

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

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Appeal from Spartanburg County  
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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Case No. 2019-CP-42-03075  
Appellate Case No. 2020-000500

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**RECEIVED**

**Oct 15 2020**

**SC Court of Appeals**

Betty Nanney,  
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,  
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,  
Laura Anne Winn, and Olishia Gaffney,

Appellants.

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**RECORD ON APPEAL**

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| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS          |
| COUNTY SPARTANBURG                        | ) | SEVENTH JUDICIAL CIRCUIT              |
|                                           | ) |                                       |
| Betty Nanney, by and through her          | ) |                                       |
| Attorney-In-Fact, Leslie Nanney,          | ) | CIVIL ACTION NO.: 2019-CP-42-03075    |
|                                           | ) |                                       |
| Plaintiffs,                               | ) | Order regarding Defendants' Motion to |
|                                           | ) | Compel Arbitration                    |
| vs.                                       | ) |                                       |
|                                           | ) |                                       |
| THI of South Carolina at Spartanburg, LLC | ) |                                       |
| d/b/a Magnolia Manor-Spartanburg, Rusty   | ) |                                       |
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| Gaffney,                                  | ) |                                       |
|                                           | ) |                                       |
| Defendants.                               | ) |                                       |
|                                           | ) |                                       |

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|-------------------------|--------------------------------------------------------------------|
| Hearing Date:           | December 16 <sup>th</sup> , 2019, at 2:30 p.m.                     |
| Hearing Judge:          | Grace Gilchrist Knie                                               |
| Counsel for Plaintiffs: | Raymond Paul Mullman, Jr., Gary W. Poliakoff, & Edward John Waelde |
| Counsel for Defendants: | Russell G. Hines                                                   |
| Court Reporter:         | Sandy Satterwhite                                                  |

This matter was before the Court on Monday, December 16<sup>th</sup>, 2019, at 2:30 p.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Defendants' Motion to Compel Arbitration. Attorneys Raymond Paul Mullman, Jr., Gary W. Poliakoff, and Edward John Waelde of Poliakoff & Associates, P.A. were present representing the interests of the Plaintiffs. Attorney Russell G. Hines of Young Clement Rivers was present representing the interests of the Defendants. Sandy Satterwhite was the Court Reporter.

#### **PROCEDURAL BACKGROUND:**

This matter began with the filing of a Summons and Complaint on September 4<sup>th</sup>, 2019, asserting the causes of action of negligence/recklessness, neglect of a vulnerable adult, and negligent administration arising from Defendants' failure to monitor and supervise Ms. Nanney's

safety and well-being while at the Facility. An Expert Affidavit was filed September 4<sup>th</sup>, 2019. A Proof of Service filed September 17<sup>th</sup>, 2019, certified that a recorded copy of the Summons and Complaint and Expert Affidavit were deposited in the United States Mail to the Registered Agent, Corporation Service Company, for THI of South Carolina at Spartanburg, LLC. An Acceptance of Service was filed September 17<sup>th</sup>, 2019, acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Laura Anne Winn. An Acceptance of Service was filed September 17<sup>th</sup>, 2019, acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Olishia Gaffney. An Acceptance of Service was filed September 17<sup>th</sup>, 2019, acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Rusty Flathmann.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg filed an Answer to the Complaint on October 9<sup>th</sup>, 2019. Defendant Laura Anne Winn filed a Motion to Dismiss the Plaintiff's Complaint on October 11<sup>th</sup>, 2019. Defendant Rusty Flathmann filed an Answer to Plaintiff's Complaint on October 11<sup>th</sup>, 2019. Defendant Olishia Gaffney filed an Answer to Plaintiff's Complaint on October 11<sup>th</sup>, 2019. Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11<sup>th</sup>, 2019. Defendant Rusty Flathmann filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11<sup>th</sup>, 2019. Defendant Olishia Gaffney filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11<sup>th</sup>, 2019. The parties were before the Court on Monday, December 16<sup>th</sup>, 2019, to take up these Motions.

**FACTUAL BACKGROUND:**

This matter arises out of a nursing home neglect case where alleging that Ms. Nanney was injured as a result of Defendants' negligence fracturing her hip. Ms. Nanney was admitted into the Facility on October 28, 2016. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission. It is undisputed that Betty Nanney did not sign the Arbitration Agreement, despite being lucid and competent. No power of attorney existed at the time of the admission into the nursing home on October 28, 2016. Leslie Nanney is Ms. Nanney's daughter. Betty Nanney granted Power of Attorney to Leslie Nanney on June 23, 2017, approximately eight months after admission. Neither Betty nor Leslie Nanney signed the Arbitration Agreement. Kaileb Horn (Kaileb), Ms. Nanney's son, signed the Arbitration Agreement. At no point in time did Kaileb Horn have Power of Attorney or any other legal authority that would have given Kaileb the legal authority to bind Ms. Nanney to arbitration. Plaintiff's provided an affidavit from Kaileb that stated: "My mother was not in the room and could not and did not make any indication or statement that I was her agent or power of attorney during the admission process. The admission process was quick and occurred while my mother was already transferred into her room." Defendants did not offer any evidence to contradict the affidavit. Defendants did not provide an affidavit from Kris Milner, the signatory for the nursing home, to support the Motion to Dismiss. The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. In this case, there is no evidence of apparent authority and Defendants did not rely on any representation as a condition of admission.

### **BURDEN OF PROOF:**

Defendant carries the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable.<sup>1</sup> Courts interpret a jury trial waiver narrowly and construe contract ambiguities against Defendant who drafted the Arbitration Agreement.<sup>2</sup> Whether the parties agreed to arbitrate is a question of substantive state law.<sup>3</sup> In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

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

Thus, the presumption favoring arbitration only applies after this Court finds there is a valid, enforceable arbitration agreement.<sup>4</sup> The mandatory language in the Federal Arbitration Act (“FAA”) only applies in instances where a valid arbitration agreement has been well established. This is self-evident from the FAA provisions: “The court shall make an order directing the parties to proceed to arbitration” but only “upon being satisfied that the making of the agreement...is not in issue.” 9 U.S.C. § 4. The FAA looks to state law to decide the threshold questions of contract formation.<sup>5</sup> Therefore, arbitration agreements guided by the FAA are subject to the same defenses

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<sup>1</sup> See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).

<sup>2</sup> Nat’l Acceptance Co., 381 F.Supp. at 271).

<sup>3</sup> Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007)(“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”).

<sup>4</sup> EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

<sup>5</sup> Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”).

applicable to all other contracts.<sup>6</sup> The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.<sup>7</sup> In short, pro-arbitration policy does not validate a contract lacking the building blocks of a binding contract.

### **LEGAL ANALYSIS:**

Defendants' motion to compel arbitration is effectively a motion to enforce a contract. Defendants had no such contract with Ms. Nanney. The "Arbitration Agreement" on which Defendants' motion relies is invalid because there can be no contract without the mutual assent of its proposed parties. Ms. Nanney never assented to the Arbitration Agreement and did not empower anyone else to assent on her behalf.

#### **A. Signatory Had No Legal Authority.**

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32). Kaileb Horn did not have that authority. Defendants have produced no evidence indicating that Kaileb Horn had authority to enter a contract on Ms. Nanney's behalf or to waive Ms. Nanney's right to a jury trial.

For agency situations, the legal burden is on the party asserting that an agency exists.<sup>8</sup> In this case, Defendant must show all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Id. An agency may not, however, be established solely

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<sup>6</sup> Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").

<sup>7</sup> See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

<sup>8</sup> Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

by the declarations and conduct of an alleged agent.<sup>9</sup> South Carolina law requires that to prove apparent authority the Defendants must show: 1) that the purported principal consciously or impliedly represented to another to be his agent, 2) that there was reliance upon the representation, and 3) that there was a change of position to the relying party's detriment. Cownburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). Defendant has failed to provide any evidence beyond Kaileb Horn's signature to suggest he was Ms. Nanney's agent. The fact that Kaileb signed documents so that Ms. Nanney could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Nanney to waive her right to a jury trial or agree to arbitration. There has been no evidence that Ms. Nanney ever manifested any form of assent establishing Kaileb as her agent.

Kaileb was one of Ms. Nanney's children. He was not Ms. Nanney's attorney-in-fact. He had no legal authority to enter contracts on Ms. Nanney's behalf. The Supreme Court of South Carolina has held that a surrogate without proper legal authority cannot bind a person to arbitration.

The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary

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<sup>9</sup> Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143, 399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)).

arbitration agreement. We therefore affirm the circuit court's holding that the Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353-54, 755 S.E.2d 450, 454 (2014).

In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the arbitration and admission agreements lacked authority to bind her sister to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make 'healthcare decisions' on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Kaileb had no legal authority to sign the Arbitration Agreement, and Defendant knew or should have known this fact. Since Kaileb lacked legal authority to enter into a contract; the arbitration agreement is void and unenforceable.

**B. Equitable estoppel, ratification and third-party beneficiary theories do not apply.**

Arbitration contracts concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of equitable estoppel. 9 U.S.C. § 2 (requiring enforcement of arbitration contract "save upon such grounds as exist at law or in equity for the revocation of any contract"). The FAA does not "alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them)." Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to equitable estoppel arguments. Id. at 632 (noting question on remand was "whether the relevant state contract law recognizes equitable estoppel").

Defendants argued that Ms. Nanney should be estopped from denying the validity of the Arbitration Agreement because Ms. Nanney accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the alleged Arbitration Agreement. However, Defendant's argument fails because it depends on Defendants' faulty merger argument, and Ms. Nanney did not receive a benefit from the Arbitration Agreement.

Defendants allege Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1,7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id.

In the case at hand, Defendants have not established the elements required to prove equitable estoppel. First, there is no evidence Defendants lacked knowledge Kaileb was not authorized to bind Ms. Nanney to the Arbitration Agreement. Additionally, Kaileb did not have power of attorney over Ms. Nanney nor did Defendant produce evidence that Ms. Nanney represented the same to Defendant. The affidavit of Kaileb Horn states that Ms. Nanney, while lucid, was unable to make verbal representation. Defendants have produced no evidence that Ms. Nanney made any representation of any agency of Kaileb.

Defendants argued Ms. Nanney created an agency relationship to support arbitration because she accepted admission. Defendants then argued Kaileb is estopped from denying authority to bind Ms. Nanney to arbitration because he does not deny authority to admit Ms. Nanney to the Facility. Finding merger would be a prerequisite to accepting Defendant's arguments, but Coleman and its progeny rejected similar merger arguments.

The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

As discussed above briefly, there were two separate agreements signed on the day of the admission, and they were not merged. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of merger not apply. The Admission Agreement's "Entire Agreement"<sup>10</sup> provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibits merging the two separate agreements. An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract where the provision identifies the two contracts

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<sup>10</sup> "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties."

distinctly—i.e. “this [Admission] Agreement *or* in the Arbitration Agreement.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Even if the “Entire Agreement” clause creates an ambiguity as to merger, the law is clear that any ambiguity must be construed against the drafter, in this case, Defendants.<sup>11</sup> Since there was no merger here, Defendants’ equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

As in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with “Page 12 of 12” while the Arbitration Agreement is a separate document. As in Thompson, the arbitration agreement announces its independence with its “Arbitration Agreement” title.

The arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has “Arbitration Agreement” at the top its first page, these factors further indicate the parties’ intent for it to stand by itself as an independent contract.” Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. So long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident’s family member when signing the contracts would not equitably estop the resident’s attorney-in-fact from challenging the family member’s authority to bind the resident to arbitration.

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<sup>11</sup> See Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct.App.2011) fn. 4.

A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and his misrepresentations, if any, would have no bearing on claims against the home by the resident even if the misrepresenting family member is also the attorney-in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home “may not hold [resident’s] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities”).

Therefore, Defendants cannot prove merger of the Admission Agreement and Arbitration Agreement. Defendants can also not claim to have been misled and cannot rely on equitable estoppel if they, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions.<sup>12</sup> Furthermore, Defendants had the capacity to determine whether Kaileb had authority to sign the Arbitration Agreement on Ms. Nanney’s behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Kaileb for any power of attorney documentation.

Defendants then argued Ms. Nanney’s admission to the Facility was the required “direct benefit.” In doing so, Defendant tied its estoppel argument to the merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home’s “equitable estoppel argument is premised on [the home’s] contention that, under state law, the admission agreements and the [arbitration agreements] merged”). Admission can be the “direct benefit” that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons

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<sup>12</sup> See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001).

outlined above, the two contracts are separate, they do not merge, and Ms. Nanney's admission does not support equitable estoppel.

Precedent is decisive on this point. Citing International Paper, the Court of Appeals held in Thompson that any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300. Since admission is unavailable as a "direct benefit" to support estoppel, Defendants would be required to point to some benefit Ms. Nanney received from the Arbitration Agreement alone. However, Ms. Nanney derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the Arbitration Agreement"). In sum, Defendants cannot meet their burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

Defendants then argued ratification of her continued residency in Defendants' facility. To establish a ratification of the Arbitration Agreement Defendants must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

This argument fails for several reasons. First, Ms. Nanney's presence alone cannot constitute an affirmative representation. See Hodge where the court rejected the notion that a nursing home resident represents her/her family member has authority to enter an arbitration agreement on the resident's behalf simply by failing to object to the family member's signature.

422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident “represented” her husband had authority by “allowing him to procure her admission” but still finding “no evidence . . . that [the resident], as the principal, represented husband was her agent”).

Defendants argued Ms. Nanney accepted the benefits of the contracts. It is doubtful that the resident received a benefit from the Arbitration Agreement. Hodge was skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home’s acts during the admission caused the resident’s death. 422 S.C. at 563, 813 S.E.2d at 303 (“we find it difficult to find [resident] benefitted even from being admitted”).

However, the only alleged benefit Defendants cited is admission itself, a benefit Defendants have admitted to be separate from arbitration. Defendants never attempt to explain what supposed benefit of the independent Arbitration Agreement Ms. Nanney derived during her time as a resident in Defendants’ facility. The Court of Appeals’ ruling in Thompson speaks directly on this point, i.e., “any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement’s] requirement that [resident] waive her right to access the courts and her right to a jury trial.” 416 S.C. at 60, 784 S.E.2d at 688.

Defendants then made a broader argument that it would be manifestly inequitable for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Kaileb’s authority to sign the Arbitration Agreement. The Adult Health Care Consent Act does provide statutory authority for family members to make an incapacitated loved one’s health care decisions, but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make “health care” decisions limited to nursing home admission and related financial decisions).

Lastly, Defendants claimed that the agreement is enforceable under a theory of third-party beneficiary. See Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (holding as to the arbitration agreement between the appellants and Son in his individual capacity, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.) With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff's action sounds solely in tort. There is no breach of contract claim asserted. Plaintiff's pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiff's tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the Arbitration Agreement is a separate and distinct agreement from the Admission Agreement. Plaintiff does not rely upon the terms of the Arbitration Agreement to establish her tort claims.

### **C. Lack of consideration and mutuality.**

The Arbitration Agreement is not a valid and enforceable agreement due to a lack of consideration and mutuality. Every contract must contain an offer, acceptance, and valuable consideration.<sup>13</sup> “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.”<sup>14</sup> Where a contract lacks valuable consideration, the contract must fail. Courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. However, in determining whether adequate consideration exists in a contract, the Court must examine and stay within the confines of the four corners of the

<sup>13</sup> Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003).

<sup>14</sup> 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).

instrument.<sup>15</sup> Therefore, the Court must assess whether the contract itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. Here, the Arbitration Agreement does not contain the required consideration. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the direct benefit that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. In this case, even assuming Kaileb had authority, there is no valuable consideration in agreeing to the Arbitration Agreement. The one-page agreement contains no benefit or detriment to the parties. Therefore, the Arbitration Agreement lacks consideration. Moreover, Defendant was prohibited from asking or receiving any consideration from Ms. Nanney. “Facilities must “not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay at the facility.” 42 U.S.C. § 1396r(c)(5)(A)(iii). Any nursing home facility that accepts Medicare or Medicaid funds for resident care is expressly forbidden from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility.

In the instant case, it is undisputed Ms. Nanney was a Medicare and Medicaid beneficiary while residing at the Facility and the Facility was billing and accepting payment from Medicare and Medicaid for Ms. Nanney’s care. Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission. Defendant has admitted the Arbitration Agreement was not a

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<sup>15</sup> 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)).

condition of admission, thus, there is no separate consideration offered for the arbitration agreement.

**D. No meeting of the minds due to missing material terms.**

A valid contract under South Carolina law requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement.<sup>16</sup> The forum chosen for the arbitration to take place is an essential and material term. A contract lacking material terms may be found unenforceable for indefiniteness.<sup>17</sup> Here there was no meeting of the minds as to (1) the choice of arbitrator; (2) the rules of evidence; or (3) allowance of pre-hearing discovery. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate. No rules for arbitration were included in or attached to the Arbitration Agreement. The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court. But, “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.”<sup>18</sup> As a result, the promise that the dispute “shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules” is moot and ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals. None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists.

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<sup>16</sup> Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards, 265 S.C.529 (1975)).

<sup>17</sup> Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

<sup>18</sup> Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

**E. The Arbitration Agreement should not be enforced because it is both procedurally and substantively unconscionable.**

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 the 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)); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

**CONCLUSION:**

The Court acknowledges and appreciates the amount of research and preparation for the hearing by all parties, as well as, the professionalism of all parties in their presentations to the Court. In conclusion, in order to prevail in its motion, the Defendant Facility must show a valid and enforceable arbitration agreement between Ms. Nanney and the Facility to prevail on its motion. After consideration of the record, arguments of the parties, and the applicable law, the Court finds that Defendants did not meet this burden. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Nanney and the Facility exists because: (1) Kaileb Horn did not have legal authority to bind Betty Nanney to the Arbitration Agreement; (2) there is a lack of consideration and mutuality under the circumstances; and (3) the affirmative defenses of equitable estoppel, ratification, and third-party beneficiary do not apply under the circumstances. Accordingly, for the foregoing reasons, Defendants' Motions to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, are denied.

**IT IS SO ORDERED.**

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

January 5<sup>th</sup>, 2020  
Spartanburg, South Carolina



Spartanburg Common Pleas

**Case Caption:** Betty Nanney , plaintiff, et al VS Thi Of South Carolina At  
Spartanburg, Llc , defendant, et al

**Case Number:** 2019CP4203075

**Type:** Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

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|                                           |   |                                          |
|-------------------------------------------|---|------------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS             |
| COUNTY OF SPARTANBURG                     | ) | SEVENTH JUDICIAL CIRCUIT                 |
|                                           | ) |                                          |
| Betty Nanney, by and through her          | ) |                                          |
| Attorney-In-Fact, Leslie Nanney,          | ) | CIVIL ACTION NO.: 2019-CP-42-03075       |
|                                           | ) |                                          |
| Plaintiffs,                               | ) | Order regarding Defendants' Motion to    |
|                                           | ) | Alter, Amend, and/or Reconsideration of  |
| vs.                                       | ) | the Court's Order denying Defendants'    |
|                                           | ) | Motions to Dismiss or Compel Arbitration |
| THI of South Carolina at Spartanburg, LLC | ) |                                          |
| d/b/a Magnolia Manor-Spartanburg, Rusty   | ) |                                          |
| Flathmann, Laura Anne Winn, and Olishia   | ) |                                          |
| Gaffney,                                  | ) |                                          |
|                                           | ) |                                          |
| Defendants.                               | ) |                                          |
|                                           | ) |                                          |

|                         |                                                                    |
|-------------------------|--------------------------------------------------------------------|
| Counsel for Plaintiffs: | Raymond Paul Mullman, Jr., Gary W. Poliakoff, & Edward John Waelde |
| Counsel for Defendants: | D. Jay Davis, Jr.                                                  |

This matter was before the court on Monday, December 16<sup>th</sup>, 2019, at 2:30 p.m., in Spartanburg County, SC, the Seventh Judicial Circuit upon Defendants' Motions to Dismiss and to Compel Arbitration. Attorneys Raymond Paul Mullman, Jr., Gary W. Poliakoff, and Edward John Waelde of Poliakoff & Associates, P.A. were present representing the interests of the Plaintiffs. Attorney Russell G. Hines of Young Clement Rivers was present representing the interests of the Defendants. Sandy Satterwhite was the Court Reporter.

