).

A power of attorney classified as “durable” contains language establishing the principal's intent that the attorney-in-fact or agent's authority be exercisable during periods of the principal's physical or mental incapacity. *See Gaddy*, 359 S.C. at 344, 597 S.E.2d at 20 n.11 (“‘Durable’ is a term of art signifying that a power of attorney survives the principal's disability.”). Former S.C. Code Ann. § 62-5-501(C), which applies here,<sup>9</sup> “require[d] a durable power of attorney to be recorded to be effective, unless the authority of the attorney-in-fact relate[d] solely to the person of the principal.” *Timmons v. Starkey*, 380 S.C. 590, 593, 671 S.E.2d 101, 103 n.2 (Ct. App. 2008).

---

<sup>9</sup> The state legislature replaced § 62-5-501 with South Carolina's Uniform Power of Attorney Act (the “UPAA”), which became effective January 1, 2017. *See generally* S.C. Code Ann. §§ 62-8-101 to -403 (Supp. 2018). Although § 62-8-109(c) of the UPAA also requires durable powers of attorney to be recorded, § 62-8-403(c) states, “[T]he applicable law in effect before the effective date of this act applies to a power of attorney created or restated before the effective date of this act.” Because the Power of Attorney was executed before January 1, 2017, former § 62-5-501 applies.

The Power of Attorney was executed and duly recorded in November 2012. When she signed the Arbitration Agreement for Ms. Ramsey in February 2017, Ms. St. Aubin was Ms. Ramsey's duly appointed attorney-in-fact, properly acting within the scope of her authority under the Power of Attorney.<sup>10 11</sup> The Arbitration Agreement is valid and enforceable.

**5. Plaintiff's arguments in opposition to the Motions to Compel Arbitration are unpersuasive.**

Plaintiff makes four (4) arguments in opposition to the Motions to Compel Arbitration. Each is addressed below. Each is unpersuasive.

**(a) Re: Plaintiff's argument that the Arbitration Agreement violates federal law where it appears to be involuntary and a precondition of admission to the Facility.**

Plaintiff argues that *if* the Arbitration Agreement is a precondition of admission it constitutes an improper benefit or other consideration under federal law governing Medicare/Medicaid reimbursements. This argument fails of its essential premise: namely, that the Arbitration Agreement was such a precondition.

---

<sup>10</sup> In "Article I – Asset Powers," the Power of Attorney states, "[Ms. St. Aubin] shall have complete authority to manage and control all of [Ms. Ramsey's] property and [Ms. Ramsey's] affairs, including (but not limited to) the following powers." The Power of Attorney then sets forth a non-exhaustive list of powers, including the power "[t]o prosecute or defend any action for [Ms. Ramsey's] protection or that of [Ms. Ramsey's] property . . . and to pay, contest, or settle any claim by or against [Ms. Ramsey] . . . ." Also included in this list is the power "[t]o do any other thing which [Ms. St. Aubin] deems advisable, necessary, or desirable for the management of [Ms. Ramsey's] affairs or for [Ms. Ramsey's] health, comfort, or welfare, and if necessary to make all necessary arrangements, contractual or otherwise, for [Ms. Ramsey] at any hospital, nursing home, convalescent home or similar establishment." Moreover, in "Article XI – Limitations on Agent's Authority," the Power of Attorney identifies only four (4) specific limitations on Ms. St. Aubin's authority to act as Ms. Ramsey's attorney-in-fact. None of these in any way concerns her authority to enter into an arbitration agreement on Ms. Ramsey's behalf.

<sup>11</sup> The Court would note here that Plaintiff's opposition to the Motions to Compel Arbitration does not include any challenge to Ms. St. Aubin's status as Ms. Ramsey's attorney-in-fact at the time she signed the Arbitration Agreement for Ms. Ramsey or any contention that entering into an arbitration agreement on Ms. Ramsey's behalf was outside Ms. St. Aubin's scope of authority under the Power of Attorney.

“In determining whether a contract is void for illegality, it [is] presumed that [the contract] only involves the doing of a lawful and proper act. Illegality is never presumed but must be proved, or must clearly appear upon the face of the contract.” *Romanus v. Biggs*, 214 S.C. 145, 152, 51 S.E.2d 503, 505 (1949). “[I]f the illegality does not appear on [the contract’s] face, it must be proved by the person who asserts it.” *Id.* (quoting 12 Am. Jur. *Contracts* § 224). The party asserting illegality must prove illegality beyond doubt. *See Id.* (“An agreement capable of an interpretation which will make it valid or legal will be given such interpretation if the agreement is ambiguous. Such interpretation is preferred to one which renders it invalid.” (quoting 12 Am. Jur. *Contracts* § 251). “A sound public policy requires the enforcement of contracts deliberately made which do not clearly contravene some positive law or rule of public morals.” *Id.* (quoting *Cross-well v. Conn. Indemnity Ass’n.*, 51 S.C. 103, 28 S.E. 200, 205 (1897).

The Arbitration Agreement is not illegal on its face. Plaintiff thus bears the burden of proving the illegality she asserts. Plaintiff has not met this burden.

While Plaintiff points out that, within the four corners of the document itself, the Arbitration Agreement is silent about whether it is a precondition of admission, this is of no moment. Plaintiff cites no authority (and the Court itself is aware of none) requiring the Arbitration Agreement to expressly state whether it is a precondition of admission. To the contrary, as explained above, the Arbitration Agreement is presumed legal,<sup>12</sup> which in this case means it is presumed not to have been a precondition of admission, and again, it must be placed on equal footing with all other contracts. *Concepcion* at 339. Moreover, the argument of counsel

---

<sup>12</sup> *Romanus*, 214 S.C. at 152, 51 S.E.2d at 505.

is not evidence,<sup>13</sup> and besides pointing to the Arbitration Agreement's lack of language addressing whether it is a precondition of admission, Plaintiff's argument has no evidentiary basis.

Merely pointing out, as Plaintiff has, that the Arbitration Agreement does not say it is not a precondition of admission, says nothing of any probative value about whether it actually was a precondition of admission;<sup>14</sup> but even assuming, *arguendo*, Plaintiff's argument is sufficient to raise some ambiguity, mere ambiguity is not enough to upset the Arbitration Agreement's presumptive validity.

**(b) Re: Plaintiff's argument that the Arbitration Agreement is unconscionable where there was no bargaining power by Ms. St. Aubin, it appeared to be an involuntary precondition of admission, and if enforceable, would require Plaintiff to pay for arbitration.**

The issue of unconscionability presents a two-part test. Unconscionably requires *both* (1) an absence of meaningful choice on the part of one party due to one-sided contract provisions and (2) terms that 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). Neither of these is present here.

The first part of the test (absence of meaningful choice) is undermined by the express acknowledgement in the Arbitration Agreement itself that the "Resident/Representative is not required to use the . . . Facility for Resident's healthcare needs and . . . there are numerous other health care providers in the State where Facility is located that are qualified to provide such care to Resident." Moreover, as previously explained, the Facility and Ms. Caddell flatly deny that the

---

<sup>13</sup> See *Shinn v. Kreul*, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel.").

<sup>14</sup> Although the Facility and Ms. Caddell do not bear the burden of proving that the Arbitration Agreement was not a precondition of admission, the Court would note here that they categorically deny that the Arbitration Agreement was a precondition of admission.

Arbitration Agreement was a precondition of admission, and Plaintiff has presented no evidence to the contrary.

As for the second part of the test (unreasonably oppressive terms), the Arbitration Agreement simply binds the parties (both sides) to submit to arbitration. Not only is this not oppressive, “both state and federal policy favor arbitration of disputes.” *Id.* at 24, 644 S.E.2d at 668.<sup>15</sup> And there is nothing about the Arbitration Agreement that suggests it is not geared towards achieving an unbiased decision by a neutral decision-maker. *Id.* at 25, 644 S.E.2d at 668 (“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.”).