The Honorable Judge Grace Gilchrist Knie signed on January 6<sup>th</sup>, 2020, and filed on January 7<sup>th</sup>, 2020, an order denying the Defendants' Motion to Dismiss and Compel Arbitration. On January 17<sup>th</sup>, 2020, Defendants filed a Motion to Alter, Amend, and/or Reconsider the Order regarding Defendants' Motion to Dismiss and Compel Arbitration. This Order pertains to the Motion to Alter, Amend, and/or Reconsider the Order regarding denying Defendants' Motion to Dismiss and Compel Arbitration.

**PROCEDURAL BACKGROUND:**

This matter began with the filing of a Summons and Complaint on September 4<sup>th</sup>, 2019 asserting the causes of action of negligence/recklessness, neglect of a vulnerable adult, and negligent administration. An Expert Affidavit was filed September 4<sup>th</sup>, 2019. A Proof of Service filed September 17<sup>th</sup>, 2019 certified that a clocked copy of the Summons and Complaint and Expert Affidavit were deposited in the United States Mail to the Registered Agent, Corporation Service Company, for THI of South Carolina at Spartanburg, LLC. An Acceptance of Service was filed September 17<sup>th</sup>, 2019 acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Laura Anne Winn. An Acceptance of Service was filed September 17<sup>th</sup>, 2019 acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Olishia Gaffney. An Acceptance of Service was filed September 17<sup>th</sup>, 2019 acknowledging receipt of the Summons and Complaint by Attorney D. Jay Davis, Jr. on behalf of Defendant Rusty Flathmann.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg filed an Answer to the Complaint on October 9<sup>th</sup>, 2019. Defendant Laura Anne Winn filed a Motion to Dismiss the Plaintiff's Complaint on October 11<sup>th</sup>, 2019. Defendant Rusty Flathmann filed an Answer to Plaintiff's Complaint on October 11<sup>th</sup>, 2019. Defendant Olishia Gaffney filed an Answer to Plaintiff's Complaint on October 11<sup>th</sup>, 2019. Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11<sup>th</sup>, 2019. Defendant Rusty Flathmann filed a Motion to Dismiss Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11<sup>th</sup>, 2019. Defendant Olishia Gaffney filed a Motion to Dismiss

Plaintiff's Complaint, Motion to Compel Arbitration, and Motion to Stay State Court Proceedings on November 11<sup>th</sup>, 2019.

The parties were before the Court on Monday, December 16<sup>th</sup>, 2019, to take up these Motions. Judge Grace Gilchrist Knie issued an Order on January 7<sup>th</sup>, 2020, denying the Defendants' Motion to Dismiss and Compel Arbitration. On January 17<sup>th</sup>, 2020, Defendants filed a Motion to Alter, Amend, and/or Reconsider the Order regarding Defendants' Motion to Compel Arbitration.

**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 17<sup>th</sup>, 2020, is respectfully denied.

**IT IS SO ORDERED.**

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

February 13th, 2020  
Spartanburg, South Carolina



Spartanburg Common Pleas

**Case Caption:** Betty Nanney , plaintiff, et al VS Thi Of South Carolina At  
Spartanburg, Llc , defendant, et al

**Case Number:** 2019CP4203075

**Type:** Order/Other

IT IS SO ORDERED.

S/GRACE GILCHRIST KNIE - 2760

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STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Betty Nanney, by and through her Attorney-  
In-Fact, Leslie Nanney

Plaintiffs,

v.

THI of South Carolina at Spartanburg, LLC  
d/b/a Magnolia Manor- Spartanburg; Rusty  
Flathmann; Laura Anne Winn; and Olishia  
Gaffney

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No: 2019-CP-42-

**SUMMONS**

(Negligence/Recklessness)

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

s/ Gary W. Poliakoff

GARY W. POLIAKOFF S.C. Bar # 4488

[atty@gpoliakoff.com](mailto:atty@gpoliakoff.com)

RAYMOND P. MULLMAN, JR. S.C. Bar #8662

[rmullmanjr@gmail.com](mailto:rmullmanjr@gmail.com)

Poliakoff & Associates, P.A.

215 Magnolia Street

P. O. Box 1571

Spartanburg, SC 29304

(864) 582-5472

*And*

LAW OFFICE OF ALBERT V. SMITH, PA  
Albert V. Smith, Esq.,  
819 John B. White Sr. Blvd  
Spartanburg, SC 29304  
(864) 585-8174

Date: September 4, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

C.A. No: 2019-CP-42-

Betty Nanney, by and through her Attorney-  
In-Fact, Leslie Nanney

Plaintiffs,

**COMPLAINT**

(Negligence/Recklessness)

v.

THI of South Carolina at Spartanburg, LLC  
d/b/a Magnolia Manor- Spartanburg; Rusty  
Flathmann; Laura Anne Winn; and Olishia  
Gaffney

Defendants.

The Plaintiff, Betty Nanney, by and through her attorney-in-fact, Leslie Nanney, does hereby respectfully allege as follows:

**PARTIES & JURISDICTION**

1. That the Plaintiff, Betty Nanney, is a citizen and resident of Spartanburg County, State of South Carolina. Plaintiff brings this action for damages recoverable pursuant to §15-5-90, Code of Laws of South Carolina (1976).
2. That the Plaintiff, Betty Nanney, was a resident of THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg (“Magnolia Manor-Spartanburg”) during the relevant time period.

3. That upon information and belief, Magnolia Manor- Spartanburg is a corporation operating within the State of South Carolina, with a registered agent in the State of South Carolina.
4. Upon information and belief, Rusty Flathamnn is a citizen and resident of South Carolina and is doing business in the County of Spartanburg, State of South Carolina. Upon information and belief, Rusty Flathmann, at all times relevant hereto was an agent of Magnolia Manor-Spartanburg as a member of the governing body and an employee of Fundamental Administrative Services as Regional Director of Operations Pursuant to 42 C.F.R. § 483.75(d), said Defendant is liable and legally responsible for the operation of the facility.
5. Upon information and belief, Laura Anne Winn is a citizen and resident of South Carolina and is doing business in the County of Spartanburg, State of South Carolina. Upon information and belief, Laura Anne Winn, at all times relevant hereto was a managing employee of Magnolia Manor-Spartanburg as the licensed Administrator and a member of the governing body of Magnolia Place-Spartanburg. Pursuant to 42 C.F.R. § 483.75(d), said Defendant is liable and legally responsible for the operation of the facility.
6. Upon information and belief, Olishia Gaffney is a citizen and resident of South Carolina and is doing business in the County of Spartanburg, State of South Carolina. Upon information and belief, Olishia Gaffney, at all times relevant hereto was a managing employee of Magnolia Manor-Spartanburg as Director of Nursing and a member of the governing body of Magnolia Place-Spartanburg. Pursuant to 42 C.F.R. § 483.75(d), said Defendant is liable and legally responsible for the operation of the facility.
7. That upon information and belief, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney are members of the governing body of Magnolia Manor-Spartanburg. Federal

regulations states that “the facility must have a governing body, or designated persons functioning as a governing body, that is legally responsible for establishing and implementing policies regarding the management and operation of the facility.”

8. That upon information and belief, at all times relevant hereto, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney were involved in the operation and/or management of this nursing home for profit. Further, at all times relevant hereto, the individual Defendants exerted significant managerial and operational control over Magnolia Manor-Spartanburg, and that such control was so extensive and pervasive that Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney actually operated and managed Magnolia Manor-Spartanburg, and did business as said facility.
9. That the Court has jurisdiction over the parties and subject matter.
10. That the acts and delicts referred to herein occurred at Defendants’ facility in the County of Spartanburg, State of South Carolina.

**GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS**

11. Relevant and consistent allegations contained in paragraphs 1-10 are incorporated by reference as if written verbatim herein.
12. On October 28, 2016, Betty Nanney was admitted to the Defendants’ skilled nursing facility for continued therapy after an emergent Left Hemicraniectomy caused right-sided paralysis following a ruptured aneurysm of the brain.
13. On October, 29, 2016, a physical therapy assessment was done at Defendants’ facility which stated that Betty was a high fall risk and required hands on assistance to stand, transfer, and for bed mobility.

14. The skilled nursing daily notes stated that Betty Nanney was “two-person physical assist with all transfers.”
15. The admission nursing fall risk assessment for Betty Nanney was 20 with 10 being considered high risk. Interventions as a result of this score were listed as, “helmet, side rails, position, Hoyer lift.”
16. Physical Therapy at Magnolia Manor-Spartanburg began treatment on October, 29, 2016, and the initial evaluation stated that Betty Nanney had “no pain.”
17. Sometime after October 29, 2016, Betty suffered an acute injury that Defendant failed to document, assess, and report in an effort to cover up the incident. On November, 3, 2016 the nurse notes stated, “Resident tearful when flexing right leg. Pain at inner thigh area near groin. Once leg moved back to extended position, relief from pain. Pain med given. On MD book for evaluation. Facial grimacing, tearful.”
18. On November 3, 2016, the Nurse Practitioner wrote, “The patient appears to be in more discomfort with passive range of motion of the right lower extremity than anywhere else. Diagnosis: acute pain. Plan: Continue scheduled Tylenol. Start scheduled Tramadol 25 mg. via PEG before meals and at bedtime with the Tylenol.
19. On November 4, 2016, the Physical Therapist documented, “Nursing reports increase in pain in right lower extremity to touch in hip area.” Update to treatment approach, “continue with transfer, bed mobility, and core strengthening to improve bed mobility.”
20. On November, 3, 2016, the nurse notes stated, “Right leg pain. On MD book.
21. On November 7, 2016, the Nurse Practitioner wrote, “I was asked to provide reevaluation of right leg pain with recent medication adjustments. This the patient

- was placed on Tylenol and tramadol 25 mg via PEG a.c. and at bedtime. The Physician came and saw the patient and increased her baclophen. She still has significant pain to her right leg which appears to be towards the right hip however due to her globally aphasic it is difficult to ascertain where exactly her discomfort is. Therapy and nursing of both seen the same. She appears comfortable at rest however she appears significantly uncomfortable with some palpation and range of motion of the upper leg.” PLAN: X-Ray of the right hip and pelvis.
22. On November 7, 2016, six days after Betty Nanney first complained of right leg and hip pain, an X-ray revealed a painful fracture of the right femur.
  23. Betty Nanney was transferred to Spartanburg Regional Hospital where she underwent surgery to repair the fracture. The emergency room Physician documented, “Comes from Mag Manor with suspected fall.”
  24. There is no documentation regarding how the fracture occurred; however, per the medical record, Betty Nanney was unable to move herself to sustain an injury and certainly could not pick herself up off the floor after a traumatic event
  25. That the Defendants and employees negligently and carelessly failed to properly manage, operate, and provide care to and keep Betty Nanney safe.
  26. That, upon information and belief, Betty Nanney’s health conditions were caused, aggravated, and exacerbated by the Defendants’ repeated failure to properly supervise her and monitor her.
  27. These deviations from reasonable care were the proximate causes of conscious pain and suffering, and a fracture of the right femur.

28. Upon information and belief, Defendants failed to provide adequate and proper nursing and custodial services to Betty Nanney. Further, that the Defendants, directly or indirectly, received federal and state funds as reimbursement for the care of residents including Betty Nanney.
29. That while residing at Defendants' facility, Betty Nanney was damaged and injured as a result of neglect, negligence, and violations of industry standards and best practices for nursing and custodial care.
30. That Betty Nanney was a resident of Defendants' facility from admission on October 28, 2016, until November 7, 2016, after her fall resulting in a painful right femur fracture.
31. That during Betty Nanney's residency at Magnolia Manor-Spartanburg, the acts and delicts of Defendants caused, and were the proximate causes of Betty Nanney's pain and suffering, right femur fracture, and medical bills.
32. That the provisions of the Omnibus Reconciliation Act of 1987 ("OBRA") were applicable with regard to the administration and operation of the facility and the provision of care and services to Plaintiff throughout the residency.
33. Defendants were under an obligation to follow all rules and regulations of OBRA as well as all applicable state and federal laws, rules, regulations, and guidelines including S.C. Regulations 61-17, the Board of Nursing Advisory Opinions, the South Carolina Adult Protection Act, the South Carolina Nurse Practice Act, S.C. Code ' 40-33-5 et. seq., and the South Carolina Long Term Health Care Administrators statute, S.C. Code 40-35-5 et seq.

34. Defendants were under an obligation to follow the provisions and standards of the Federal Nursing Home Act applicable to the administration and operation of the facility and the provision of services, care and treatment as well as all applicable state laws, rules, regulations, and guidelines including but not limited to The Adult Protection Act of South Carolina Code § 43-35-5, et. seq.; South Carolina Department of Health and Environmental Control regulations for Nursing Homes at Regulation 61-17, et. seq.; the South Carolina Nursing Practice Act; Board of Nursing Advisory Opinions; South Carolina Code of Laws Title 40 Chapter 35; and South Carolina Code of Regulations Chapter 93.
35. That the Defendants were liable and responsible for the acts and delicts of their employees, agents, and servants under the principle of respondeat superior, and actual and apparent agency.
36. That the Defendants held Magnolia Manor-Spartanburg out to the State of South Carolina, the South Carolina Department of Health and Environmental Control, the public at large, and to Betty Nanney and her family, specifically, as being:
- a. skilled in the performance of nursing, rehabilitative, and other medical support services;
  - b. properly staffed, supervised and equipped to meet the total needs of its residents;
  - c. able to specifically meet the total nursing, personal care, medical, and physical therapy needs of its residents; and,
  - d. Licensed by the South Carolina Department of Health and Environmental Control and complying on a continual basis with all state and federal rules, regulations, and standards established for nursing homes in South Carolina.
37. That the Defendants held Magnolia Manor-Spartanburg out to the United States of America, the Centers for Medicare and Medicaid Services, the public at large, Betty Nanney and her family, specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.

38. To protect nursing home residents like Plaintiff, the federal government mandates that if a nursing home voluntarily accepted Medicare or Medicaid funds, the nursing home would be required to follow strict mandates for patient safety, documentation, and costs and expenditures. These mandates became known as the OBRA regulations at 42 CFR 483.1- et seq. For example, one of the regulations simply states, "skilled nursing facilities participating in Medicare must meet certain specified requirements." 42 C.F.R. 483.1.
39. The regulations are designed to reduce or eliminate accidents, assure proper staffing and supervision, and establish and maintain a reasonable quality of life for each resident.
40. OBRA regulations go to great lengths to ensure nursing home patients will be "in an environment that promotes maintenance or enhancement of [resident's] quality of life." 42 C.F.R. 483.10.
41. They state that each patient "must" receive, and the facility "must" provide the necessary care and services to "attain or maintain the highest practicable physical, mental, and psychosocial well-being[.]" See e.g. 42 C.F.R. 483.25.
42. The OBRA regulations require that each nursing home has sufficient staff to provide the necessary care and services. 42 C.F.R. 483.35(a).
43. The facility must provide services by sufficient numbers on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans.
44. Defendants specifically violated the applicable standard for the administration of a nursing home found at §483.70 which expressly states: "A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-

- being of each resident.”
45. Defendants knew or should have known that the US GAO (2009) found that the most poorly performing nursing homes in the United States tended to be owned by for-profit chains.
  46. Defendants knew or should have known that studies have found that poor nursing home quality is directly related to inadequate staffing levels (Harrington et al. 2000; US Centers for Medicare and Medicaid Services [CMS] 2001; Schnelle et al. 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).
  47. Defendants knew or should have known that nurse staffing levels have been documented to have a positive impact on both the process and the outcomes of nursing home care, such as improved functional status, better mortality rates, and fewer deficiencies for poor quality (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Castle and Engberg 2007, 2008; Castle 2008).
  48. Defendants knew or should have known that a systemic review of 87 research articles and reports from 1975 to 2003 found that high total staffing levels, especially licensed staff, were associated with higher quality of care (Bostick et al. 2006).
  49. Defendants knew or should have known that the Relationship of Nursing Home Staffing to Quality of Care at HSR: Health Services Research 39:2 (April 2004) study is supported by other correlational data documenting a relationship between staffing (particularly RNs) and a variety of outcomes, including: lower death rates, higher rates of discharges to home, improved functional outcomes such as fewer urinary tract infections, lower urinary catheter use, and less antibiotic use (Linn, Gurel, and Linn

- 1977; Nyman 1988; Munroe 1990; Cherry 1991; Spector and Takada 1991; Aaronson, Zinn, and Rosko 1994; Bliesmer et al. 1998; Harrington et al. 2000; U.S. Department of Health and Human Services 2000b).
50. Defendants knew or should have known that inadequate staffing has been associated with inadequate feeding assistance during meals, poor skin care, lower activity participation, and less toileting assistance (Spector and Takada 1991; Kayser-Jones 1996, 1997; Kayser-Jones and Schell 1997).
  51. Defendants knew or should have known that lower staffing levels, especially RN staffing, translate into lower labor costs, which appears to be a management strategy by the top 10 chains as well as other for-profit facilities to reduce costs. Nurse Staffing and Deficiencies in the Largest For-Profit Nursing Home Chains and Chains Owned by Private Equity Companies. DOI: 10.1111/j.1475-6773.2011.01311.x
  52. Defendants knew or should have known that low staffing levels are a major concern because low staffing, especially RN staffing, have been associated with more federal deficiencies and poorer resident outcomes as noted in previous studies (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Bostick et al. 2006; Castle and Engberg 2007, 2008; Castle 2008; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).
  53. Defendants knew or should have known that a clear link has been demonstrated between lower nurse staffing levels in nursing homes and adverse patient outcomes.
  54. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(6) "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult

- including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services. Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death. Noncompliance with regulatory standards alone does not constitute neglect.
55. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for their own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death.
56. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11), a "Vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for their own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.
57. Plaintiff was a resident of Magnolia Manor-Spartanburg and was therefore a vulnerable adult under the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11).
58. S.C. Regulation 61-17 Section 603(A) states that the facility must meet the following standard: "There shall be direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs.[care plans]"

59. S.C. Regulation 61-17 Section 605(A) states that the facility must meet the following standard: "An adequate number of licensed nurses shall be on duty to meet the total nursing needs of residents. Licensed nursing staff shall be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation.
60. S.C. Regulation 61-17 Section 605(B) states that the facility must meet the following standard for unlicensed Nursing Staff: "The required number of nurse aides and other unlicensed nursing staff shall be determined by the number of residents assigned to beds at the facility. Additional staff members shall be provided if the minimum staff requirements are inadequate to provide appropriate care and services to the residents of a facility."
61. S.C. Regulation 61-17 Section 601(E) states that the facility must meet the following standard regarding staffing information: "Time schedules shall be maintained indicating the numbers and classification of all staff, including relief staff, who work on each shift of duty. The time schedules shall reflect all changes so as to indicate who actually worked."
62. S.C. Regulation 61-17 Section 601(H) states that the facility must meet the following standard regarding third party providers: "When a facility engages a source other than the facility to provide services normally provided by the facility, *e.g.*, staffing, training, recreation, meal service, social services, professional consultant, maintenance, transportation, there shall be a written agreement with the source that describes how and when the services are to be provided, the exact services to be provided, and the requirement that these services are to be provided by qualified individuals. The source

- shall comply with this regulation in regard to resident care, treatment, services, and rights.
63. S.C. Regulation 61-17 Section 607(A) states that the facility must meet the following standard regarding training: "Staff members shall be provided the necessary training to perform the duties for which they are responsible."
64. S.C. Regulation 61-17 Section 607(B) states that the facility must meet the following standard regarding training: "Before performing any duties, all newly-hired staff members shall be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members shall be instructed in the provisions of S.C. Code Section 43-35-5 et seq., "Omnibus Adult Protection Act" and S.C. Code Section 44-81-10 et seq., "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in this regulation.
65. S.C. Regulation 61-17 Section 607(C) states that the facility must meet the following standard regarding training: "All staff shall be provided in-service training programs that identify training needs related to problems, needs, care of residents and infection control and are sufficient to assure staff's continuing competency. Training for the tasks each staff member performs shall be conducted in order to provide the care, treatment, procedures, and/or services delineated in Section 1000."
66. S.C. Regulation 61-17 Section 601(D) states that the facility must meet the following standard regarding employee information: "There shall be accurate current information maintained regarding all staff members of the facility that shall include:
1. Name, address and telephone number;
  2. Date of hire;

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

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

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

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

- knowledge;
  - o. consulting to improve the practice of nursing; and
  - p. performing additional acts that require special education and training and that are approved by the board.
69. S.C. Regulation 61-17 Section 803(B) states that the facility must meet the following standard regarding the resident's Individual Care Plan (ICP): The ICP shall describe:
- 1. The needs of the resident, including the services that are to be furnished, *i.e.*, what assistance, how much, who will provide the assistance, how often, and when;
  - 2. Advance directives and healthcare power-of-attorney, as applicable;
  - 3. Recreational and social activities that are suitable, desirable, and important to the resident;
  - 4. Dietary needs and preferences of resident as approved by a physician;
  - 5. Discharge planning, to include assessing continuing care needs and developing a plan designed to assure the resident's needs will be met after discharge or transfer.
70. S.C. Regulation 61-17 Section 805(B) states that the facility must meet the following standard regarding the resident's Electronic Resident Records: "A facility that maintains electronic records shall:
- 1. Retain the hard copy originals of any materials that cannot be electronically stored;
  - 2. Employ an off-site backup storage system as protection in the event that the on-site system is damaged or destroyed;
  - 3. Use an imaging mechanism that is able to copy documents with signatures;
  - 4. Assure that records, once put in electronic form, are unalterable.
71. S.C. Regulation 61-17 Section 805(C) states that the facility must meet the following standard regarding the resident's Electronic Resident Records: "Electronic signatures may be used any place in the resident or outpatient record that requires a signature, provided signature identification can be verified and an electronic signature may be legally used. Electronic authorization shall be limited to a unique identifier (confidential code) used only by the individual making the entry to preclude the improper or unauthorized use of any electronic signature.