**(c) Re: Plaintiff’s argument that the Arbitration Agreement lacks additional, valuable consideration.**

The Arbitration Agreement plainly sets forth the parties’ mutual and concurrent promises to arbitrate. This constitutes sufficient consideration. *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) (“A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.”) (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E. 292 (1996)). To require anything more would violate the FAA’s requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion* at 339.

---

<sup>15</sup> As for Plaintiff’s complaint about having to pay for arbitration, the policy preference in favor of arbitration already accounts for the obvious fact that arbitration will usually involve the employment of a paid arbitrator(s). Moreover, litigation is not without its own costs, which Plaintiff ignores. Further still, the Arbitration Agreement states that the arbitration proceedings are to be conducted as provided in the South Carolina ADR Rules. The duties and responsibilities of the parties and the cost of the arbitration are matters addressed to the arbitrator. See Rule 13(b), SCADR.

**(d) Re: Plaintiff's argument that the material terms of the Arbitration Agreement are ambiguous and the Arbitration Agreement should be deemed unenforceable.**

The Arbitration Agreement does not lack any material term or suffer from any fatal ambiguity. Provided they meet their mutual obligations of good faith and fair dealing,<sup>16</sup> there is no good reason why Plaintiff, the Facility, and Ms. Caddell cannot arbitrate the instant dispute in accordance with the Arbitration Agreement. In addition to clearly stating the parties' mutual and concurrent promises to arbitrate, the Arbitration Agreement expressly addresses who is bound by the agreement, the scope of the disputes that are subject to arbitration, and how the arbitrator is to be selected. It further provides that the arbitration shall be conducted as provided in the South Carolina ADR Rules and makes clear that the arbitrator's decision is binding on all parties and enforceable in a court of competent jurisdiction. And here again, to require anything more from the Facility and Ms. Caddell as a contracting parties just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion* at 339.

**6. Having found the Arbitration Agreement enforceable, the Motions to Stay should be granted, too.**

In pertinent part, the FAA provides as follows:

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.*

---

<sup>16</sup> There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

9 U.S.C. § 3 (emphasis added). Having decided that the Motions to Compel Arbitration should be granted, the Court finds that the Motions to Stay should be granted as well.

### **CONCLUSION**

For the reasons set forth herein, the Subject Motions are hereby GRANTED. Plaintiff's claims against the Facility and Ms. Caddell are compelled to ARBITRATION, and the entirety of this action is STAYED pending full and final completion of the arbitration proceedings.

IT IS SO ORDERED.

---

GRACE GILCHRIST KNIE  
Presiding Judge – Seventh Judicial Circuit  
Court of Common Pleas – Spartanburg County

Spartanburg, South Carolina

Dated: \_\_\_\_\_

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

TO: THE HONORABLE GRACE GILCHRIST KNIE, Presiding Judge, and ERIC M. POULIN, ESQUIRE, ROY T. WILLEY, IV, ESQUIRE, and STEFAN B. FEIDLER, ESQUIRE, ANASTOPOULO LAW FIRM, LLC, Attorneys for Plaintiff

NOW COME Defendants, THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care (the "Facility"); THI of South Carolina, LLC ("THISC"); Hunt Valley Holdings, LLC ("HVH"); THI of Baltimore, Inc. ("THIB"); and Casey Caddell, as Officer/Manager of the Facility ("Ms. Caddell"), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCF, and, on the grounds set forth below, hereby move this Honorable Court to alter, amend, and/or reconsider its Order Regarding Defendants' Motion to Compel Arbitration and Stay Action, filed January 9, 2020 (the "Subject Order").<sup>1</sup>

---

<sup>1</sup> The Subject Order ruled on the Facility and Ms. Caddell's motions to compel arbitration (the "Motions to Compel Arbitration") and motions by THISC, HVH, and THIB to stay this action until the arbitrability issue (i.e., the issue raised by the Motions to Compel Arbitration)

1. **It is expressly requested that the Court (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Subject Motions (whether raised in writing, to include via proposed order, or via oral argument), all of which are hereby incorporated herein by reference.**

*See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.”) (emphasis in original).

2. **The Subject Order states, “The Admission Agreement and Arbitration Agreement were two separate agreements. This separation is evidenced by several factors. For instance, the Agreements are separately numbered and separately titled; the Admission Agreement provided an opt-out option where either party could terminate the Admission Agreement, while the Arbitration Agreement did not provide such a provision.” Most respectfully, the Court’s view of the Admission Agreement and the Arbitration Agreement as “separate agreements,” as opposed to separate instruments intended to be merged, is erroneous.**

Although merger/estoppel is not essential to the Motions to Compel Arbitration—because Ms. St. Aubin properly signed the Arbitration Agreement for Ms. Ramsey as her attorney-in-fact—it does provide additional support for the motions, and, most respectfully, the Court is mistaken in viewing the Admission Agreement and the Arbitration Agreement as “separate agreements,” as opposed to a single, merged agreement, under which Ms. Ramsey directly benefitted.

---

is finally determined and any/all arbitration proceedings are completed (the “Motions to Stay”). Collectively, the Motions to Compel Arbitration and the Motions to Stay are the “Subject Motions.”

Re: Merger

Even though it found against merger on the particular *facts* before it, the *Coleman* Court nonetheless recognized as correct the general proposition of *law* on which the appellants' based their merger argument:

Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.

Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,

The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.

*Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).

Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.

*Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added).

Although the Court did not cite any particular authority in the Subject Order, it appears the Court has failed to recognize material distinctions between the facts of the instant case and those that controlled *Coleman*, as well as those that controlled the decisions in *Hodge v. UniHealth Post-*

*Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), which relied on *Coleman*.

All the *arbitration* agreements at issue in *Coleman*, *Hodge*, and *Thompson* provided that they could be disclaimed or revoked within 30 days of their signing, while the corresponding *admission* agreements did not. There is no such disclaimer/revocation provision in the instant *Arbitration* Agreement. Here, the Court points to the *opposite* situation (i.e., opposite from *Coleman*, *Hodge*, and *Thompson*)—that the instant Admission Agreement provides an opt-out option but the Arbitration Agreement does not—to support the same *conclusion* (as *Coleman*, *Hodge*, and *Thompson*). Respectfully, this is illogical.

The only reason for the Arbitration Agreement is the Admission Agreement, i.e., the Arbitration Agreement covers disputes relating to/arising out of the Admission Agreement. So, yes, the Arbitration Agreement would remain in effect after termination of the Admission Agreement, but all this means is that any claims relating to/arising out of the Admission Agreement would still have to be arbitrated even if they are not asserted until after termination of the Admission Agreement. In other words, the Arbitration Agreement is still tied to the Admission Agreement even after the termination of the Admission Agreement. The Arbitration Agreement is necessarily linked to the Admission Agreement in a way that the Admission Agreement is not necessarily linked to the Arbitration Agreement.

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is in fact necessary to the Arbitration Agreement. The Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which there would be no question of merger to begin with; but that is not what happened. The Arbitration Agreement was in fact executed, and

it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement’s) sole reason for being.

Though not mentioned in the Subject Order, probably the biggest factor underlying the *Coleman* decision was that the Admission Agreement at issue contained an “Entire Agreement” clause that specifically referenced the Arbitration Agreement in a way that indicated the parties viewed it as separate and apart from the Admission Agreement. Such is not the case here. Indeed, the instant “Entire Agreement” clause expressly states that “other Admissions materials” are deemed to be a part of the Admission Agreement, i.e., it expressly contemplates a lack of its own supposed “separateness.”