72. The facility as a health care provider maintains electronic records which requires the facility to maintain an audit trail. See the requirements of 45 CFR §164.312.
73. The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's electronic health records (EHR). For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record.
74. The audit trail shows what the provider did with the records—e.g., simply reviewed them, prepared a note, or edited a note. Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail.
75. The audit trail cannot be erased and all events related to the access of a patient's EHR are permanently documented in the audit trail.
76. 45 C.F.R. § 164.306(a)(1) commands the facility . . . to "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information [that it] creates, receives, maintains, or transmits;"
77. 45 C.F.R. § 164.304 provides that "availability" in this context means "that data or information is accessible and useable upon demand by an authorized person;"
78. 45 C.F.R. § 164.308(a)(7)(ii) provides that a facility . . . must "[e]stablish and implement procedures to create and maintain retrievable exact copies of electronic protected health information;"
79. 45 C.F.R. § 164.312(b) provides that a facility . . . must "[i]mplement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information;"

80. 45 C.F.R. § 170.210(b) requires that "[t]he date, time, patient identification, user identification . . . must be recorded when electronic health information is created, modified, accessed, or deleted; and an indication of which action(s) occurred and by whom must be recorded;"
81. 21 C.F.R. § 11.10(e) provides that a facility shall employ procedures and controls including the "[u]se of secure, computer generated, time-stamped audit trails to independently record the date and time of operator entries and actions that create, modify, or delete electronic records" and that "[s]uch audit trail documentation shall be retained for a period at least as long as that required for the subject electronic records . . . ;"
82. 21 C.F.R. § 11.10(k)(2) states that a facility shall employ appropriate controls over systems documentation including "[r]evision and change control procedures to maintain an audit trail that documents time-sequenced development and modification of systems documentation;"
83. 42 U.S.C. § 1320d-2(d)(2) provides that a facility . . . "shall maintain reasonable and appropriate administrative, technical, and physical safeguards —(A) to ensure the integrity and confidentiality of the [health] information; (B) to protect against any reasonably anticipated—(I) threats or hazards to the integrity of the information; and (ii) unauthorized uses or disclosures of the information. . . ;"
84. 42 U.S.C. § 1320d(6) provides that "individually identifiable health information" is defined to include "any information . . . created or received by a health care provider . . . [that] relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future

- payment for the provision of health care to an individual, and . . . identifies the individual; or . . . can be used to identify the individual"
85. According to §483.20 applicable to nursing homes, a Resident Assessment requires the facility to provide with ongoing assessment information necessary to develop a care plan, to provide the appropriate care and services for each resident, and to modify the care plan and care/services based on the resident's status. The facility is expected to use resident observation and communication as the primary source of information when completing the RAI. In addition to direct observation and communication with the resident, the facility should use a variety of other sources, including communication with licensed and non-licensed staff members on all shifts and may include discussions with the resident's physician, family members, or outside consultants and review of the resident's record.
  86. According to Defendants' Nursing Policies and Procedures regarding physician communication and changes of condition, the facility is required to documents all assessments and changes in condition:
  87. According to §483.20 applicable to nursing homes related to Comprehensive Care Plans states: The facility must develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care.
  88. The baseline care plan must:
    - (i) Be developed within 48 hours of a resident's admission.
    - (ii) Include the minimum healthcare information necessary to properly care for a resident including, but not limited to—

- (A) Initial goals based on admission orders.
  - (B) Physician orders.
  - (C) Dietary orders.
  - (D) Therapy services.
  - (E) Social services.
  - (F) PASARR recommendation, if applicable.
89. Defendants' facility had a duty to properly assess, care plan, and attempt interventions to prevent falls, and other preventable injuries.
90. According to §483.25 related to Quality of Care requires the facility to provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.
91. According to §483.25(d) related to Accidents, the facility must ensure that:
- (1) The resident environment remains as free from accident hazards as is possible; and
  - (2) Each resident receives adequate supervision and assistance devices to prevent accidents.
92. S.C. Regulation 61-17 Section 701(A) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall maintain a record of each accident and incident, including each serious accident and incident as defined in Section 701.B, involving residents or staff members or volunteers, occurring in the facility or on the facility grounds. A facility's record of each accident and incident shall be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures, and retained by the facility for six (6) years after the resident stops receiving services.

93. S.C. Regulation 61-17 Section 701(E) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall retain a copy of every serious accident and incident with all of the information provided to the Department and the names, injuries, and treatments associated with each resident, staff, and/or visitor involved. A facility shall retain all serious accident and incident records for six (6) years after the resident stops receiving services."
94. S.C. Regulation 61-17 Section 801(B) states that the facility must meet the following standard regarding documentation in the resident record: "Contents of the resident record may be stored in separate files, in separate areas within the facility, and the record shall include the following information:
1. Medical history and physical examination;
  2. Consent form for treatment signed by the resident or his legal representative;
  3. Care and services agreement;
  4. Healthcare directives and special information, *e.g.*, advance directive information, do-not-resuscitate (DNR) orders, and allergies;
  5. **Incidents involving the resident;**
  6. Medical treatment;
  7. Orders, including telephone and standing orders, for all medication, care, services, therapy, procedures, and diet from physicians or other legally authorized healthcare providers, which shall be completed prior to, or at the time of admission, and subsequently, as warranted;
  8. Individual Care Plan;
  9. Provisions for routine and emergency medical care, to include the name and telephone number of the resident's physician;
  10. Assessments and progress notes, *e.g.*, dietary, activity, therapy;
  11. Record of administration of each dose of medication;
  12. Record of the use of restraints, if applicable, including time, type, reason and authority for applying;
  13. Treatment, procedure, wound care report (dictated or written into the record after treatment, procedure, or wound care) to include at least:
    - a. Description of findings;
    - b. Techniques utilized to perform treatments and procedures;
    - c. Specimens removed, if applicable;
    - d. Name of provider;
    - e. Progress notes generated by physicians and healthcare professionals;

- f. Notes of observation, including temperature, pulse, respiration, blood pressure and weight when indicated by physician's orders or by a change in the resident's condition;
- g. Special procedures and preventive measures performed, *e.g.*, isolation for symptoms, diagnosis, and/or treatment of infectious conditions including but not limited to tuberculosis, influenza, pneumonia, therapies;
- h. Reports of all laboratory, radiological, and diagnostic procedures along with tests performed and the results appropriately authenticated;
- i. Consultations by physicians or other healthcare professionals;
- j. Photograph of resident, if the resident or his responsible party approves;
- k. Date and hour of discharge or transfer, as applicable;
- l. Discharge and/or transfer summary, including care and condition at discharge or transfer, date and time of discharge or transfer, instructions for self-care, instructions for obtaining post-treatment or procedure emergency care, and signature of physician authorizing discharge or transfer;
- m. Date and circumstances of death, as applicable.

95. The federal regulation at §483.75(l) related to documentation in the clinical records requires: "In accordance with accepted professional standards and practices, the facility must maintain medical records on each resident that are—
- (i) Complete;
  - (ii) Accurately documented;
  - (iii) Readily accessible; and
  - (iv) Systematically organized"
96. Defendants' facility had a duty to document the respective interventions and incidents adequately in the nurses' notes.
97. S.C. Regulation 61-17 Section 701(D) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall submit a written report of its investigation of every serious accident and incident to the Department within five (5) days of the serious accident or incident. A facility's written report to the Department shall provide at a minimum:
- 1. Facility name;
  - 2. License number;
  - 3. Type of accident or incident;
  - 4. Date accident or incident occurred;
  - 5. Number of residents directly injured or affected;

6. Resident record number or last four (4) digits of Social Security Number;
7. Resident age and sex;
8. Number of staff directly injured or affected;
9. Number of visitors directly injured or affected;
10. Name(s) of witness(es);
11. Identified cause of accident or incident;
12. Internal investigation results if cause unknown; and
13. Brief description of the accident or incident including the location of occurrence and treatment of injuries."

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

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

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

- management, pharmaceutical services, meal service operations, emergency procedures, fire prevention, maintenance, housekeeping and infection control, the operation of the facility, and other special care and procedures as identified in this section. The policies and procedures shall address the provision of any special care offered by the facility that would include how the facility shall meet the specialized needs of the affected residents such as Alzheimer's disease and/or related dementia, physically or developmentally disabled, in accordance with any laws that pertain to that service offered, for example, Alzheimer's Special Care Disclosure Act."
100. S.C. Regulation 61-17 Section 500(C) states that the facility must meet the following standard: "All policies and procedures shall:
1. Establish a time period for review of policies and procedures in writing and such reviews shall be documented;
  2. Be revised as appropriate in order to reflect actual facility practice; and
  3. Be accessible to staff, printed or electronically, at all times."
101. The facility Administrator shall be licensed as a nursing home Administrator in accordance with S.C. Code Section 40-35-30. In addition, all other applicable provisions of S.C. Code Title 40, Chapter 35, shall be followed.
102. S.C. Regulations applicable to nursing homes found in 61-17 Section 602 requires that "each facility shall have a full-time licensed Administrator".
103. S.C. Code Section 40-35-110 states that "Misconduct" includes the following:
- (1) acting in a manner inconsistent with the health or safety of the patients of the nursing home or community residential care facility;
  - (2) failing to ensure that the nursing home or community residential care facility in which he is an administrator complies with the provisions of law and regulations of the licensing or supervising authority or agency, whether federal, state, or local,

having jurisdiction over the operation and licensing of the nursing home or community residential care facility;

(3) intentional or knowing, direct or indirect, violation of or the aiding and abetting in the violation of this chapter or a regulation promulgated under this chapter;

(4) failing to operate a nursing home or community residential care facility in a manner that ensures the safety, health, and welfare of the patients;

(5) use of a false, fraudulent, or forged statement in the practice of nursing home administration or community residential care facility administration.

104. The federal regulation at §483.75(j) requires that: “The facility must provide or obtain laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.”
105. The intent of this regulation is to assure that laboratory services are accurate and timely so that the utility of laboratory testing for diagnosis, treatment, prevention or assessment is maximized. The facility is responsible for quality and timely laboratory services whether or not services are provided by the facility or an outside agency.
106. The federal regulation at §483.40(a) requires that: “The facility must ensure that
  - (1) The medical care of each resident is supervised by a physician; and
  - (2) Another physician supervises the medical care of residents when their attending physician is unavailable.”
107. The intent of this regulation is to ensure the medical supervision of the care of nursing home residents by a personal physician.
108. The federal regulation at §483.75(k) requires that: “The facility must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.”
109. That while a Facility, Betty Nanney suffered an incident that resulted in a fractured

- femur requiring surgery, medical bills, and pain and suffering.
110. That the facility failed to keep Betty Nanney safe from preventable incidents resulting in injury.
  111. That the facility failed to provide adequate supervision for Betty Nanney.
  112. That the facility failed to ensure proper preventative measures were in place to keep resident safe.
  113. That the facility failed to properly assess resident.
  114. That the facility failed to properly train staff.
  115. That the facility failed to abide by applicable federal and state laws governing long term care facilities and skilled nursing facilities
  116. Defendants' facility had a duty to ensure that proper preventative measures were in place to keep the resident safe and free from avoidable and preventable injuries.
  117. Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Betty Nanney.
  118. That at all times relevant hereto, Defendants were required to exercise due care in the supervision and care of their residents to prevent the occurrence of new adverse health conditions and to prevent currently existing adverse health conditions from deteriorating.
  119. That the facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet the resident's medical nursing, nutritional, mental, and psychological needs as identified in the comprehensive assessment.

120. That the facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.
121. That several types of personnel have essential roles in the assessment, care planning, prevention, and treatment of falls, incidents, and injuries of unknown origin.
122. That evaluation, multi-disciplinary documentation of treatment, and detailed individual care plans must be developed and implemented.
123. That the acts and delicts of Defendants caused, and were the proximate causes of, Betty Nanney's injuries, loss of dignity, hospitalization, conscious pain and suffering, medical bills and disability.
124. That the Defendants were jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants.
125. That the Defendants hold themselves out as specialists in the field of adult - geriatric care with the expertise necessary to maintain the health, safety, and highest practicable quality of life of persons unable to adequately care for themselves.
126. That the Defendants were under a duty to provide reasonable, appropriate and adequate care to Betty Nanney pursuant to state and federal laws, rules, regulations, guidelines, and existing industry standards.
  - a. Defendants failed to provide the highest practicable level of care, training, and competency.
  - b. Defendants repeatedly failed to maintain nursing and other staffing at levels necessary to meet the needs of Betty Nanney.
  - c. Defendants failed to provide proper and timely assessments, and provide two person physical assist with all transfers, throughout Betty Nanney's stay and on the day of the subject fall.
  - d. Defendants repeatedly failed to follow proper skilled nursing care standards

- e. to maximize the health, safety, and well-being of Betty Nanney.
  - Defendants repeatedly failed to ensure that Betty Nanney was safe, free from abuse, neglect, and accorded the dignity and respect owed.
- 127. Defendants failed to establish and implement a resident care plan for Betty Nanney based upon her needs.
- 128. That at all times pertinent hereto, Betty Nanney resided at the above-named facility and as such was under the exclusive control and care of Defendants and their employees, agents, officers, and servants while a resident.
- 129. That the Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Betty Nanney.
- 130. That, upon information and belief, at all times prior to and during Betty Nanney's residency, the facility was understaffed, , and failed to properly screen, train, supervise, and discipline their staff, and failed to put them in suitable positions for their skills, experience, and competence.
- 131. Defendants owed a duty to Betty Nanney to provide the same level of care and treatment as any other reasonable, prudent, similar business that owns, operate, manages, and/or controls a nursing facility would have provided under the same or similar circumstances taking into consideration Betty Nanney's known medical condition.

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

- 132. Relevant and consistent allegations contained in paragraphs 1-131 are incorporated by reference as if written verbatim herein.
- 133. That Defendants had a duty of due care to their patients and residents, to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.

134. 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 Betty Nanney. 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 Betty Nanney, which was required by law and which was necessary for his health and safety;
  - c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Betty Nanney;
  - d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Betty Nanney;
  - 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 properly monitor Betty Nanney;
  - k. failing to appropriately assess Betty Nanney's condition;
  - l. failing to update the written plan of care to include necessary interventions to promote safety;
  - m. failing to prevent Betty Nanney from suffering a preventable injury;
  - n. failing to monitor and assess Betty Nanney adequately for pain and discomfort;
  - o. failing to treat Betty Nanney with dignity and respect;
  - p. failing to exercise due care; and
  - q. by other negligent acts and/or omissions yet to be determined or defined.
135. That the Defendants independently and through their agents, servants, and employees demonstrated conscious and intentional disregard of and indifference to the rights and safety of Betty Nanney and other patients at Magnolia Manor-Spartanburg as demonstrated by:
- a. Their business practice of attempting to care for residents with an inadequate number of trained staff, which their officers and managers knew or should have

known was reasonably likely to result in injury to Betty Nanney and their other patients; and

- b. Their business practice of failing to supervise and train their staff in order to ensure that their policies and procedures were known to and adhered to by licensed staff, and that licensed staff practiced within their scopes of practice.
136. That as a result, Betty Nanney experienced prolonged conscious pain and suffering, and incurred substantial medical bills.
137. That the aforesaid acts and delicts were the sole and proximate cause of Betty Nanney's damages, and injuries.

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

138. Relevant and consistent allegations contained in paragraphs 1-137 are incorporated by reference as if written verbatim herein.
139. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff Betty Nanney was considered a vulnerable adult.
140. That, according to the South Carolina Adult Protection Act, neglect means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.
141. That Defendants failed to provide care to Betty Nanney to keep her safe and to prevent injuries from a fall.
142. That Defendants failed to supervise Betty Nanney and allowed her to suffer a fall resulting in a right hip fracture.

143. That Defendants failed to provide care, goods, and services to Betty Nanney in the form of fall prevention and failure to assess Betty Nanney's condition.
144. That Betty Nanney trusted in, confided in and relied upon Defendants to use their expertise and discretion for her care.
145. That Defendants had Betty Nanney's trust and reliance on their services and so became responsible for Betty Nanney's health while residing at the nursing home facility.
146. That as a result of aforementioned reliance and trust upon Defendants Betty Nanney's physical, mental, and emotional health was placed in the hands of Defendants.
147. That Defendants received compensation for the care and treatment they were responsible for providing to Betty Nanney during her residency but did not provide that care and treatment.
148. That as a direct and proximate result of Defendants' negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Betty Nanney was severely injured in Magnolia Manor-Spartanburg incurring in medical bills and impairment.
149. That the sole and proximate cause of all the harms, losses, and injuries suffered by Betty Nanney was the combined and concurrent acts and delicts of all the Defendants and their agents acting in a joint venture and integrated enterprise.

**THIRD CAUSE OF ACTION**  
**(Negligent Administration)**

150. Relevant and consistent allegations contained in paragraphs 1-149 are incorporated by reference as if written verbatim herein.