The fact that the Arbitration Agreement was not required for admission does not mean that it was not intended to be part of the admissions materials intended to be construed together. To say that the Arbitration Agreement is not essential to admission is not the same as saying it was not part of the admissions paperwork once it was in fact voluntarily agreed to and signed in conjunction with Ms. Ramsey’s admission. In other words, Ms. St. Aubin could have decided not to agree to it, in which case it would not have been included in the admissions paperwork, or anywhere else, as it simply would not have existed. But she did agree to it, as part and parcel of the admissions paperwork, Ms. Ramsey’s admission to the Facility being the express—and only—reason why the parties chose to enter into the arbitration agreement to begin with. (See Arbitration Agreement (“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 . . . .")

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing, "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.") *with* Arbitration Agreement (providing, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments reflect the entirely consistent notion that the applicable law (both federal and state, specifically, the State of South Carolina) applies wherever it applies.

The Subject Order also points to the Admission Agreement and the Arbitration Agreement being separately paginated and titled. Respectfully, to point to such things is really to do no more than to point out that the Admission Agreement and Arbitration Agreement are separate instruments, a fact which does not actually suggest anything probative about the intent of the contracting parties as to whether they should be *construed* together. Indeed, the question of merger will not arise in the first place unless there are multiple instruments involved. Obviously, it cannot be the case that the mere existence of the necessary factual predicate for the question of merger to arise, i.e., separate instruments, shows an intention contrary to merger.

And to fall back on the idea that any ambiguity in this regard (i.e., in regard to the question of merger) must be construed against the Facility as the drafter makes no sense in this context. It

must be remembered that merger is the *default* position, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all of these align—same time, same parties, same purpose, same transaction—our courts *will* consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” To allow the merger presumption to be upset based on evidence that does not even go so far as to clearly indicate a contrary intention, but at most *might* (or might not) reflect a contrary intention, is to allow the exception to devour the rule.

Here, the Admission Agreement and Arbitration Agreement should be deemed merged, i.e., they should be construed together, the two instruments having been executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Ramsey’s admission to the Facility and would not have been done at all but for her admission to the Facility. Respectfully, to the extent that the above-cited language in the “Factual Background” section of the Subject Order constitutes a finding against merger, it relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”).

Re: Equitable Estoppel

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Ramsey received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Respectfully, and though, again, this argument (merger/estoppel is not necessary to the Motions to Compel Arbitration given Ms. St. Aubin's power of attorney), if anything, the Court should have found that the Arbitration Agreement merged with the Admission Agreement Ms. St. Aubin signed for Ms. Ramsey and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Ms. Ramsey having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof only to later, via her estate, attempt to repudiate the Arbitration Agreement with which her Admission Agreement merged. *See Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, following the Court of Appeals' earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which Plaintiff would be estopped from refusing to comply with the Arbitration Agreement here, where Ms. Ramsey received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the arbitration agreement was merged); *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for

review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added).

**3. Most respectfully, the meeting of the minds/material terms analysis in the Subject Order is erroneous.**

The Arbitration Agreement does not lack any material term or suffer from any fatal ambiguity. Provided they meet their mutual obligations of good faith and fair dealing,<sup>2</sup> there is no good reason why the parties cannot arbitrate the instant dispute in accordance with the Arbitration Agreement.

In addition to clearly stating the parties’ mutual and concurrent promises to arbitrate, the Arbitration Agreement expressly addresses who is bound by the agreement, the scope of the disputes that are subject to arbitration, and how the arbitrator is to be selected.

The Arbitration Agreement is sufficiently clear about how the “panel” of potential arbitrators. It specifically refers the parties to the South Carolina ADR Rules. The ADR Rules themselves refer to the “Roster,” i.e., the official list of certified neutrals maintained and published by the South Carolina Supreme Court Board of Arbitrator and Mediator Certification. Rule 2(i), SCADR. And in any event, Plaintiff’s complaint about a (supposed) lack of clarity in this regard is a red herring. As a practical matter, this provision of the Arbitration Agreement simply allows the parties to use any arbitrator of their choosing, provided they are able to reach agreement about same. If for any reason the parties cannot agree, the Arbitration Agreement provides a failsafe in the form of the Court’s appointment of an arbitrator. The Court’s appointment of an arbitrator does not reflect the absence of a term that the Court is asked to *supply*; it reflects the presence of a term that the Court is merely asked to *enforce*.