151. That Defendants had a duty of due care to residents; to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.
  152. That Facility was negligently managed and administered by Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney, who were working together to manage and operate the facility.
  153. That the facility was negligently administrated in violation of 42 C.F.R. 483.75 by Defendants who were working jointly to govern, administer, control, manage and operate the facility.
  154. That the Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Betty Nanney.
- More specifically, the Defendants were negligent in the following particulars:
- a. failing to properly supervise as required, and as promised to the Plaintiffs upon admission;
  - b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Betty Nanney, which was required by law and which was necessary for his health and safety;
  - c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Betty Nanney;
  - d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Betty Nanney;
  - 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 properly monitor Betty Nanney;
  - k. failing to appropriately assess Betty Nanney's condition;
  - l. failing to keep Betty Nanney's chart free of inadequate documentation;

- m. failing to prevent Betty Nanney from suffering a fall;
  - n. failing to prevent Betty Nanney from being hospitalized;
  - o. failing to prevent Betty Nanney from sustaining a fracture;
  - p. failing to treat Betty Nanney with dignity and respect;
  - q. failing to exercise due care; and
  - r. by other negligent acts and/or omissions yet to be determined or defined.
155. That as a result, Betty Nanney experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills.
156. That the aforesaid acts and delicts were the sole and proximate cause of Betty Nanney's injuries.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual damages in the sums deemed appropriate by the jury, for the costs of the action, and for such other and further relief as this Court may deem just and proper. In the event that one of more Defendants contend or believe that someone on behalf of Betty Nanney has entered into an agreement to arbitrate any issues related to her stay in Magnolia Manor - Spartanburg, in reliance on 9 USC §4, Plaintiffs demand a trial by jury to resolve all fact issues of whatever nature related to claims that a binding Arbitration Agreement was entered into that would require the submission of the claims raised in this Petition to an arbitrator.

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

*And*

LAW OFFICE OF ALBERT V. SMITH, PA  
Albert V. Smith, Esq.,  
819 John B. White Sr. Blvd  
Spartanburg, SC 29304  
(864) 585-8174

Date: September 4, 2019

|                                        |   |                                     |
|----------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS        |
|                                        | ) |                                     |
| COUNTY OF SPARTANBURG                  | ) | SEVENTH JUDICIAL CIRCUIT            |
|                                        | ) |                                     |
| Betty Nanney, by and through her       | ) | CASE NO. 2019-CP-42-03075           |
| Attorney-In-Fact, Leslie Nanney,       | ) |                                     |
|                                        | ) |                                     |
|                                        | ) |                                     |
|                                        | ) |                                     |
| Plaintiffs,                            | ) |                                     |
|                                        | ) |                                     |
| vs.                                    | ) | <b>DEFENDANT THI OF SOUTH</b>       |
|                                        | ) | <b>CAROLINA AT SPARTANBURG, LLC</b> |
| THI of South Carolina at Spartanburg,  | ) | <b>D/B/A MAGNOLIA MANOR-</b>        |
| LLC d/b/a/ Magnolia Manor-Spartanburg; | ) | <b>SPARTANBURG'S ANSWER TO</b>      |
| Rusty Flathmann; Laura Anne Winn; and  | ) | <b>PLAINTIFF'S COMPLAINT</b>        |
| Olishia Gaffney,                       | ) |                                     |
|                                        | ) |                                     |
|                                        | ) |                                     |
|                                        | ) |                                     |
| Defendants.                            | ) |                                     |
|                                        | ) |                                     |

TO: GARY W. POLIAKOFF, RAYMOND P. MULLMAN and ALBERT SMITH,  
ATTORNEYS FOR THE PLAINTIFF:

The Defendant, THI of South Carolina at Spartanburg, LLC, hereinafter referred to as “this Defendant” or “the Facility,” *subject to and without waiving its right to compel this matter to arbitration*, hereby responds to the allegations set forth in Plaintiff’s Complaint as follows:

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

2. This Defendant is without sufficient knowledge or information to respond to the initial allegations set forth in Paragraph 1 of Plaintiff’s Complaint and therefore denies the same and demands strict proof thereof. Further responding, this Defendant denies the remaining allegations set forth in the above Paragraph and demands strict proof thereof.

3. In responding to Paragraph 2 of Plaintiff's Complaint, this Defendant admits Ms. Nanney was a resident of this Defendant's facility but would crave reference to Ms. Nanney's admissions documents and skilled nursing chart for her dates of residency.

4. This Defendant admits the allegations set forth in Paragraph 3 insofar as they allege this Defendant is a limited liability company operating in South Carolina and has a registered agent in South Carolina. This Defendant denies the remainder of the allegations set forth in the above Paragraph and demands strict proof thereof.

5. The allegations set forth in Paragraphs 4, 5, and 6 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, those allegations are denied.

6. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations set forth above call for legal conclusions, no response is required.

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

8. The allegations set forth in Paragraph 9 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, they are denied.

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

10. In responding to the allegations set forth in Paragraph 11 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

11. In responding to the allegations set forth in Paragraph 12 of Plaintiff's Complaint, this Defendant admits that Ms. Nanney was a resident at the Facility but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency status. The Defendant denies any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant.

12. In responding to the allegations set forth in Paragraphs 13, 14, 15 and 16 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Any allegations inconsistent with those contents or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

13. This Defendant denies the allegations in the first sentence set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof. In responding to the remaining allegations set forth in Paragraph 17 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Any allegations inconsistent with those contents or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

14. In responding to the allegations set forth in Paragraphs 18, 19, 20, 21, 22, 23 and 24 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Any allegations inconsistent with those contents or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

15. This Defendant denies the allegations set forth in Paragraphs 25, 26, 27, 28 and 29 of Plaintiff's Complaint and demands strict proof thereof.

16. In responding to the allegations set forth in Paragraph 30 of Plaintiff's Complaint, this Defendant admits that Ms. Nanney was a resident at the Facility but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency status. The Defendant denies any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant.

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

18. Responding to the allegations set forth in Paragraphs 32, 33, and 34 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

19. This Defendant denies the allegations as set forth in Paragraph 35 of Plaintiff's Complaint.

20. Responding to the allegations set forth in the Paragraphs 36 and 37 of Plaintiff's Complaint, this Defendant affirmatively states that it solely represents it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the

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

21. Responding to the allegations set forth in Paragraphs 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

22. The allegations set forth in Paragraph 57 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent they allege a deviation or standard of care, those allegations are denied and strict proof is demanded thereof.

23. In responding to the allegations set forth in Paragraphs 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, and 85 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, it is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs

call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

24. In responding to the allegations set forth in Paragraph 86 of Plaintiff's Complaint, this Defendant would crave reference to the policies and procedures cited by Plaintiff for their contents. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

25. The allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required or they allege liability, they are denied. Defendant admits it had a duty to comply with the standard of care.

26. In responding to Paragraph 89 of Plaintiff's Complaint, Defendant admits it had a duty to provide skilled nursing care to its residents, including Ms. Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

27. Responding to the allegations set forth in Paragraphs 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, and 108 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of

care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

28. In responding to Paragraph 109 of Plaintiff's Complaint, this Defendant admits that Ms. Nanney suffered a fractured femur would affirmatively assert that the same occurred despite optimal care. Any allegations inconsistent with this response or intended to allege or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

29. This Defendant denies the allegations set forth in Paragraphs 110, 111, 112, 113, 114, and 115 of Plaintiff's Complaint and demands strict proof thereof.

30. In responding to Paragraph 116 of Plaintiff's Complaint, this Defendant admits it had a duty to provide skilled nursing care to its residents, including Ms. Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

31. This Defendant denies the allegations set forth in Paragraph 117 and demands strict proof thereof.

32. In responding to Paragraph 118 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care to its residents, including Ms. Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations

inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

33. Responding to the allegations set forth in Paragraphs 119, 120, 121, and 122 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

34. This Defendant denies the allegations set forth in Paragraphs 123 and 124 of Plaintiff's Complaint and demands strict proof thereof.

35. Responding the allegations in Paragraph 125 of Plaintiff's Complaint, this Defendant affirmatively states that it is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. To the extent the allegations in the above Paragraph are directed at other parties, no response is required.

36. Responding to the allegations set forth in Paragraph 126 of Plaintiff's Complaint, this Defendant admits it has a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or

intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

37. This Defendant denies the allegations set forth in Paragraph 127 of Plaintiff's Complaint and demands strict proof thereof.

38. Responding to the allegations set forth in Paragraph 128 of Plaintiff's Complaint, this Defendant admits Ms. Nanney was under care and treatment of the facility during her residency. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant.

39. This Defendant denies the allegations set forth in Paragraphs 129 and 130 of Plaintiff's Complaint and demands strict proof thereof.

40. Responding the allegations in Paragraph 131 of Plaintiff's Complaint, this Defendant admits that as the sole licensee and operator of the skilled nursing facility at issue in Plaintiff's Complaint, it had a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

41. In responding to the allegations set forth in Paragraph 132 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

42. In responding to the allegations set forth in Paragraph 133 of Plaintiff's Complaint, this Defendant admits those allegations insofar it is alleged this Defendant had a duty to provide skilled nursing care to its residents, including Ms. Nanney but would deny the allegations insofar as they allege a scope of its duty. Further responding, this Defendant affirmatively asserts that the

care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

43. This Defendant denies the allegations set forth in Paragraphs 134, 135, 136 and 137 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

44. In responding to the allegations set forth in Paragraph 138 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

45. The allegations set forth in Paragraph 139 and 140 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, they are denied. Defendant admits it had a duty to comply with the standard of care.

46. This Defendant denies the allegations set forth in Paragraphs 141, 142, 143, 144, 145, 146, 147, 148, and 149 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

47. In responding to the allegations set forth in Paragraph 150 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

48. Responding the allegations in Paragraph 151 of Plaintiff's Complaint, this Defendant admits that as the sole licensee and operator of the skilled nursing facility at issue in Plaintiff's Complaint, it had a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

49. This Defendant denies the allegations set forth in Paragraphs 152, 153, 154, 155 and 156 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

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

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

51. This matter must be stayed as against this Defendant pending the result of arbitration pursuant to a valid arbitration agreement entered into between Plaintiff's decedent and this Defendant pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. This Defendant hereby gives notice of its intent to file a Motion to Stay and compel arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59. This Defendant would allege that some of the injuries or damages sustained by the Plaintiff or Plaintiff's decedent, if any, were due to, caused and occasioned by a natural disease

process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete or partial bar to this action.

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

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

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

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

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

62. This Defendant would affirmatively state that Plaintiff lacks standing to pursue some or all of the claims alleged.

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

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

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

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Kate C. Mettler

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

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

Attorneys for the Defendant THI of South Carolina

at Magnolia Place at Spartanburg, LLC, d/b/a

Magnolia Manor-Spartanburg

Charleston, South Carolina

Dated: October 9, 2019

|                                        |   |                                        |
|----------------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS           |
|                                        | ) |                                        |
| COUNTY OF SPARTANBURG                  | ) | SEVENTH JUDICIAL CIRCUIT               |
|                                        | ) |                                        |
| Betty Nanney, by and through her       | ) | CASE NO. 2019-CP-42-03075              |
| Attorney-In-Fact, Leslie Nanney,       | ) |                                        |
|                                        | ) |                                        |
|                                        | ) |                                        |
|                                        | ) |                                        |
| Plaintiffs,                            | ) |                                        |
|                                        | ) |                                        |
| vs.                                    | ) |                                        |
|                                        | ) |                                        |
| THI of South Carolina at Spartanburg,  | ) | <b>DEFENDANT RUSTY FLATHMANN'S</b>     |
| LLC d/b/a/ Magnolia Manor-Spartanburg; | ) | <b>ANSWER TO PLAINTIFF'S COMPLAINT</b> |
| Rusty Flathmann; Laura Anne Winn; and  | ) |                                        |
| Olishia Gaffney,                       | ) |                                        |
|                                        | ) |                                        |
|                                        | ) |                                        |
|                                        | ) |                                        |
| Defendants.                            | ) |                                        |
|                                        | ) |                                        |

TO: GARY W. POLIAKOFF, RAYMOND P. MULLMAN and ALBERT SMITH,  
ATTORNEYS FOR THE PLAINTIFF:

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

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

2. This Defendant is without sufficient knowledge or information to respond to the initial allegations set forth in Paragraph 1 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. Further responding, this Defendant denies the remaining allegations set forth in the above Paragraph and demands strict proof thereof.

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

4. The allegations set forth in Paragraph 3 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, those allegations are denied.

5. This Defendant admits only that he is a resident of South Carolina. The remaining allegations set forth in Paragraph 4 of Plaintiff's Complaint are denied and demands strict proof thereof.

6. The allegations set forth in Paragraphs 5 and 6 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, those allegations are denied.

7. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations set forth in Paragraph 7 of Plaintiff's Complaint call for legal conclusions, no response is required.

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

9. The allegations set forth in Paragraph 9 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, they are denied.

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

11. In responding to the allegations set forth in Paragraph 11 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

12. In responding to the allegations set forth in Paragraphs 12, 13, 14, 15, and 16 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Further, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the allegations set forth in the above Paragraphs are directed at parties other than this Defendant, no response is required.

13. To the extent this allegation is directed at Defendant, this Defendant denies the allegation in the first sentence set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof. In responding to the remaining allegations set forth in Paragraph 17 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with this response or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

14. In responding to the allegations set forth in Paragraphs 18, 19, 20, 21, 22, 23, and 24 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility,

including Ms. Nanney. Any allegations inconsistent with this response or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

15. This Defendant denies the allegations set forth in Paragraphs 25, 26, 27, 28 and 29 of Plaintiff's Complaint and demands strict proof thereof.

16. In responding to the allegations set forth in Paragraph 30 of Plaintiff's Complaint, upon information and belief, this Defendant admits that Ms. Nanney was a resident at the Facility but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency status. The Defendant denies any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant.

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

18. Responding to the allegations set forth in Paragraphs 32, 33, and 34 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

19. This Defendant denies the allegations set forth in Paragraph 35 of Plaintiff's Complaint.

20. Responding to the allegations set forth in the Paragraphs 36 and 37 of Plaintiff's Complaint, this Defendant affirmatively states that the Facility Defendant is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

21. Responding to the allegations set forth in Paragraphs 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

22. The allegations set forth in Paragraph 57 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied and strict proof is demanded thereof.

23. In responding to the allegations set forth in Paragraphs 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, and 85 of Plaintiff's

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

24. This Defendant denies the allegations set forth in Paragraph 86 of Plaintiff's Complaint to the extent they are directed at this Defendant. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof. To the extent the allegations set forth in Paragraph 86 of Plaintiff's Complaint are directed at parties other than this Defendant, no response is required.

25. The allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, they are denied. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

26. In responding to Paragraph 89 of Plaintiff's Complaint, this Defendant admits the Facility Defendant had a duty to provide skilled nursing care to its residents, including Ms.

Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

27. Responding to the allegations set forth in Paragraphs 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, and 108 of Plaintiff's Complaint, this Defendant admits that the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

28. In responding to Paragraph 109 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with this response or intended to allege or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

29. This Defendant denies the allegations set forth in Paragraphs 110, 111, 112, 113, 114, and 115 of Plaintiff's Complaint and demands strict proof thereof.

30. In responding to Paragraph 116 of Plaintiff's Complaint, this Defendant admits the Facility Defendant had a duty to provide skilled nursing care to its residents, including Ms.

Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

31. This Defendant denies the allegations set forth in Paragraph 117 of Plaintiff's Complaint and demands strict proof thereof.

32. This Defendant denies the allegations set forth in Paragraph 118 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

33. Responding to the allegations set forth in Paragraphs 119, 120, 121, and 122 of Plaintiff's Complaint, this Defendant admits that the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

34. This Defendant denies the allegations set forth in Paragraphs 123 and 124 of Plaintiff's Complaint and demands strict proof thereof.

35. This Defendant denies the allegations set forth in Paragraph 125 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required.

36. Responding to the allegations set forth in Paragraph 126 of Plaintiff's Complaint, this Defendant admits the Facility Defendant had a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the applicable standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

37. This Defendant denies the allegations set forth in Paragraph 127 of Plaintiff's Complaint and demands strict proof thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

38. This Defendant denies the allegations set forth in Paragraph 128 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations set forth in the above Paragraph are directed at parties other than this Defendant, no response is required. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

39. This Defendant denies the allegations set forth in Paragraphs 129 and 130 of Plaintiff's Complaint and demands strict proof thereof. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

40. To the extent the allegations set forth in Paragraph 131 of Plaintiff's Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof. To the extent these allegations are directed parties other than this Defendant, no response is required. Further responding, this Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care to any resident of the Facility, including Ms. Nanney. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

41. In responding to the allegations set forth in Paragraph 132 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

42. To the extent the allegations set forth in Paragraph 133 of Plaintiff's Complaint are directed at this Defendant, they are denied and strict proof is demanded thereof. To the extent these allegations are directed parties other than this Defendant, no response is required.

43. This Defendant denies the allegations set forth in Paragraphs 134, 135, 136, and 137 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

44. In responding to the allegations set forth in Paragraph 138 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

45. The allegations set forth in Paragraph 139 and 140 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, they are denied.

46. This Defendant denies the allegations set forth in Paragraphs 141, 142, 143, 144, 145, 146, 147, 148, and 149 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

47. In responding to the allegations set forth in Paragraph 150 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

48. To the extent they are directed at answering Defendant, Defendant denies the allegations set forth in Paragraphs 151, 152, 153, 154, 155 and 156 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

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

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

50. This matter must be stayed as against this Defendant pending the result of arbitration pursuant to a valid arbitration agreement entered into between Plaintiff's decedent and Facility Defendant pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. This Defendant hereby gives notice of its intent to file a Motion to Stay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Kate C. Mettler

P.O. Box 993, Charleston, SC 29402

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

Attorneys for the Defendant Rusty Flathmann

Charleston, South Carolina

Dated: October 11, 2019

|                                        |   |                                    |
|----------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS       |
|                                        | ) |                                    |
| COUNTY OF SPARTANBURG                  | ) | SEVENTH JUDICIAL CIRCUIT           |
|                                        | ) |                                    |
| Betty Nanney, by and through her       | ) | CASE NO. 2019-CP-42-03075          |
| Attorney-In-Fact, Leslie Nanney,       | ) |                                    |
|                                        | ) |                                    |
|                                        | ) |                                    |
| Plaintiffs,                            | ) |                                    |
|                                        | ) |                                    |
| vs.                                    | ) |                                    |
|                                        | ) |                                    |
| THI of South Carolina at Spartanburg,  | ) | <b>OLISHIA GAFFNEY'S ANSWER TO</b> |
| LLC d/b/a/ Magnolia Manor-Spartanburg; | ) | <b>PLAINTIFF'S COMPLAINT</b>       |
| Rusty Flathmann; Laura Anne Winn; and  | ) |                                    |
| Olishia Gaffney,                       | ) |                                    |
|                                        | ) |                                    |
|                                        | ) |                                    |
| Defendants.                            | ) |                                    |
|                                        | ) |                                    |

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TO: GARY W. POLIAKOFF, RAYMOND P. MULLMAN and ALBERT SMITH,  
ATTORNEYS FOR THE PLAINTIFF:

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

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

2. This Defendant is without sufficient knowledge or information to respond to the initial allegations set forth in Paragraph 1 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof. Further responding, this Defendant denies the remaining allegations set forth in the above Paragraph and demands strict proof thereof.

3. In responding to Paragraph 2 of Plaintiff's Complaint, this Defendant admits Ms. Nanney was a resident of this Defendant's facility but would crave reference to Ms. Nanney's admissions documents and skilled nursing chart for her dates of residency.

4. The allegations set forth in Paragraphs 3, 4, and 5 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent a response is required, those allegations are denied.

5. In responding to the allegations set forth in Paragraph 6 of Plaintiff's Complaint, this Defendant admits she is a resident of South Carolina and served as the Director of Nursing for the Facility and was a member of the governing body during the relevant time period. Any and all remaining allegations are denied and strict proof is demanded thereof.

6. This Defendant denies the allegations set forth in Paragraphs 7 and 8 of Plaintiff's Complaint and demands strict proof thereof. To the extent the allegations set forth above call for legal conclusions, no response is required.

7. The allegations set forth in Paragraph 9 of Plaintiff's Complaint call for pure legal conclusions and therefore no response is required. To the extent a response is required, they are denied.

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

9. In responding to the allegations set forth in Paragraph 11 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

10. In responding to the allegations set forth in Paragraph 12 of Plaintiff's Complaint, this Defendant admits that Ms. Nanney was a resident at the Facility but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency

status. The Defendant denies any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant.

11. In responding to the allegations set forth in Paragraphs 13, 14, 15, and 16 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Any allegations inconsistent with those contents or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

12. This Defendant denies the first sentence allegation set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof. In responding to the remaining allegations set forth in Paragraph 17 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Any allegations inconsistent with those contents or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

13. In responding to the allegations set forth in Paragraphs 18, 19, 20, 21, 22, 23 and 24 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records and skilled nursing chart for their contents. Any allegations inconsistent with those contents or intended to allege damages or liability as to this Defendant are denied and strict proof is demanded thereof.

14. This Defendant denies the allegations set forth in Paragraphs 25, 26, 27, 28 and 29 of Plaintiff's Complaint and demands strict proof thereof.

15. In responding to the allegations set forth in Paragraph 30 of Plaintiff's Complaint, this Defendant admits that Ms. Nanney was a resident at the Facility but would crave reference to the skilled nursing chart and medical records to confirm the date of her admission and residency

status. The Defendant denies any and all allegations inconsistent with those records or intended to allege liability or damages against the Defendant.

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

17. Responding to the allegations set forth in Paragraphs 32, 33, and 34 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

18. This Defendant denies the allegations set forth in Paragraph 35 of Plaintiff's Complaint.

19. Responding to the allegations set forth in the Paragraphs 36 and 37 of Plaintiff's Complaint, this Defendant affirmatively states that the Facility Defendant is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

20. Responding to the allegations set forth in Paragraphs 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

21. The allegations set forth in Paragraph 57 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied and strict proof is demanded thereof.

22. In responding to the allegations set forth in Paragraphs 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, and 85 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

23. In responding to the allegations set forth in Paragraph 86 of Plaintiff's Complaint, this Defendant would crave reference to the policies and procedures cited by Plaintiff for their contents. Any allegations inconsistent with those contents or intended to assert or imply liability as to this Defendant are denied and strict proof is demanded thereof.

24. The allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required or they allege as deviation from the standard of care, they are denied.

25. In responding to Paragraph 89 of Plaintiff's Complaint, this Defendant admits the Facility Defendant had a duty to provide skilled nursing care to its residents, including Ms. Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

26. Responding to the allegations set forth in Paragraphs 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, and 108 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations. This Defendant affirmatively asserts that such statutes and regulations do not establish a standard of care. This Defendant further asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the appropriate standard of care. To the extent that the allegations set forth in the above Paragraphs call for legal conclusions, no response is required. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against this Defendant are denied and strict proof is demanded thereof.

27. In responding to Paragraph 109 of Plaintiff's Complaint, this Defendant would crave reference to Ms. Nanney's medical records for their contents. Any allegations inconsistent with those contents or intended to allege or imply liability and/or damages as to this Defendant are denied and strict proof is demanded thereof.

28. This Defendant denies the allegations set forth in Paragraphs 110, 111, 112, 113, 114, and 115 of Plaintiff's Complaint and demands strict proof thereof.

29. In responding to Paragraph 116 of Plaintiff's Complaint, this Defendant admits the Facility Defendant had a duty to provide skilled nursing care to its residents, including Ms. Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

30. This Defendant denies the allegations set forth in Paragraph 117 and demands strict proof thereof.

31. In responding to Paragraph 118 of Plaintiff's Complaint, this Defendant admits the Facility Defendant is the sole entity that has a duty to provide skilled nursing care to its residents, including Ms. Nanney, in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

32. Responding to the allegations set forth in Paragraphs 119, 120, 121, and 122 of Plaintiff's Complaint, this Defendant admits that as the licensed operator of the skilled nursing facility at issue, the Facility Defendant is subject to certain applicable statutes and regulations.

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

33. This Defendant denies the allegations set forth in Paragraphs 123 and 124 of Plaintiff's Complaint and demands strict proof thereof.

34. Responding the allegations in Paragraph 125 of Plaintiff's Complaint, this Defendant affirmatively states that the Facility Defendant is the sole licensee of the skilled nursing facility at issue in Plaintiff's Complaint which provides skilled nursing care and treatment to its residents in compliance with the governing standard of care. To the extent the allegations in the above Paragraph are directed at other parties, no response is required.

35. Responding to the allegations set forth in Paragraph 126 of Plaintiff's Complaint, this Defendant admits the Facility Defendant had a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the applicable standard of care. This Defendant affirmatively asserts that the care and treatment provided to Ms. Nanney was at all times in compliance with the applicable standard of care. Any and all allegations contained in the above Paragraphs inconsistent with this response or intended to allege liability or damages against the Defendant are denied and strict proof is demanded thereof.

36. This Defendant denies the allegations set forth in Paragraph 127 of Plaintiff's Complaint and demands strict proof thereof.

37. This Defendant denies the allegations set forth in Paragraphs 128, 129 and 130 of Plaintiff's Complaint and demands strict proof thereof.

38. Responding the allegations in Paragraph 131 of Plaintiff's Complaint, this Defendant admits that as the sole licensee and operator of the skilled nursing facility at issue in Plaintiff's Complaint, the Facility Defendant had a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

39. In responding to the allegations set forth in Paragraph 132 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

40. In responding to the allegations set forth in Paragraph 133 of Plaintiff's Complaint, this Defendant admits those allegations insofar it is alleged the Facility Defendant had a duty to provide skilled nursing care to its residents, including Ms. Nanney. Further responding, this Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

41. This Defendant denies the allegations set forth in Paragraphs 134, 135, 136 and 137 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

42. In responding to the allegations set forth in Paragraph 138 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

43. The allegations set forth in Paragraph 139 and 140 of Plaintiff's Complaint call for legal conclusions and therefore no response is required. To the extent a response is required or they allege liability, they are denied.

44. This Defendant denies the allegations set forth in Paragraphs 141, 142, 143, 144, 145, 146, 147, 148, and 149 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

45. In responding to the allegations set forth in Paragraph 150 of Plaintiff's Complaint, this Defendant would restate its answers to the Paragraphs above as if set forth herein verbatim.

46. Responding the allegations in Paragraph 151 of Plaintiff's Complaint, this Defendant admits that as the sole licensee and operator of the skilled nursing facility at issue in Plaintiff's Complaint, the Facility Defendant had a duty to provide skilled nursing care and treatment to Ms. Nanney in compliance with the governing standard of care. This Defendant affirmatively asserts that the care provided to Ms. Nanney was at all times in compliance with the governing standard of care. Any allegations inconsistent with this response or intended to allege or imply liability as to this Defendant are denied and strict proof is demanded thereof.

47. This Defendant denies the allegations set forth in Paragraphs 152, 153, 154, 155 and 156 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

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

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

49. This matter must be stayed as against this Defendant pending the result of arbitration pursuant to a valid arbitration agreement entered into between Plaintiff's decedent and

Facility Defendant pursuant to Section 3 of the Federal Arbitration Act, 9 U.S.C. § 3. This Defendant hereby gives notice of its intent to file a Motion to Stay and compel arbitration.

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

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

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

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

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

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

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

53. This Defendant would affirmatively assert that, to the extent it was is liable to Plaintiff, which is vehemently denied, it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Uniform Contributions Among Tortfeasors Act, Noneconomic Damages Award Act, and Medical Malpractice Reform Bill, including but not

limited to §15-38-15; §15-32-200 et. seq.; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Kate C. Mettler

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Attorneys for the Defendant Olishia Gaffney

Charleston, South Carolina

Dated: October 11, 2019

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SPARTANBURG )  
  
Betty Nanney, by and through )  
her Attorney-In-Fact, Leslie )  
Nanney, )  
Plaintiffs, )  
vs. ) Case No. 2019-CP-42-03075  
 )  
THI of South Carolina at )  
Spartanburg, LLC d/b/a )  
Magnolia Manor-Spartanburg; )  
Rusty Flathmann, Laura Anne )  
Winn; and Olishia Gaffney, )  
 )  
Defendants. )  
 )

## HEARING TRANSCRIPT

The above-mentioned Non-Jury Hearing was taken on the 16th day of December, 2019, before the Honorable Grace Gilchrist Knie, commencing at the hour of 3:32 p.m. at the Spartanburg County Circuit Court, Spartanburg, South Carolina:

1 APPEARANCES:

2 Gary W. Poliakoff, Esquire, and  
3 Raymond Paul Mullman, Jr., Esquire, and  
4 Edward John Waelde, Esquire

5 POLIAKOFF & ASSOCIATES

6 215 Magnolia Street

7 Spartanburg, South Carolina 29306

8 Attorneys for Plaintiffs

9

10 Russell G. Hines, Esquire

11 YOUNG CLEMENT RIVERS

12 25 Calhoun Street, Suite 400

13 Charleston, South Carolina 29401

14 Attorney for Defendant THI of South Carolina at

15 Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg

16

17 REPORTED BY: Sandy Satterwhite, Court Reporter

18 P.O. Box 742

19 Roebuck, South Carolina 29376

20 (864) 706-5698

21 satterwhite@charter.net

22

23

24

25

1 BY THE COURT:

2 So the next matter is Nanney versus THI, Civil Action  
3 Number 18-CP-42-2574, and --- oh, I'm sorry. I'm reading  
4 the wrong number. 19-CP-42-36 --- I'm sorry --- 3075,  
5 19-CP-42-3075.

6 If you all will bear with me just one moment.

7 Okay. Thank you all for your patience. I was  
8 looking at the motions, again. If you will all please  
9 identify yourselves for the record.

10 BY MR. HINES:

11 Russ Hines for, well, the moving parties, THI of South  
12 Carolina, Magnolia Manor, etcetera.

13 BY THE COURT:

14 Okay. Thank you. Yes, sir?

15 BY MR. POLIAKOFF:

16 Gary Poliakoff for the Plaintiffs, and I have with me John  
17 Waelde and Ray Mullman for the Plaintiffs.

18 BY THE COURT:

19 Okay. Thank you. Okay. So, Mr. Hines, there are four  
20 motions: One filed on October the 11th, three on November  
21 the 11th, and the first concerns one of the Defendants,  
22 Ms. Winn. I'm happy to hear from you, sir.

23 BY MR. HINES:

24 Your Honor, those motions on behalf of the individuals are  
25 motions to --- well, they --- it accompanies what is the

1           primary motion here today, and let me also add, may it  
2           please the Court?

3   BY THE COURT:

4           Yes, sir.

5   BY MR. HINES:

6           But the primary motion is the motion to compel  
7           arbitration. The individuals, and I don't know, and  
8           forgive me for not knowing, but I don't know if the  
9           Plaintiffs even would object to this part of it. The  
10          basis for applying the arbitration agreement are,  
11          including within the coverage of the arbitration  
12          agreement, the individuals, is that they come with its  
13          terms as agents or employees of the facility.

14                 I know they allege that these individuals are in  
15          fact agents or employees of the facility in the Complaint,  
16          and so my intention, they --- perhaps they could address  
17          this if they --- well, they can address it now, if the  
18          Court would like, but what I intend to do is just to make  
19          the point that the agreement reads, and this is Exhibit 2.

20                 Your Honor, as a housekeeping matter, can I bring a  
21          copy up of what we filed, too?

22   BY THE COURT:

23           Sure. That's fine, and opposing counsel, I'm assuming,  
24           everybody has seen each other's Memorandum or Memoranda in  
25           support and in opposition. I think the opposing Memo was

1           filed before the other, but, yes, okay.

2   BY MS. POLIAKOFF:

3           Yes.

4   BY THE COURT:

5           Okay, and ---

6   BY MS. POLIAKOFF:

7           In keeping with tradition.

8   BY THE COURT:

9           Okay, and so --- so, Mr. Hines, would you like for  
10          Plaintiffs' counsel to address your first question?

11   BY MR. HINES:

12          I think that probably would be helpful, Your Honor, and  
13          thank you, and, again, I do apologize, actually, because  
14          candidly I should have checked with the before I'm  
15          standing up here and telling me I didn't know, because  
16          it's pretty straight forward as to method. The question  
17          is not whether or not they agree on whether or not the  
18          arbitration agreement is enforceable, it's whether or not  
19          they, what their position is in respect of the individuals  
20          and whether or not they would come with this language, you  
21          know, that the agreement was made between the facility,  
22          and its agents, employees and servants.

23   BY MR. MULLMAN:

24          Well, I'll just --- the stay is going to be outcome  
25          determinant upon ---

1 BY THE COURT:

2 That's Mr. Mullman.

3 BY MR. MULLMAN:

4 Yes, I'm sorry. I know Mr. Poliakoff is arguing it, but  
5 I'm going to address this one issue. I think we both  
6 agree that the arbitration issue will be outcome  
7 determinative on the other issues. We don't think the  
8 arbitration is enforceable. Therefore, the motion to stay  
9 will moot at that point. However, if the arbitration is  
10 found to be enforceable, we would agree that the motion to  
11 stay would apply.

12 BY THE COURT:

13 Okay.

14 BY MR. MULLMAN:

15 Does that make sense?

16 BY MR. HINES:

17 Well, and I think, I mean what we are asking that these  
18 motions on behalf of the individuals is that they be  
19 included within the arbitration proceeding that we are  
20 seeking.

21 BY MR. MULLMAN:

22 And we would agree with that if the arbitration is  
23 enforceable, these three Defendants would be part of the  
24 arbitration.

25 BY MR. HINES:

1 Right. I think that --- I think that resolves ---  
2 essentially that resolves all three motions contingent  
3 upon whether or not, you know, how Your Honor views the  
4 fourth motion, the primary motion, which is whether or not  
5 this agreement is enforceable and we can successfully  
6 compel arbitration. As I understand Mr. Mullman, what he  
7 is saying is, while they certainly disagree about whether  
8 or not we compel arbitration, if arbitration is compelled,  
9 these individuals, along with the entity, the THI entity,  
10 would ---

11 BY THE COURT:

12 Be covered under that Order.

13 BY MR. HINES:

14 Exactly, Your Honor.

15 BY THE COURT:

16 Okay. All right.

17 So, yes, sir, I'm ready, if you are.

18 BY MR. HINES:

19 Thank you, Your Honor. Let me start by saying this,  
20 because I know that --- well, I will try to keep this as  
21 brief as I can with the idea that I would like to have  
22 some time to see sort of where Mr. Mullman might  
23 concentrate his points in opposition to me with the idea  
24 being that I'll be happy to answer any questions that the  
25 Court might have. These guys are very, very good in what

1           they do, and they've got quite a number of arguments in  
2           the responsive brief, and I don't know ---

3   BY THE COURT:

4           Okay. Well, let me just go ahead and explain that I will  
5           certainly, I'm going to hear from you, I'm going to hear  
6           from them, and then I'm going to allow you to address  
7           anything else that you need to. Okay?

8   BY MR. HINES:

9           Thank you, Your Honor.

10   BY THE COURT:

11           Okay.

12   BY MR. HINES:

13           Your Honor, let me say right off the bat here the first  
14           basis that might be argued for enforcement of the  
15           arbitration agreement like this, you can find the  
16           arbitration agreement at Exhibit 2, tab two, the Memo that  
17           you have. It's just a one-page document.

18           This --- this case, Your Honor, has to do with a  
19           claim of negligence allegations, having to do with someone  
20           who was a resident of a skilled nursing facility. That's  
21           Ms. Nanney. There's two Ms. Nanneys in this that to keep  
22           straight. A resident was Betty Nanney. She's the mother,  
23           and her daughter, Leslie, is bringing this action as her  
24           with a Power of Attorney, as her Attorney-in-Fact.  
25           Actually, Ms. Leslie did not have Power of Attorney at the

1           time the arbitration agreement and admission agreement in  
2           this case were signed, and, in fact, Leslie didn't sign it  
3           anyways. It was signed by the son. I'm not sure if his  
4           name is pronounced Caleb or Cuyler.

5   BY MR. POLIAKOFF:

6           Caleb.

7   BY MR. HINES:

8           His name is Mr. Horne. So Mr. Horne, who is the child of  
9           the resident, Ms. Nanney, signed both the admission  
10          agreement, which is Exhibit 1 of those materials, Your  
11          Honor, and also the arbitration agreement.

12                 I'd like to start by making a point that the  
13          arbitration agreement on its face, if we could just look  
14          at the four corners of the document, I submit, Your Honor,  
15          it is facially valid. The document itself includes within  
16          it the representation.

17                 Your Honor, this is the --- well, the last sentence  
18          before the signatures, by his/her signature below the  
19          executing party represents that he/she has the authority  
20          to sign on the resident's behalf so as to bind the  
21          resident as well as the representative, and that at the  
22          very beginning of it is when we also have the  
23          representative identified. In this case that's Mr. Horne,  
24          and it --- you know, it indicates resident's, you know,  
25          Durable Power of Attorney for Healthcare/Resident's Legal

1 Guardian/Resident's Responsible Party, hereinafter  
2 collectively referred to as representative.

3 So, the point I'm making there, Your Honor, is that  
4 this document, if one were simply to pick it up and read  
5 it, knowing nothing other than what it says on its face, I  
6 submit, Your Honor, that it's --- it would be facially  
7 valid. I know there is an argument in response to this  
8 motion of this argument. This --- this --- there's a lack  
9 of consideration. Your Honor, I'll take that up. I ---  
10 well, respectfully, I disagree. I don't think there's  
11 much question that mutual promises to arbitrate are  
12 sufficiently a valid consideration to support an  
13 arbitration agreement; and one thing I would also mention  
14 at this time is that this is an arbitration agreement  
15 that's covered governed by the FAA, Federal Arbitration  
16 Act. It specifically says that in the agreement itself,  
17 there's an acknowledgment that makes that expressed that  
18 this is covered by.

19 Furthermore, in the Dean case, and I don't think  
20 there is any actual pushback on this, Your Honor, but the  
21 services involved in the admission to the facility are  
22 services that implicate the interstate commerce, and  
23 therefore, they're covered by the FAA.

24 The point of saying all that is that the FAA,  
25 importantly, the case law, case Concepcion is the case

1           that says is there are others at least to this effect, but  
2           the arbitration agreements under the FAA have to be placed  
3           on equal footing with other contracts.

4           The reason I say that now, Your Honor, is we're  
5           looking at this in terms of a contract fundamentals,  
6           offer, acceptance, consideration that in any way that this  
7           contract is to be evaluated in some way, because it's an  
8           arbitration contract, if it's --- if it is treated  
9           differently than an other contract, that means it violates  
10          the FAA.

11          For instance, as I mentioned, facially my position  
12          is this is a valid agreement executed by someone who has  
13          represented themselves as having all due authority, that  
14          being Mr. Horne.

15          Now in opposition to this motion, when we get Mr.  
16          Horne's Affidavit, he says, "Well, no, I didn't have  
17          authority, and I signed it. I signed it quickly, because  
18          I was, my mother was in the process of being there at this  
19          facility. No one explained it to me." Well, Your Honor,  
20          those types of things, I mean the law is that one who has  
21          signed a document and let -- unless there is some question  
22          as to Mr. Horne's capacity, and I'm not aware of any being  
23          raised, when someone signs a document, and, again, this is  
24          a one-page document, also, with, you know, bold print that  
25          says, "Arbitration Agreement. I understand I'm giving up,

1 but waiving my right to jury trial," that someone has  
2 presumed to have read, understood and consented to the  
3 agreement.

4 And so, it has always occurred to me when I see  
5 oppositions to motions like this where there is some  
6 notion that the facility needed to do something else in  
7 order to effectuate an arbitration agreement like to  
8 research further or investigate further the representation  
9 by the representative that they had authority or to  
10 explain the terms of the agreement to them. Things of  
11 that nature would be violative of the FAA, because it  
12 would be requiring the facility something other than would  
13 be required of another contract. It's --- you know,  
14 another thing I suggest that it's doing is it's showing  
15 some sort of undue hostility to arbitration agreements  
16 generally.

17 You know, under both the state and federal law the  
18 policy favors arbitration agreements, and there's a sort  
19 of a theme of disfavor that I respectfully submit sort of  
20 runs through the opposition to enforcement here.

21 For instance, the idea that this agreement doesn't  
22 provide any benefit to the --- to the resident. Well,  
23 that assumes that the resident doesn't have some sort of  
24 dispute they would like to submit to arbitration against  
25 the facility. I mean it's --- it's a very one-sided.