---

<sup>2</sup> There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

The Arbitration Agreement's reference to the ADR Rules also answers any question about payment for arbitration, as well as any other material questions about the arbitration proceedings:

**(a) Authority of Arbitrators.** The arbitrator shall at all times be authorized to control the hearing and the procedures to be followed.

**(b) Duties.** The arbitrator shall set up the arbitration hearing. The arbitrator shall define and describe the following to the parties:

- (1) The non-binding<sup>3</sup> arbitration process, including the difference between arbitration and other forms of conflict resolution;
- (2) The duties and responsibilities of the arbitrator and the parties; and
- (3) The cost of the arbitration hearing

Rule 13(a)-(b), SCADR; *see also* Rule 12(b) (Arbitration Hearings), (c) (Award), (e) (Judgment Entered on Award). The Arbitration Agreement, therefore, does in fact adequately address the payment-for-arbitration issue referenced in the Subject Order.

And, respectfully, the language in the Subject Order that “ had language regarding payment of arbitration fees been included in the Arbitration Agreement it could have potentially been considered additional consideration” does not make sense. The Subject Order already—correctly—found *unpersuasive* Plaintiffs’ argument that the Arbitration Agreement was an involuntary precondition to admission in violation of federal law regarding Medicare/Medicaid reimbursements. Plaintiff’s argument in this regard failed of its essential premise: namely, that the Arbitration Agreement was a precondition to admission, which it was *not*—as indeed the Court’s rejection of Plaintiff’s argument recognizes. The fact that the Arbitration Agreement is

---

<sup>3</sup> Rule 12(a), SCADR (“Arbitrations selected by the parties under these rules are deemed non-binding arbitrations *unless otherwise expressly agreed by the parties.*”) (emphasis added). Here, the Arbitration Agreement makes clear that the arbitrator’s decision is *binding* on all parties and enforceable in a court of competent jurisdiction.

*not a precondition of admission* means that it cannot possibly violate any federal rule against the Facility accepting additional consideration *as a precondition of admission*. This does not, however, mean that there was no consideration to support the Arbitration Agreement, which their certainly was (*see* 4 below). It just means that the Arbitration Agreement itself did not constitute any form of unlawful consideration to the Facility, which, in turn, means that there was no potential whatsoever for the payment of the costs of arbitration (regardless of who pays) to have any bearing upon, much less lend any credence to, Plaintiff's illegality argument.

And, last but not least, to require anything more from the Facility and Ms. Caddell as contracting parties just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

**4. Most respectfully, the lack of consideration and mutuality analysis in the Subject Order is erroneous.**

First off, Defendants did *not*, as the Subject Order states, "argue[] [that] the Arbitration Agreement was not involuntary and instead made in consideration of admission." Defendants argued that the Arbitration Agreement was voluntary because in fact it was, but this has nothing to do with Plaintiff's lack-of-consideration argument, and *Defendants have never contended that Ms. Ramsey's admission constituted the consideration for the Arbitration Agreement*.

The Arbitration Agreement plainly sets forth the parties' mutual and concurrent promises to arbitrate. *This* constitutes sufficient consideration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 275 (4th Cir. 1997) ("A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.") (citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E. 292 (1996)). To require anything more would violate the FAA's requirement that arbitration agreements be placed on equal footing with all other contracts. *Concepcion* 563 U.S. at 339. As

a matter of law, it legally cannot be the case that mutual promises constitute sufficient consideration to form a binding agreement except in the case of arbitration agreements. And the very idea that mutual promises to arbitrate do not effect an exchange of benefits to both sides is irreconcilable with the existence of the presumption in favor of arbitration agreements that even the Subject Order itself acknowledges.