1           In this particular case, the resident may or  
2           resident's representative may decide that they prefer the  
3           litigation forum, but that's, you know, it's a very  
4           self-serving view to suggest that a dispute, it's not  
5           possible for a dispute to arise.

6           For instance, over payment, over or some, some  
7           controversy that the resident himself might want to take  
8           up with a facility, and in that, again, arbitration being  
9           a favored means of a dispute resolution as a general rule,  
10          so I mean the whole idea of it is that it is supposed to  
11          be more efficient quicker resolution and cost effective.

12          So, Your Honor, I say that to say that, in short, we  
13          have a facially valid agreement to arbitrate that I submit  
14          contains all the material terms that one would need to  
15          have to affect an agreement to arbitrate.

16          It clearly sets forth what the subject matter of the  
17          contract is that or these --- yeah, that the contract is  
18          that the parties will either agree upon an arbitrator or  
19          have one selected by the Court, and the arbitration would  
20          be deducted in accordance with the State of South Carolina  
21          ADR Rules and it be binding on the parties; and as far as  
22          consideration, we have mutual promises to arbitrate and  
23          submit.

24          That's all the consideration we need, and to require  
25          anything more we violate the FAA, because that would be

1           applying some sort of higher standard to this type of  
2           contract than we would to others.

3                   Now the question then, because of the Affidavit that  
4           Mr. Horne has filed, it muddies the water, let's say, as  
5           to whether it or not he has the authority that he had  
6           represented at the time of the --- that he signed this.  
7           Now I'm not saying that he can't do that now. I'm not  
8           saying that he is bound by the representation that was  
9           made at the time that it was entered into, but I am saying  
10          that, and I'm also acknowledging, that because he has made  
11          it, he's disputed his authority or denied his authority,  
12          that I can't come to you today and say, "Your Honor, I  
13          could prove that he did have a true agency. That he did  
14          have either actual or apparent authority to sign this."  
15          I'm not prepared. I'm not equipped with the means to do  
16          it, and at this juncture it gives me, I guess, the thought  
17          to mention to you our secondary request to this motion  
18          here is to allow us discovery on that point, meaning that  
19          the --- the only thing that I am aware of, there's been an  
20          Affidavit. Again, to try and undermine the facial  
21          validity of this document there's the Affidavit by Mr.  
22          Horne that says, "Well, you know what I didn't have  
23          authority to sign it, even though I represented that I  
24          did."

25                   We're not able to --- I mean that's an Affidavit

1           that obviously can't be cross examined. The Affidavit is  
2           a page long. The Affidavit is --- essentially, without  
3           the Affidavit, I don't know that they can --- without that  
4           one or at least another Affidavit, I don't know how they  
5           could upset the facial validity of this, this contract,  
6           and that really is, as I see it, well, an incredibly  
7           material bit of evidence that they brought forth that we  
8           have no ability to check; and so, Your Honor, if I'm going  
9           to make the argument that on the basis of equitable  
10          estoppel, this that you have before you today, sufficient  
11          evidence and legal authority to grant our motion, but in  
12          the alternative, if Your Honor does not agree with that,  
13          what we would like is we would like to be able to conduct  
14          discovery into the question of true agency, whether it's  
15          by and actual agency or apparent agency, or even on the  
16          back end of it ratification, because we --- one thing we  
17          know is that Ms. Nanney, or, excuse me, I should say,  
18          Leslie, who is bringing this case as the Attorney-in-Fact  
19          for her mother Betty, Betty gave Leslie Power of Attorney  
20          after the documents at issue here, the admission agreement  
21          and the arbitration agreement, were signed by Mr. Horne.

22                 So, I'm not suggesting that Mr. Horne or Leslie even  
23          herself, although she didn't sign them, had Power of  
24          Attorney at that time; but, of course, we know that to  
25          give Power of Attorney to anyone, the person who is giving

1           that power would have to be competent to do it at that  
2           time; and I think this Power of Attorney post-dates the  
3           admission by ---

4       BY MR. POLIAKOFF:

5           Eight months.

6       BY MR. HINES:

7           --- eight months, and so, Your Honor, again, I'm not  
8           suggesting that Power of Attorney would --- would provide  
9           the authority, you know, in and of itself to --- I mean,  
10          again, Mr. Horne didn't have, does not --- he has not ever  
11          had Power of Attorney, to my knowledge, and Ms. Leslie  
12          Nanney didn't get it until after the fact, but what I'm  
13          suggesting is that we know that Betty Nanney had to have  
14          been competent in this period of time because she was able  
15          to make Ms. Nanney her Attorney-in-Fact, even eight months  
16          after she was admitted. The point of me saying that, Your  
17          Honor, is to get into the argument of that estoppel, and  
18          estoppel is really a two-pronged --- a two-pronged part.  
19          First it looks at merger, and then we look at the  
20          estoppel. The point of merger is to say we have an  
21          admission agreement and we have an arbitration agreement,  
22          and our position is that those documents should be  
23          considered merged.

24                 In the Coleman case and the Hodge case and the  
25          Thompson case every one of those cases went against the

1 party that was seeking to enforce the arbitration  
2 agreement. I acknowledge that, but those cases, I think,  
3 are still helpful to provide the analytical framework for  
4 me to make this argument today.

5 Number one, in Coleman, Coleman Court specifically  
6 recognized the, at least a theoretical possibility of a  
7 viable argument for enforcement on the basis of --- on the  
8 basis of merger and estoppel, and this is from Coleman.  
9 Appellant's equitable estoppel argument premised on their  
10 intention that, under state law, the admission agreements  
11 and the arbitration agreements merged. Here the documents  
12 were executed at the same time by the same parties with  
13 the same purpose, and, of course, the same transaction.  
14 Unless there is a contrary intention, appellants are  
15 correct that there was a merger.

16 Now the court in Coleman went on to find that there  
17 was a contrary intention, as did the courts in Thompson  
18 and Hodge, which are cases that essentially the progeny of  
19 Coleman.

20 One thing is different here, and I think this is why  
21 Your Honor has the ability to see it differently, is this  
22 really is a factual question as to what was the intention  
23 of the contract to contract parties; and, again, I would  
24 submit there are certain superficial things that seemed to  
25 be argued in the opposition to this point. For instance,

1 the fact that we have two different documents: An  
2 admission agreement and arbitration agreement. Well, Your  
3 Honor, the question of merger will only arise when we have  
4 two different documents or different or multiple  
5 instruments. So, the idea that a-ha, this one is numbered  
6 page, you know, one through twelve and this one is page  
7 one of one, is really, I would suggest, specious, because,  
8 you know, you'll never have merger be an issue unless you  
9 have multiple instruments to consider.

10 The other thing I would mention is that merger, in  
11 addition to it never being something that an issue that  
12 would present itself absent multiple instruments, it  
13 doesn't present itself, unless you have a very specific  
14 set of circumstances, multiple instruments executed at the  
15 same time by the same parties for the same purpose, and,  
16 of course, the same transaction.

17 Another thing that Coleman Court implicitly  
18 indicated here, actually, I think --- I think the document  
19 --- I think I, actually, in fact, and I included some  
20 experts explicitly. When it says, "Here the documents  
21 were executed at the same time by the same parties for the  
22 same purposes and in the course of the same transaction"  
23 is that is exactly what's happening when you have an  
24 admission agreement and an arbitration agreement signed as  
25 we have here as was the case in Coleman at the same time

1 by the same parties for the same purposes in the course of  
2 the same transaction.

3 So, again, it's a superficial notion that there's a  
4 --- that there's some contrary intent to merger based upon  
5 the fact that we have multiple instruments, because,  
6 again, you never going to need to raise the question of  
7 merger without multiple instruments. Moreover, the merger  
8 presumption doesn't just arise if you didn't have the same  
9 parties, if you didn't have the purposes or the same time  
10 or the course of the same transaction, you have to have  
11 all those things in place before the presumption arises.

12 So, I submit to Your Honor that's it's a factual  
13 question of the intent of the parties, and it needs to be  
14 remembered that the presumption is in favor of merger,  
15 and, again, that presumption, that presumption only exists  
16 when you have the confluence of all these things at the  
17 same time, same parties, same purpose, same transaction,  
18 which is what we have here.

19 The reasons in the Coleman, Thompson, Hodge cases  
20 for finding no merger are not, they're not present here.  
21 In every one of those cases there was the ability to ---  
22 there was the ability to the --- with the arbitration  
23 agreement, there was the ability to disclaim it after,  
24 within 30 days of the signing the document, they could  
25 essentially drop away from the transaction. That's not

1 present here. I think, I suppose I can understand what  
2 the Court is thinking in those cases. They're thinking,  
3 "Well, how could there be intent these documents be merged  
4 and construed together if one of them might simply fall  
5 out?" We don't have that here. There is not the 30-day  
6 sort of window to change your mind.

7 Another thing that's argued sometimes against merger  
8 is, "Well, this is not a condition of the admission, the  
9 arbitration agreement," and that's true. It's not  
10 required of the --- to be admitted. It's a voluntary  
11 decision to agree to it or not, but that doesn't mean that  
12 it's not in conjunction with the admission, and that's ---  
13 that's the point is that it absolutely is an admission's  
14 material, the arbitration agreement is. There would be  
15 point for it to exist were there not an admission. The  
16 only thing it does is it --- well, it provides for a  
17 mechanism, an alternative mechanism of a dispute  
18 resolution in the event that there is a dispute  
19 essentially arising out of the fact of admission and what  
20 happens after they're admitted; and so, Your Honor, I  
21 guess --- well, and you've been quite indulgent with me,  
22 and I'm sorry to prattle on for so long without having  
23 heard from opposing counsel, but I guess what I'm trying  
24 to say is it's a factual point, Your Honor, as to whether  
25 or not there was this contrary intention. It really needs

1 to be some truly probative, non-speculative evidence that  
2 suggests an intention contrary merger, because otherwise  
3 the exception would swallow the rule, but we have all of  
4 these things, these four things that have to come together  
5 to presume merger. If you could just upset that by  
6 saying, "Well, you know," then you just --- you find some,  
7 something that doesn't even clearly show an intent to  
8 contrary merger, but --- but it most clouds the issue. It  
9 really makes the --- it really makes the idea that we have  
10 a presumption of merger sort of elusive, because, again,  
11 the presumption is the default. It's not the other way  
12 around; and so, Your Honor, with the merger of these two  
13 documents, then we would get to the point of saying that  
14 you can't accept the benefits, the direct benefits of one,  
15 which would be the benefit of the admission, and in this  
16 case she was there, well, this happened, I think, the  
17 allegation is that she was allowed to fall, even though  
18 she was a fall risk, that Betty Nanney, and was --- and  
19 was injured as a result of that. Essentially, the  
20 allegation, or at least in short, and --- but the point is  
21 she was --- there is a benefit that she received by virtue  
22 of her admission, she was received. You know, she was  
23 admitted. She received room. She received board. She  
24 received various treatments, you know, so, and in the case  
25 of Wilson versus or Willis versus Wilson, our Supreme

1 Court not so long ago, I think just earlier this year, has  
2 recognized or at least favored the application of the  
3 direct benefits test in determining whether or not  
4 estoppel can be applied to arbitrary agreements.

5 So, the basic analysis, since you're here, Your  
6 Honor, is that if you would agree with the point that we  
7 have a merger of the admission agreement and the  
8 arbitration agreement, I don't think there will be much  
9 room to argue that there was not a benefit from the  
10 admission. Now they obviously argue that or contend that  
11 she had a fall and she was injured, but I think that's an  
12 unduly, would be a myopic view of what we mean by benefit  
13 here, because the idea is that it's not that she had a  
14 problem there, but she received benefits in the form of  
15 having a room, board, treatments, meals and it's not  
16 claimed at all that was --- that that was problematic.  
17 This is about one incident.

18 So, gosh, Your Honor, if you have any questions for  
19 me. I realize you've given me quite a bit of time, and I  
20 appreciate it, but I'll just be happy to sit and listen up  
21 for opposing counsel, and, if you allow me, I'll chime in  
22 with some rebuttal at the end.

23 BY THE COURT:

24 Yes, sir, of course you will be able to rebut, but now,  
25 thank you, and I do have your hard copy of your Memorandum

1 with the attachments, and I'm making notes. I hope that's  
2 okay. This is mine, right?

3 BY MR. HINES:

4 Oh, certainly, Your Honor. Thank you.

5 BY THE COURT:

6 Okay. All right. So, Mr. Poliakoff?

7 BY MR. POLIAKOFF:

8 Thank you, Your Honor, and may it please the Court? Very  
9 simply put there was no authority whatsoever of any kind  
10 under the sun for Caleb to have signed the arbitration  
11 agreement. Basically, Your Honor, this case, Betty  
12 Nanney, I think everybody here agrees she's fully lucid,  
13 still is today. She's unable to express herself. What  
14 put her in the nursing home to start with is she had a  
15 brain aneurysm and she can't speak. One can approach her.  
16 She can fully understand everything one says. She can  
17 communicate in a variety of ways but not verbally.

18 In any case, she had no Power of Attorney. She had  
19 given no one authority of any kind whatsoever as of  
20 October 28, 2016, when she was admitted to this facility.  
21 She gave no statements or no representations of any kind,  
22 nor has the defense been able to point to anything. The  
23 defense has full possession of all of the admission's  
24 records. This is their motion. It has been pending for  
25 quite some time. If they had some claim like that,

1           certainly they would have given the Court and counsel some  
2           benefits of some Affidavit that this woman, who can't  
3           speak, had made some representation, but we all know she  
4           didn't because she's unable.

5           As far as any alleged representation by Caleb, that  
6           misses the point legally entirely. If someone wants to  
7           try to show an, quote, apparent authority due to  
8           representations, it has to be the representation of the  
9           principal, not the representation of the purported agent.  
10          Representations of purported agents are not the key that  
11          the Courts look to in determining whether there is any  
12          apparent authority. Most importantly, there was simply no  
13          legal authority on October 28, 2016, no Power of Attorney  
14          existed at all. The Power of Attorney was signed eight  
15          months later that Betty Nanney, the actual Plaintiff,  
16          assigned to her daughter Leslie, Leslie Nanney. Caleb  
17          signed her in. He signed an Affidavit that he made no  
18          representations of any kind. Nobody explained the  
19          arbitration agreement to him. He doesn't remember signing  
20          it. He doesn't even --- didn't notice it at the time. He  
21          just signed what was put in his face, and that's the sub  
22          --- substance of the Affidavit that he submitted.

23          Had the Defendant wished to have any kind of  
24          Affidavit, perhaps the Defendant would have graced the  
25          Court and counsel with its Memorandum more than one

1 business day prior to this hearing and given us the  
2 benefit of any such Affidavit, but it did not, which is  
3 part of tradition for this particular Defendant chain.  
4 Not only does this Defendant chain fight every  
5 arbitration, even when no agreement exists or when there's  
6 an agreement but no authority exists, but it delays  
7 constantly, and that's been a problem before this Court,  
8 and virtually every case from this chain Fundamental/THI  
9 in recent years.

10 There are two agreements, and that's crucial here,  
11 and those are covered entirely by the Coleman case, the  
12 Hodge case and the Thompson case. They are not merged.  
13 There is no viable or valid argument or reasonable  
14 argument of any kind that those two agreements are merged.

15 In fact, in the arbitration agreement itself, there is  
16 language, this is a footnote on page two of our particular  
17 brief, the admission's agreement itself says, "This  
18 agreement represents the entire agreement and  
19 understanding between the parties and supersedes all  
20 previous representations, understandings or agreements,  
21 oral or written, between the parties and may not be  
22 amended except by written agreement of the parties." So  
23 in particular it says, "This agreement," i.e., the  
24 admission's agreement, represents the entire agreement.

25 So now they're trying to claim some merger where

1 merger clearly does not exist and it clearly does not  
2 exist under well settled case law in South Carolina,  
3 particularly Coleman, directly on point, and its progeny  
4 Hodge and Thompson cases and a whole variety of Circuit  
5 Court Orders, one of which Your Honor issued on  
6 identically the same point literally about two months ago  
7 in the case of Mary Solesbee versus Fundamental, the same  
8 chain, issued September 11 of 2019. I can hand that up if  
9 Your Honor is interested.

10 Also, our Court of Appeals continues in the same  
11 vein if there's no authority, then documents are of no ---  
12 particularly an arbitration agreement is of no accord.  
13 The case of Hilda Scott versus White Oak Manor, actually  
14 my firm's case, was filed May 1st, 2019, and the South  
15 Carolina Court of Appeals basically also holding it, among  
16 other things, that if there's no authority, then the  
17 purported arbitration agreement is not valid; and under  
18 Coleman the arbitration agreement, when it's separate from  
19 the admission's agreement, the key that Coleman looked at  
20 is whether it involves healthcare decisions or payment for  
21 healthcare. They were talking there about the Adult  
22 Health Care Consent Act, and they found that if the  
23 arbitration agreement itself does not involve, quote,  
24 healthcare decisions, end quote, or, quote, payment for  
25 healthcare, end quote, then the Adult Health Care Consent

1 Act doesn't apply to the arbitration agreement, and that's  
2 what we have here, Your Honor. It's simply that that Act,  
3 the Adult Health Care Consent Act simply does not apply  
4 here.

5 Additionally, these tangential arguments of  
6 estoppel, ratification, third party beneficiary, merger,  
7 none of these apply. In our brief we set out the elements  
8 for equitable estoppel in this context. They simply do  
9 not, this situation simply does not meet those elements.

10 Coleman rejects the merger arguments entirely.  
11 There's been no agency established whatsoever, and there's  
12 --- Courts have found also that there's no particular  
13 benefit to Ms. Nanney to the arbitration agreement, that  
14 is giving up her right to access the courts and have the  
15 constitutional right to a trial by jury. There's no  
16 benefit to her by this side agreement.

17 And, additionally, Your Honor, it's still the law.  
18 There was some flux some months back about Medicare,  
19 Medicaid, CMS perhaps making some change in an old rule,  
20 but the rule still stands and has been upheld and  
21 acknowledged. The rule is that basically a nursing home  
22 facility cannot require an arbitration agreement as a  
23 condition of admission. They simply can't do it. They  
24 can't require any other consideration, including an  
25 arbitration agreement as a condition of admission, and

1           that's typically why we see them as separate agreements.

2           There's been no consideration. These issues have  
3           been dealt with over and over again. In this courtroom  
4           Judge Mark Hayes has signed a number of Orders, Your Honor  
5           has, other judges have, as well, other judges throughout  
6           South Carolina, and in particular with this same chain,  
7           Fundamental have found the same thing over and over and  
8           over again, but for the --- this chain insisting on having  
9           arbitration when it has zero, literally no grounds under  
10          the sun to --- to claim arbitration is why we're here.  
11          It's been decided by the Supreme Court of South Carolina,  
12          Court of Appeals, multiple times by Circuit Courts in  
13          Orders against this particular chain. It's just what they  
14          do. It is part of what they do, and that's why we're  
15          here.

16          I heard counsel make a statement of, quote, a  
17          facially valid agreement to arbitrate, end quote. No such  
18          thing exists here. The man had no legal authority  
19          whatsoever. Just literally a few minutes ago we had a man  
20          before the Court in a separate unrelated case sitting  
21          where Mr. Waelde is sitting who has been apparently  
22          convicted of murder and given life. Mr. Hines could have  
23          solicited him to have signed an agreement to arbitrate our  
24          client's case. That would have no more validity than  
25          Caleb signing the agreement when Caleb, in fact, had no

1 authority to give up her constitutional rights whatsoever.

2 Additionally, there were some requests for  
3 discovery. Again, we supplied our Affidavit, which makes  
4 all the sense in the world, and the Defendant has not  
5 graced with any Affidavit at all. Again, it's the  
6 Defendant's motion. The motion, the bare bones motion has  
7 been filed for quite some time, and, again, they gave us  
8 their motion the last business day before this hearing,  
9 which was last Friday when we actually filed our Memo  
10 literally anticipating what they were going to claim for  
11 the simple reason we were able to do that because we've  
12 been through this over and over and over again case after  
13 case with this same chain, and, again, merger is well  
14 covered by the fact that there is no merger under the  
15 circumstances we have here. It has been covered  
16 repeatedly by courts at every level of this state. Thank  
17 you, Your Honor.