Moreover, the Subject Order cites *Reidman Corp. v. Jarosh*, 290 S.C. 252, 349 S.E.2d 404 (1986), for the proposition that “[o]ur courts have held that where there is a mutual promise to arbitrate, there must be additional consideration.” But this is just not what the case says. Indeed, what it does say is short enough to cite the entirety of it here:

PER CURIAM:

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals in *Riedman Corp. v. Jarosh*, 289 S.C. 191, 345 S.E.2d 732 (Ct.App.1986). We grant the writ, dispense with further briefing, and affirm.

Respondent brought this action alleging that petitioner had breached a covenant not to compete contained in an at-will employment contract. The trial court sustained a demurrer on the ground that at-will employment is insufficient consideration to support a covenant not to compete. The Court of Appeals reversed, holding that the covenant was supported by sufficient consideration.

*We now hold that a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself.* Therefore, the Court of Appeals properly reversed the trial judge on this issue.

The remaining questions posed by the petitioner are without merit. Accordingly, the decision of the Court of Appeals is

AFFIRMED.

(emphasis added).

As shown above, *Riedman* does not address arbitration agreements at all; it addresses covenants not to compete. And at that, if anything, what it says about these (that employment at-

will is itself sufficient consideration to support them) is supportive of Defendants' position (that mutual promises to arbitrate constitute sufficient consideration).

5. **Most respectfully, because the Court should have granted the Motions to Compel Arbitration the Motions to Stay are not moot, and the Court should have granted them, too.**

In pertinent part, the FAA provides as follows:

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.

9 U.S.C. § 3 (emphasis added); *see, e.g., Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S. C. 631, 641, 239 S. E. 2d 647, 652 (1977) (“*The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.*”). However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and can not be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.”); *cf.* S.C. Code Ann. § 15-48-20(d) (providing that any action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or an application for arbitration has been made under section). Because the Court should have granted the Motions to Compel Arbitration the Motions to Stay are not moot, and the Court should have granted them, too.

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of the Subject Motions, whether in written or oral form, to include, without limitation, Defendants' proposed order, 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 in favor of an order(s) granting the Subject Motions.

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.  
Matthew O. Riddle  
Gaillard T. Dotterer, III  
P.O. Box 993  
Charleston, SC 29402  
(843) 720-5406  
[jdavis@ycrlaw.com](mailto:jdavis@ycrlaw.com)  
[mriddle@ycrlaw.com](mailto:mriddle@ycrlaw.com)  
[gdotterer@ycrlaw.com](mailto:gdotterer@ycrlaw.com)  
*Attorneys for Defendants*

Charleston, South Carolina

January 19, 2020

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

---

Appeal from Spartanburg County  
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

---

Case No. 2019-CP-42-03236

---

Rita St. Aubin,  
as Personal Representative of the Estate of Irene Ramsey,  
  
Respondent,

v.

THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory  
Post Acute Care; THI of South Carolina, LLC; Hunt Valley  
Holdings, LLC; THI of Baltimore, Inc.; and Casey Caddell, as  
Officer/Manager of THI of South Carolina at Camp Care, LLC,  
d/b/a Lake Emory Post Acute Care,

Appellants.