18 BY THE COURT:

19 Thank you. Okay.

20 Counsel, I'm happy to hear from you on rebuttal or  
21 reply.

22 BY MR. HINES:

23 Yes.

24 BY THE COURT:

25 However you want to title it.

1 BY MR. HINES:

2 Thank you, Your Honor. Again, may it please the Court?

3 Let me mention a couple of things. I don't know that  
4 these really will have any bearing on the motion, but I  
5 suppose since opposing counsel mentioned it, there was  
6 some notion, sort of well poisoning, Your Honor, like, you  
7 know, "These folks do this all the time," you know, that  
8 has nothing to do with this motion, and we're not ---

9 BY THE COURT:

10 Oh, and don't --- please don't think that I'm reading any  
11 of that into this. I'm look --- I'm taking a fresh look  
12 at everything, and I do that in every case.

13 BY MR. HINES:

14 Thank you very much for that, Your Honor, and I do very  
15 much appreciate that, well, which I knew was the case,  
16 anyways. I suppose --- thank you for the indulgence.  
17 I'll just move along, but I do push back against that. It  
18 is, one, not being an accurate picture of, you know, other  
19 litigations implicitly referenced there, and they're also  
20 not, not relevant here, and I guess more substantively  
21 here, Your Honor, I could just mention this. It's all  
22 there with you. Exhibit 8 here's an Order granting a  
23 Motion to Compel Arbitration. Exhibit 10, an Order from  
24 just this past August in this court, Spartanburg, granting  
25 a Motion to Compel Arbitration, very similar facts. That

1 case was called Price versus THI of South Carolina,  
2 Magnolia Manor and a couple other ones, Exhibits, I think,  
3 11 and 12. Those were motions, and they granted  
4 discovery. They didn't grant the --- didn't compel the  
5 arbitration but allowed discovery into the question of  
6 agency.

7 So, Your Honor, I wouldn't want you to get the  
8 impression that we have just been running into nothing but  
9 resistance and rejectionable arguments. They've gotten  
10 traction in these courts. I've got one that I need to  
11 submit a proposed Order on now that will is going to be  
12 granting us one in another county.

13 So, nothing, Your Honor, here is --- Your Honor, I  
14 think I understand the point opposing counsel was trying  
15 to make, but let me be clear about the one I was trying to  
16 make about what a facially valid agreement is.

17 When Mr. Poliakoff said, "Well, Mr. Hines could have  
18 gotten essentially anybody." He just picked someone at  
19 random who had obviously no connection to the --- to the  
20 people and these events and gotten him to sign it and said  
21 all those things. Your Honor, you know, I mean aside from  
22 the fact I wouldn't do that, but let's just say I did for  
23 the sake of this hypothetical. If you read the document  
24 and didn't know anything else, you would look at this,  
25 "Well, this guy says," I mean I'm talking about reading it

1           on its face it says that this guy is authorized. I'm not  
2           suggesting that's dispositive. I'm just suggesting that's  
3           what it says, and by the way, the example that was given  
4           there, I do think is quite materially different than the  
5           facts we've got here because it wasn't someone who was  
6           truly just someone who clearly had no connection to it.  
7           This is an adult child who was accompanying this person  
8           and helping them with the admission's process. So, I  
9           mean, you know, I wouldn't want it to be --- to be  
10          overlooked. In fact, I would suggest that the example  
11          that was given in rebuttal to me is actually helpful to  
12          illustrate how much significantly different the situation  
13          we have is here. It was not somebody who was just off,  
14          you know, completely unrelated. It was the son, the adult  
15          child, who was assisting the mother with this process and  
16          who signed representing that he had authority, and I  
17          understand that he says he doesn't, he didn't have  
18          authority, but that's not on the face of it, and I'm not  
19          suggesting to you that the face of the document is  
20          dispositive, but I am suggesting to you, though, is that  
21          the only thing that they have to say that the face is not,  
22          the face of the document is not accurate is the Affidavit  
23          that we don't have the ability to cross examine; and so  
24          the point of me saying that is not to say that the face of  
25          the document proves the authority. I can't prove the

1 authority. I'll concede that, but it's a factual  
2 question, and it's a factual question that we are not had,  
3 we're not allowed a full and fair opportunity to --- to  
4 look into and have answered. I mean, there's this idea  
5 that, hell, they've got --- they've got their files.  
6 They've got everything. Of course we don't have that. We  
7 --- our files don't say anything about this Affidavit from  
8 Mr. Horne.

9 You were also told that Betty Nanney, and of course,  
10 Leslie Nanney must also be, considering she's Power of  
11 Attorney, but is lucid, and I understand Ms. Nanney has  
12 not been and is not able to speak, but counsel did say  
13 that she's lucid today and communicating in a variety of  
14 ways. Now candidly, I've never taken a deposition of  
15 someone who is unable to speak, but I am sure that there  
16 are ways to do discovery into what a person in that  
17 situation could provide of an evidentiary value. So, and  
18 certainly it may be the typical deposition. It may be a  
19 deposition or it could be interrogatories propounded to  
20 counsel. I mean there's ways to get into those issues,  
21 and so the thing that I, I guess we'll come back on that  
22 point is that Mr. Poliakoff said, "There's no grounds  
23 under the sun that we could prevail on." Your Honor,  
24 respectfully, that's --- that's just too far overstate the  
25 case. I mean I --- this is a case Wilson versus Willis, a

1           2019 case from our Supreme Court. It's recognized, and  
2           I'm quoting here, that South Carolina has recognized  
3           several theories that could bind non-signatures to  
4           arbitration agreements under general principles of  
5           contract and agency law, including one incorporation by  
6           reference; two, assumption; three, agency; four, failed  
7           piercing/alter ego; and five, estoppel."

8           So, there is a basis in law for us to put forth to  
9           legally do what we're asking the Court to do, and  
10          certainly we wouldn't come to the Court and asking the  
11          Court to do it if it wasn't one or at least in good faith  
12          we didn't believe it to be one, and so really what I  
13          submit respectfully, Your Honor, that you're hearing is  
14          that their argument against what we're asking is largely  
15          based, and I think essentially it is based, upon factual  
16          matters that we haven't had a full and fair opportunity to  
17          delve into. I mean the whole idea that there is no  
18          authority is a point of fact, and the only reason we know  
19          that Mr. Horne didn't have authority because he said so in  
20          a one-page Affidavit; and so, Your Honor, it also  
21          mentioned just a couple things, that it was decided that  
22          there was no benefit. Again, the idea that the  
23          arbitration agreement didn't provide a benefit is really a  
24          self-serving and respectfully sort of just an unduly  
25          narrow way of looking at the document. They might not

1       like the idea of arbitrating this particular dispute, but  
2       there's any number of disputes that a resident might have  
3       wanted to bring forth and have resolved through  
4       arbitration. I mean the arbitration is a benefit. It's  
5       mutual. The both parties have agreed to this document to  
6       be bound to arbitrate, and, again, arbitration, there's  
7       this, you know, a theme that arbitration is a bad thing,  
8       which is not, is not --- it's not a theme that our case  
9       law, the federal or state, agrees with where arbitration  
10      is considered to be something that's looked upon with  
11      favor.

12             One other thing, the Coleman case, it absolutely did  
13      not say, I think it might have been some inflation of the  
14      two points. What I referred to Coleman about it had to do  
15      with it actually providing a basis, a legal basis, legal  
16      hook, if you will, to argue merger estoppel off of. When  
17      you get into the idea of the presumption of merger, the  
18      two instruments or multiple instruments, and it's the same  
19      time, same parties, and so forth.

20             Mr. Poliakoff is absolutely right as far as what it  
21      said about the Adult Health Care Consent Act, and that's a  
22      separate point than the merger point. I just want to make  
23      that clear. We're not arguing that the Adult Health Care  
24      Consent Act allows or provides authority here. It  
25      certainly does and that's what Coleman says.

1           The Stott case is another one. I don't know that  
2           that one is particularly germane here, Your Honor, because  
3           as I recall that case had to do with Powers of Attorney.  
4           I don't think the issues that we're talking about here  
5           were actually litigated in that case. As I recall, there  
6           was a question of whether or not the scope of one or more  
7           Powers of Attorney would include the ability to sign with  
8           authority the arbitration agreement issue. I don't recall  
9           that it got into any issues of merger or estoppel or the  
10          discovery issue we're talking about here today. So, I  
11          really would respectfully submit that was not germane to  
12          what we're discussing, and --- oh, two more, to points,  
13          and I'll be done, Your Honor.

14          The issue with Medicare, I think, well, I  
15          respectfully would submit that issue that there is some  
16          sort of problem with the regulatory problem with Medicare.  
17          I think that one is pretty easily disposed of, because  
18          even when Mr. Poliakoff was telling you, was making the  
19          argument, I understood him to say the problem there is  
20          when there is an arbitration agreement that is required  
21          that admission is contingent upon the arbitration  
22          agreement. That's not what we have here. It's absolutely  
23          not contingent upon it. It could be signed or it could  
24          not be signed, and my point is to say that, one, we don't  
25          have a problem with that requirement, because it's not,

1           it's not an additional consideration, and it's certainly  
2           not required of admission, but the way that it works, and  
3           this actually it dovetails into my last point. He  
4           mentioned the entire agreement provision from the  
5           admission agreement. He read to you part of it. He  
6           didn't read the last sentence, which is, "The undersigned  
7           further acknowledges that he/she has received and read the  
8           admission handbook and other admission materials and  
9           understands that these documents are made a part of this  
10          agreement by reference herein."

11                 Your Honor, it references this idea of other  
12          admission materials, and other admission material is  
13          indeed this arbitration agreement, which Coleman, even  
14          though it doesn't come out in favor of the proponent of  
15          arbitration, there it does, does confirm the idea that the  
16          admission agreement and arbitration agreement are, and  
17          most importantly, not just same parties and same time, but  
18          same purpose and same transaction, the purpose of  
19          admitting this person to the facility. So, you know, this  
20          entire agreement clause taken into account it's expressed  
21          reference and inclusion of these other admission  
22          materials, I would submit it is helpful to us and not  
23          helpful to opposing counsel; and, again, the only way the  
24          arbitration agreement makes sense is if you deal with it  
25          in conjunction with the admission agreement. There would

1           be no reason for the arbitration to exist but for the  
2           admission agreement, and so it's --- it's not a condition,  
3           but it absolutely is in conjunction with the admission;  
4           and so, Your Honor, number one, we are asking the Court to  
5           compel arbitration based upon this merger, estoppel; and  
6           if the Court is not inclined to do that, because we do  
7           recognize that we're unable today to prove to you a true  
8           agency by way of either an actual or apparent agency, Mr.  
9           Poliakoff --- and forgive me, Madam Court Reporter,  
10          because I realize I've gone pretty fast, but he's correct  
11          in saying that it would have to be a manifestation of the  
12          principal to get to an apparent agency, and I'm not  
13          prepared to prove that to you today, Your Honor, but that  
14          gets me to my fallback argument, which is, you know, I  
15          really haven't had a chance to be in a position to prove  
16          it today because, yes, we have certain file materials, but  
17          that's only a slice of the pie. I mean, when it comes to  
18          resolving important factual questions in courts, I'm  
19          pretty sure that Rule 26, for instance, underscores the  
20          sort of basic idea that we resolve them based upon, well,  
21          the evidence that's out there, you know, within reason.  
22          We look for, you know, the elements, evidence that's  
23          relevant to the subject matter. Certainly there is that  
24          out there, because we've been provided with an Affidavit  
25          of Mr. Hart, and so what's he's got to say is relevant to

1           the subject matter, and if we're not allowed to look into  
2           that, Your Honor, we respectfully submit we're unduly and  
3           unfairly prejudiced in our ability to, you know, to  
4           present our position in favor of the enforcement of the  
5           agreement. Thank you, Your Honor.

6   BY THE COURT:

7           Thank you.

8   BY MR. POLIAKOFF:

9           I'll be brief and just addressing a few points made to  
10          just to the reply, if it may please the Court? Several  
11          positions by counsel we do agree with. One is where the  
12          Defendant admits, "I can't prove authority." That's no  
13          great admission simply because true they can't. They  
14          can't. There is no authority, and so they cannot prove  
15          authority.

16                 Additionally, the Defendant essentially admits that  
17          they have not met their burden of proof today. I agree  
18          that it's not due to any failings by counsel. It's simply  
19          because there is no proof that would afford them the  
20          relief that they're asking this Court to give, and I fully  
21          agree with counsel who has concurred with me that as far  
22          as representations, it must be a manifestation by the  
23          principal to the facility, not the --- not this purported  
24          agent, and so --- so we've got three basic people are  
25          entities here. We've got Betty Nanney, who is unable to

1           verbalize anything, so we know she didn't make any  
2           representations. Nobody says she's able to talk. She is  
3           lucid, but she's unable to verbalize or talk. We've got  
4           Caleb, who says, "I had no authority." He signed an  
5           Affidavit saying, "I made no other representations.  
6           Nobody explained arbitration to me. I don't even remember  
7           signing it. Really don't know anything about it until  
8           it's come up in the context of this motion," and so if  
9           there were some representation to the facility, well, my  
10          colleague represents the facility. I mean the facility,  
11          if there was something to claim, if there was some  
12          discovery out there or something that discovery would  
13          reveal, they hold that in their hands. If there were  
14          some person at the facility who says, "Somebody made a  
15          representation to us," they don't need discovery for that.  
16          They can give that to us all day every day. Their motion  
17          has been filed for a long time. Regardless of when they  
18          dropped their Memo on us, they could have given us some  
19          kind of Affidavit, but the reason they didn't is that  
20          doesn't exist. There were no representations by this  
21          family, certainly not by Betty, unable to verbalize,  
22          certainly not by Caleb or anybody else; and so for anybody  
23          that makes any difference, there were no representations.  
24          There's nothing that discovery would tell us. Even if the  
25          Court were inclined to give some discovery on an issue

1           that discovery would not help us with, Section Four of the  
2           Federal Arbitration Act, the FAA, provides for a jury  
3           trial if there are any factual disputes, but we don't even  
4           arise to the level of a factual dispute. There simply is  
5           no representation by any family member that would give  
6           them any even argument of apparent authority; but anyway,  
7           Your Honor, the arbitration agreement is clearly a  
8           separate document. It has separate signatures. The  
9           admission's agreement has a page of signatures. The  
10          arbitration agreement is an additional sheet with its own  
11          signatures, and they're not akin. They don't go hand in  
12          hand. The admission agreement is required for admission.  
13          The arbitration agreement is an additional piece of paper  
14          that is not required for any purpose, other than the  
15          facility doesn't like Plaintiffs having access to real  
16          courts, real judges and real juries. Thank you, Your  
17          Honor.

18       BY THE COURT:

19               Okay. Thank you.

20                       Okay. I hate to ask, but, Mr. Hines, anything else?

21       BY MR. HINES:

22               Well, very, very briefly, Your Honor, I just want to say,  
23               because I suppose it goes without saying that I don't  
24               agree exactly with what Mr. Poliakoff said about any  
25               admission of us failing meet the burden of proof. I trust

1           that's a given, and, oh, he just --- he's given me one  
2           more thought about trying to make a point with that. Yes,  
3           they have different signature pages. They're different  
4           instruments. They're separate instruments. They're  
5           always going to be. You'll never have --- you will never  
6           see a merger argument where you don't have multiple  
7           instruments, Your Honor. So I would just underscore the  
8           point that walks right into, respectfully, the superficial  
9           and specious nature of an argument against merger  
10          argument. Yeah, they're two. Yeah, there are always  
11          going to be two or maybe three or four. There are always  
12          going to be more than one, and that's what we have here,  
13          and this --- and, you know, again, it's the theme that ---  
14          that this entity, you know, the --- the THI entity, just  
15          wants to keep litigants away from --- from real, real  
16          courts and real judges, real juries. That whole notion is  
17          completely --- is completely irreconcilable with the idea  
18          that arbitration is something that's favored under this  
19          state and federal policy as a good thing in terms of  
20          resolving disputes.

21                 So, again, Your Honor, that's --- well, thank you  
22                 very much for your time, and I'll --- well, I'll sit down  
23                 now.

24       BY THE COURT:

25                 Okay. Thank you. All right. First, I continue to be

1           amazed at the preparation that you all put into these  
2           hearings, and I appreciate it very much. You all, both  
3           sides, are just experts in your field, and that's very  
4           refreshing.

5   BY MR. HINES:

6           Thank you.

7   BY MR. POLIAKOFF:

8           Thank you.

9   BY THE COURT:

10          And both do an excellent job. I --- and in saying that, I  
11          want both, I'm wondering if it would be a tremendous  
12          amount of trouble if you all could each convert your  
13          Memoranda to Orders, two proposed Orders for me, and if  
14          you'll do it in Word format and send it to my law clerk,  
15          then it's so much easier for me to work from, and  
16          selfishly that saves me some time. Okay, and I'm  
17          wondering if you all can do that by Friday?

18   BY MR. HINES:

19          Certainly, Your Honor.

20   BY THE COURT:

21          Okay.

22   BY MR. POLIAKOFF:

23          Yes, Your Honor. Thank you.

24   BY THE COURT:

25          Okay. All right, and so again, thank you all for you

1 efficiency and for your patience in waiting to be heard.

2 I appreciate it very much.

3 BY MR. HINES:

4 Thank you, Your Honor.

5 BY MR. POLIAKOFF:

6 Thank you, Your Honor.

7 (HEARING CONCLUDED AT 4:32 P.M.)

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1 STATE OF SOUTH CAROLINA )  
 2 ) CERTIFICATE  
 3 COUNTY OF SPARTANBURG )  
 4  
 5

6 This is to certify that the within hearing was taken on  
 7 the 16th day of December, 2019;

8 That the within witnesses were duly sworn to tell the  
 9 truth and that the foregoing is an accurate transcript of the  
 10 testimony given under oath;

11 That copies of all exhibits, if any, entered herein are  
 12 attached hereto and made a part of this record;

13 That the undersigned court reporter, a Notary Public for  
 14 the State of South Carolina, is not an employee or relative of  
 15 any of the parties, counsel or witness and is in no manner  
 16 interested in the outcome of this action.

17 IN WITNESS WHEREOF, I have hereunto set my Hand and Seal  
 18 at Spartanburg, South Carolina, this 16th day of May, 2020.  
 19  
 20

21 s/Sandra Satterwhite  
 22 Notary Public for South Carolina  
 23 My Commission Expires: 3/8/27

24 (SEAL)  
 25

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS         |
|                              | ) |                                      |
| COUNTY OF SPARTANBURG        | ) | SEVENTH JUDICIAL CIRCUIT             |
|                              | ) |                                      |
| BETTY NANNEY, BY AND THROUGH | ) | CASE NO. 2019-CP-42-03075            |
| HER ATTORNEY-IN-FACT, LESLIE | ) |                                      |
| NANNEY ,                     | ) |                                      |
|                              | ) |                                      |
| PLAINTIFFS,                  | ) |                                      |
|                              | ) |                                      |
| vs.                          | ) |                                      |
|                              | ) |                                      |
| THI OF SOUTH CAROLINA AT     | ) | <b>DEFENDANT LAURA ANNE WINN'S</b>   |
| MAGNOLIA MANOR-              | ) | <b>MOTION TO DISMISS PLAINTIFF'S</b> |
| SPARTANBURG, LLC D/B/A       | ) | <b>COMPLAINT</b>                     |
| MAGNOLIA MANOR-              | ) |                                      |
| SPARTANBURG; RUSTY           | ) |                                      |
| FLATHMANN; LAURA ANNE WINN   | ) |                                      |
| AND OLISHIA GAFFNEY,         | ) |                                      |
|                              | ) |                                      |
| DEFENDANTS.                  | ) |                                      |
|                              | ) |                                      |

TO: GARY W. POLIAKOFF, RAYMOND P. MULLMAN and ALBERT SMITH,  
ATTORNEYS FOR THE PLAINTIFF:

The Defendant, Laura Anne Winn (hereinafter referred to as “this Defendant”), by and through her undersigned counsel, hereby moves, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCP), for an Order from this Honorable Court dismissing all claims asserted against her in the above-captioned matter. This Defendant reserves the right to present matters outside of the pleadings prior to a hearing on this matter pursuant to Rule 12(b), SCRCP. More specifically, this Motion is based upon the following:

This Defendant is not a proper party to this action as she did not owe the Plaintiff a legal duty of care with respect to the alleged injuries suffered in this action. Specifically, Ms. Winn was not an employee or agent of Defendant THI of South Carolina at Magnolia Manor-Spartanburg, LLC (the “Facility”) during the time period relevant to Plaintiff’s allegations, nor did she have any

personal or professional relationship with the Plaintiff or any other defendant in this action during the time period at issue that could give rise to a legal duty of care. Moreover, Ms. Winn did not supervise, monitor, or interact with any staff member at the Facility during the time the alleged events occurred. Accordingly, Ms. Winn is an improper party to this action and the claims against her should be dismissed.