---

**NOTICE OF APPEAL**

---

YOUNG CLEMENT RIVERS, LLP  
Stephen L. Brown (SC Bar No. 66468)  
D. Jay Davis, Jr. (SC Bar No. 12084)  
Matthew O. Riddle (SC Bar No. 76650)  
Russell G. Hines (SC Bar No. 72100)  
Gaillard T. Dotterer, III (SC Bar No. 103620)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488

*Attorneys for Appellants*

**Other Counsel of Record:**

Eric M. Poulin (SC Bar No. 100209)  
Roy T. Willey, IV (SC Bar No. 101010)  
Stefan B. Feidler (SC Bar No. 101918)  
ANASTOPOULO LAW FIRM, LLC  
32 Ann Street  
Charleston, South Carolina 29403  
(843) 614-8888

*Attorneys for Respondent*

Defendants, THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care; THI of South Carolina, LLC; Hunt Valley Holdings, LLC; THI of Baltimore, Inc.; and Casey Caddell, as Officer/Manager of THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory Post Acute Care (collectively, "Appellants"), hereby appeal the following orders of the Honorable Grace Gilchrist Knie, Circuit Court Judge:

- Her Honor's **Order Regarding Defendants' Motion to Compel Arbitration and Stay Action**, filed January 9, 2020, and
- Her Honor's **Order Regarding Defendants' Motion to Alter, Amend, and/or Reconsider the Court's Order Denying Defendants' Motion to Compel Arbitration and Stay**, filed February 14, 2020.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on February 14, 2020.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)

D. Jay Davis, Jr. (SC Bar No. 12084)

Matthew O. Riddle (SC Bar No. 76650)

Russell G. Hines (SC Bar No. 72100)

Gaillard T. Dotterer, III (SC Bar No. 103620)

25 Calhoun Street, Suite 400

Charleston, South Carolina 29401

P.O. Box 993 (29402)

(843) 720-5488

*Attorneys for Appellants*

Charleston, South Carolina

Dated: 2/25/20

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

---

Appeal from Spartanburg County  
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

---

Case No. 2019-CP-42-03236

---

Rita St. Aubin,  
as Personal Representative of the Estate of Irene Ramsey,  
  
Respondent,

v.

THI of South Carolina at Camp Care, LLC, d/b/a Lake Emory  
Post Acute Care; THI of South Carolina, LLC; Hunt Valley  
Holdings, LLC; THI of Baltimore, Inc.; and Casey Caddell, as  
Officer/Manager of THI of South Carolina at Camp Care, LLC,  
d/b/a Lake Emory Post Acute Care,

Appellants.

---

**PROOF OF SERVICE**

---

YOUNG CLEMENT RIVERS, LLP  
Stephen L. Brown (SC Bar No. 66468)  
D. Jay Davis, Jr. (SC Bar No. 12084)  
Matthew O. Riddle (SC Bar No. 76650)  
Russell G. Hines (SC Bar No. 72100)  
Gaillard T. Dotterer, III (SC Bar No. 103620)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488

*Attorneys for Appellants*

I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellants, hereby certify that the foregoing **NOTICE OF APPEAL** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on February 25, 2020, properly posted for delivery to the following addressees:

Eric M. Poulin, Esquire  
Roy T. Willey, IV, Esquire  
Stefan B. Feidler, Esquire  
Anastopoulo Law Firm, LLC  
32 Ann Street  
Charleston, SC 29403  
*Attorneys for Respondent*

I also certify that a copy of this **NOTICE OF APPEAL** is this day, February 25, 2020, being E-Filed with the lower court (which will also, i.e., in addition to service by mail, effect service of the notice electronically on all counsel of record).

Respectfully submitted,  
YOUNG CLEMENT RIVERS, LLP

By:   
\_\_\_\_\_  
Russell G. Hines (SC Bar No. 72100)  
*Attorneys for Appellants*

Charleston, South Carolina

Dated: 2/25/20

### **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.

**RECEIVED**  
**Oct 12 2020**  
**SC Court of Appeals**

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: s/Russell G. Hines  
Stephen L. Brown (SC Bar No. 66468)  
D. Jay Davis, Jr. (SC Bar No. 12084)  
Matthew O. Riddle (SC Bar No. 76650)  
Russell G. Hines (SC Bar No. 72100)  
Gaillard T. Dotterer, III (SC Bar No. 103620)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488  
*Attorneys for Appellants*

Charleston, South Carolina

October 12, 2020