This Motion is based on the applicable rules and case law, the contents of the Complaint, the attached Declaration, as well as any memorandum or affidavits to be filed with this matter and the arguments of counsel.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

D. Jay Davis, Jr.

Kate C. Mettler

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

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

Attorneys for the Defendant Laura Anne Winn

Charleston, South Carolina

Dated: October 11, 2019

|                              |   |                                        |
|------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS           |
|                              | ) |                                        |
| COUNTY OF SPARTANBURG        | ) | SEVENTH JUDICIAL CIRCUIT               |
|                              | ) |                                        |
| BETTY NANNEY, BY AND THROUGH | ) | CASE NO. 2019-CP-42-03075              |
| HER ATTORNEY-IN-FACT, LESLIE | ) |                                        |
| NANNEY,                      | ) |                                        |
|                              | ) |                                        |
| PLAINTIFFS,                  | ) |                                        |
|                              | ) |                                        |
| vs.                          | ) | <b>DEFENDANT THI OF SOUTH</b>          |
|                              | ) | <b>CAROLINA AT SPARTANBURG, LLC</b>    |
|                              | ) | <b>D/B/A MAGNOLIA MANOR-</b>           |
| THI OF SOUTH CAROLINA AT     | ) | <b>SPARTANBURG'S MOTION TO DISMISS</b> |
| MAGNOLIA MANOR-              | ) | <b>PLAINTIFF'S COMPLAINT, COMPEL</b>   |
| SPARTANBURG, LLC D/B/A       | ) | <b>ARBITRATION AND STAY STATE</b>      |
| MAGNOLIA MANOR-              | ) | <b>COURT PROCEEDINGS</b>               |
| SPARTANBURG; RUSTY           | ) |                                        |
| FLATHMANN; LAURA ANNE WINN   | ) |                                        |
| AND OLISHIA GAFFNEY,         | ) |                                        |
|                              | ) |                                        |
| DEFENDANTS.                  | ) |                                        |
|                              | ) |                                        |

TO: GARY W. POLIAKOFF, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Magnolia Manor-Spartanburg, LLC (hereinafter referred to as "this Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order staying or dismissing this and 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 Betty Nanney'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.

Kate C. Mettler

Gaillard T. Dotterer, III

P.O. Box 993, Charleston, SC 29402

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

[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com); [gdotterer@ycrlaw.com](mailto:gdotterer@ycrlaw.com)

Attorneys for the Defendant THI of South Carolina  
at Magnolia Manor-Spartanburg, LLC d/b/a  
Magnolia Manor-Spartanburg

Charleston, South Carolina

Dated: November 11, 2019

PLEASE READ CAREFULLY

FACILITY - RESIDENT/REPRESENTATIVE  
ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Resident/Representative Signature

Date

Printed Name of Resident/Representative

Authorized Agent of Facility

Date

Printed Name &amp; Title

DEFENDANT'S  
EXHIBIT

Original: Business File • Photocopy: Resident/Representative

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS         |
|                              | ) |                                      |
| COUNTY OF SPARTANBURG        | ) | SEVENTH JUDICIAL CIRCUIT             |
|                              | ) |                                      |
| BETTY NANNEY, BY AND THROUGH | ) | CASE NO. 2019-CP-42-03075            |
| HER ATTORNEY-IN-FACT, LESLIE | ) |                                      |
| NANNEY,                      | ) |                                      |
|                              | ) |                                      |
| PLAINTIFFS,                  | ) |                                      |
|                              | ) |                                      |
| vs.                          | ) |                                      |
|                              | ) | <b>DEFENDANT RUSTY FLATHMANN'S</b>   |
|                              | ) | <b>MOTION TO DISMISS PLAINTIFF'S</b> |
| THI OF SOUTH CAROLINA AT     | ) | <b>COMPLAINT, COMPEL ARBITRATION</b> |
| MAGNOLIA MANOR-              | ) | <b>AND STAY STATE COURT</b>          |
| SPARTANBURG, LLC D/B/A       | ) | <b>PROCEEDINGS</b>                   |
| MAGNOLIA MANOR-              | ) |                                      |
| SPARTANBURG; RUSTY           | ) |                                      |
| FLATHMANN; LAURA ANNE WINN   | ) |                                      |
| AND OLISHIA GAFFNEY,         | ) |                                      |
|                              | ) |                                      |
| DEFENDANTS.                  | ) |                                      |
|                              | ) |                                      |

TO: GARY W. POLIAKOFF, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Rusty Flathmann (hereinafter referred to as "this Defendant") by and through his 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 or dismissing 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 Betty Nanney's admission to the Defendant THI of South Carolina at Magnolia Manor-Spartanburg, LLC's skilled nursing facility (the "Facility") (See Arbitration Agreement attached as **Exhibit A**). At times relevant to Plaintiff's Complaint, this Defendant served as a member of the governing body of the Facility.

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.

Kate C. Mettler

Gaillard T. Dotterer, III

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[kmettler@ycrlaw.com](mailto:kmettler@ycrlaw.com); [gdotterer@ycrlaw.com](mailto:gdotterer@ycrlaw.com)

Attorneys for the Defendant Rusty Flathmann

Charleston, South Carolina

Dated: November 11, 2019

|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS         |
|                              | ) |                                      |
| COUNTY OF SPARTANBURG        | ) | SEVENTH JUDICIAL CIRCUIT             |
|                              | ) |                                      |
| BETTY NANNEY, BY AND THROUGH | ) | CASE NO. 2019-CP-42-03075            |
| HER ATTORNEY-IN-FACT, LESLIE | ) |                                      |
| NANNEY,                      | ) |                                      |
|                              | ) |                                      |
| PLAINTIFFS,                  | ) |                                      |
|                              | ) |                                      |
| vs.                          | ) |                                      |
|                              | ) |                                      |
| THI OF SOUTH CAROLINA AT     | ) | <b>DEFENDANT OLISHIA GAFFNEY'S</b>   |
| MAGNOLIA MANOR-              | ) | <b>MOTION TO DISMISS PLAINTIFF'S</b> |
| SPARTANBURG, LLC D/B/A       | ) | <b>COMPLAINT, COMPEL ARBITRATION</b> |
| MAGNOLIA MANOR-              | ) | <b>AND STAY STATE COURT</b>          |
| SPARTANBURG; RUSTY           | ) | <b>PROCEEDINGS</b>                   |
| FLATHMANN; LAURA ANNE WINN   | ) |                                      |
| AND OLISHIA GAFFNEY,         | ) |                                      |
|                              | ) |                                      |
| DEFENDANTS.                  | ) |                                      |
|                              | ) |                                      |

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TO: GARY W. POLIAKOFF, ESQUIRE, ATTORNEY FOR THE PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, Olishia Gaffney (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 or dismissing 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 Betty Nanney's admission to the Defendant THI of South Carolina at Magnolia Manor-Spartanburg, LLC's skilled nursing facility (the "Facility"), where this Defendant was employed as the Director of Nursing 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.

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Attorneys for the Defendant Olishia Gaffney

Charleston, South Carolina

Dated: November 11, 2019

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Betty Nanney, by and through her Attorney-In-Fact, Leslie Nanney

Plaintiff,

v.

THI of South Carolina at Spartanburg, LLC  
d/b/a Magnolia Manor- Spartanburg; Rusty  
Flathmann; Laura Anne Winn; and Olishia  
Gaffney

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No: 2019-CP-42-03075

**PLAINTIFF'S MEMO IN OPPOSITION  
TO MOTION TO COMPEL  
ARBITRATION**

**TO: D. JAY DAVIS, ATTORNEY FOR DEFENDANTS:**

COMES NOW the Plaintiff, Betty Nanney, by and through her Attorney-In-Fact, Leslie Nanney, does submit this memorandum of law in opposition to Defendants' Motion to Compel Arbitration. In opposing this motion, Plaintiff would show that the Arbitration Agreement is unenforceable for the reasons set forth below:

**STATEMENT OF ISSUES**

- a. The Arbitration Agreement is unenforceable where Kaileb Horn did not have authority to bind Betty Nanney to the Arbitration Agreement.
- b. The affirmative defenses of equitable estoppel, ratification and third-party beneficiary do not apply.
- c. The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.
- d. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms which would violate the Federal Arbitration Act and applicable case law.
- e. The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid contract.

**FACTUAL BACKGROUND**

This matter arises out of a nursing home abuse case where Defendants injured Ms. Nanney fracturing her hip and then attempted to cover the incident up for over a week before getting Ms. Nanney the care and treatment she needed at the hospital. **See Exhibit 1—Expert Affidavit.** Leslie Nanney is Ms. Nanney’s daughter and was granted Power of Attorney by Ms. Nanney on June 23, 2017. **See Exhibit 2—Power of Attorney.** No power of attorney existed at the time of the admission into the nursing home on October 28, 2016. Neither Betty or Leslie Nanney signed the Arbitration Agreement to admit Ms. Nanney into Magnolia Manor-Spartanburg. Kaileb Horn (Kaileb), Ms. Nanney’s son, was the individual who signed all the admissions paperwork. At no point in time did Kaileb Horn have Power of Attorney, agency -actual or apparent - or any other form of legal authority that would have given Kaileb the ability to act on behalf of Ms. Nanney. **See Exhibit 3—Kaileb Affidavit**

There were dozens of pages of documents including two separate agreements signed during the admission process. The separate and distinct Admission Agreement allowing Ms. Nanney to become a resident and governed the type of care Ms. Nanney would receive at the Facility and Ms. Nanney’s financial obligation to pay for those services. Upon information and belief, the Admission Contract contains a section titled “Entire Agreement”<sup>1</sup> provision indicating this Contract constituted “the entire agreement and understanding between the parties” concerning admission to the Facility.

Another document called “Arbitration Agreement” was signed by Kaileb Horn later on **October 28, 2016.** This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity with its own signature blocks. The Arbitration

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

Agreement, purportedly a contract between the Facility and Ms. Nanney, provides for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Nanney's care at the Facility. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission.

On **September 4, 2019**, Plaintiff filed the Complaint alleging survival claims arising from Defendants' failure to monitor and supervise Ms. Nanney's safety and well-being while at the Facility. On **November 11, 2019**, the Facility filed a frivolous Motion to Dismiss, Compel Arbitration and Stay State Court Proceedings. Defense counsel knows or should know that no valid or enforceable arbitration agreements exists based on well-established case law in South Carolina including the Coleman, Hodge, and Thompson cases. Defendants are clearly using this Motion to delay and obstruct the orderly progression of this litigation. Defendants have refused to respond to discovery or participate in litigation. The Facility must show a valid and enforceable arbitration agreement between Ms. Nanney and the Facility to prevail on its motion. Defendants know that they cannot meet this burden.

### **BURDEN OF PROOF**

The Facility seeks to compel arbitration. Defendant carries the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable as Defendant represents.<sup>2</sup> Courts interpret a jury trial waiver narrowly and construe contract ambiguities against Defendant who drafted the Arbitration Agreement<sup>3</sup> Whether the parties agreed to arbitrate is a

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<sup>2</sup> See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).

<sup>3</sup> Nat'l Acceptance Co., 381 F.Supp. at 271).

question of substantive state law.<sup>4</sup> In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

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

Thus, the presumption favoring arbitration only applies *after* the court finds there is a valid, enforceable arbitration agreement.<sup>5</sup> The mandatory language in the Federal Arbitration Act (“FAA”) only applies in instances where a valid arbitration agreement has been well established. This is self-evident from the FAA provisions: “The court shall make an order directing the parties to proceed to arbitration” but only “upon being satisfied that the making of the agreement...is not in issue.” 9 U.S.C. § 4. The U.S. Supreme Court has often cited the FAA’s savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.<sup>6</sup> The FAA looks to state law to decide the threshold questions of contract formation.<sup>7</sup> Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.<sup>8</sup> The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing

<sup>4</sup> Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007) (“General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”).

<sup>5</sup> EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler’s Cove Homeowners Ass’n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

<sup>6</sup> Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.

<sup>7</sup> Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (“the court should apply ‘ordinary state-law principles that govern the formation of contracts.’”).

<sup>8</sup> Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C. at 14, 644 S.E.2d at 663 (“general contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause.”).

at law or equity, including fraud, duress, and unconscionability.<sup>9</sup> In short, pro-arbitration policy does not validate a contract lacking the building blocks of a binding contract.

### **LEGAL ANALYSIS**

Defendants' motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. Defendants had no such contract with Ms. Nanney. The "Arbitration Agreement" on which Defendants' motion relies is invalid because, under bedrock contract principles, there can be no contract without the mutual assent of its proposed parties. Ms. Nanney never assented to the Arbitration Agreement and did not empower anyone else to assent on her behalf.

#### **A. Signatory Had No Legal Authority**

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32). Kaileb Horn did not have that authority. Defendants have produced no evidence indicating that Kaileb Horn had authority to enter a contract on Ms. Nanney's behalf or to waive Ms. Nanney's right to a jury trial.

For agency situations, the legal burden is on the party asserting that an agency exists.<sup>10</sup> In this case, Defendant must show all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Id. An agency may not, however, be established solely

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<sup>9</sup> See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

<sup>10</sup> Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

by the declarations and conduct of an alleged agent.<sup>11</sup> South Carolina law requires that to prove apparent authority the Defendants must show: 1) that the purported principal consciously or impliedly represented to another to be his agent, 2) that there was reliance upon the representation, and 3) that there was a change of position to the relying party's detriment. Cownburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent but that between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). Defendant has failed to provide any evidence beyond Kaileb Horn's signature to suggest he was Ms. Nanney's agent. The fact that Kaileb signed documents so that Ms. Nanney could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Nanney to waive her right to a jury trial or agree to arbitration. Ms. Nanney never manifested any form of assent establishing Kaileb as her agent.

Kaileb was one of Ms. Nanney's children. He was not Ms. Nanney's attorney-in-fact. He had no legal authority to enter contracts on Ms. Nanney's behalf. Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

The scope of Sister's authority to consent to "decisions concerning Decedent's health care" extended to the admission agreement, which was the basis upon which Facility agreed to provide health care and Sister agreed to pay for it. **The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between Facility and Decedent or Sister should issues arise in the future. Under the Act, Sister did not have the capacity to bind Decedent to this voluntary arbitration agreement.** We therefore affirm the circuit court's holding that the

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<sup>11</sup> Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143, 399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)).

Act did not confer authority on Sister to execute a document which involved neither health care nor financial terms for payment of such care.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 353-54, 755 S.E.2d 450, 454 (2014).

Coleman is directly on point with the facts of the case at hand. In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed the arbitration and admission agreements lacked authority to bind her sister to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act gave the sister authority to make 'healthcare decisions' on behalf of her sister, consent for medical treatment is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Kaileb had no legal authority to sign the Arbitration Agreement, and from the record so far, Defendant knew or should have known this fact but demanded he sign anyway. Since Kaileb lacked legal authority to enter into a contract to waive Plaintiff's constitutional right to a jury trial, the arbitration agreement is void and unenforceable.

**B. Equitable estoppel, ratification and third-party beneficiary theories do not apply.**

Defendants incorrectly allege Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel

must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Defendants briefly mention some of these elements but make no effort to apply them.

In the case at hand, Defendant has not shown any evidence to establish the elements required to prove equitable estoppel. First, there is no evidence Defendants lacked knowledge Kaileb was not authorized to bind Ms. Nanney to the Arbitration Agreement. Additionally, Kaileb did not have power of attorney over Ms. Nanney nor did Defendant produce evidence Ms. Nanney represented the same to Defendant.

Arbitration contracts concerning interstate commerce are governed by the FAA but its provisions apply state law to enforceability questions such as the application of equitable estoppel. 9 U.S.C. § 2 (requiring enforcement of arbitration contract “save upon such grounds as exist at law or in equity for the revocation of any contract”). The FAA does not “alter background principles of state contract law regarding the scope of agreements (including the question of who is bound by them).” Arthur Anderson LLP v. Carlisle, 556 U.S. 624, 630 (2009). Arthur Andersen specifically applied this principle to equitable estoppel arguments. Id. at 632 (noting question on remand was “whether the relevant state contract law recognizes equitable estoppel”).

Defendants argue Ms. Nanney created an agency relationship to support arbitration because she “accepted” admission. Defendants then argue Kaileb is estopped from denying authority to bind Ms. Nanney to arbitration because he does not deny authority to admit Ms. Nanney to the Facility. Accepting merger is a prerequisite to accepting Defendant’s arguments, but Coleman and its progeny rejected similar merger arguments. Coleman refused to apply the merger doctrine because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration

agreements.” 407 S.C. at 355, 755 S.E.2d at 455. Thompson v. Pruitt Corp. and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC applied Coleman and provided further examples of factors demonstrating “separateness” and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302. The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the merger doctrine because language in the contracts “recognize[d] the ‘separateness’ of the admission and arbitration agreements.” 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating “separateness” and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

Like in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with “Page 12 of 12” while the Arbitration Agreement is a separate document. As in Thompson, the arbitration agreement announces its independence with its “Arbitration Agreement” title.

Defendants argue Ms. Nanney should be estopped from denying the validity of the Arbitration Agreement because Ms. Nanney accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the alleged Arbitration Agreement. However, Defendant’s argument fails because it depends on Defendant’s faulty merger argument, and Ms. Nanney did not receive a “benefit” from the Arbitration Agreement.

As discussed above briefly, there were two separate agreements signed on the day of the admission, and they were not merged. By their own terms, the Admission Agreement indicated

an intent that the common law doctrine of merger not apply. The Admission Agreement's "Entire Agreement"<sup>12</sup> provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibits merging the two separate agreements. An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement *or* in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Even if the "Entire Agreement" clause creates an ambiguity as to merger, the law is clear that any ambiguity must be construed against the drafter, in this case, Defendants.<sup>13</sup> Since there was no merger here, Defendants' equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger). The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired.

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<sup>12</sup> "I/we hereby acknowledge that I/we have read this page and all preceding pages and acknowledge that this Agreement represents the entire agreement and understanding between the parties and supersedes all previous representations, understandings or agreements, oral or written, between the parties and may not be amended except by written agreement of the parties."

<sup>13</sup> See Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct.App.2011) fn. 4.

In sum, the Facility cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. So long as the admission and arbitration contracts are separate documents, alleged misrepresentations made by a resident's family member when signing the contracts does not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and her misrepresentations have no bearing on claims against the home by the resident even if the misrepresenting family member is also the attorney-in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home "may not hold [resident's] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities").

Therefore, Defendant cannot prove merger of the Admission Agreement and Arbitration Agreement. Defendant can also not claim to have been misled and cannot rely on equitable estoppel if it, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions.<sup>14</sup> Furthermore, Defendant had the capacity to determine whether Kaileb had authority to sign the Arbitration Agreement on Ms. Nanney's behalf. Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendant is very familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Kaileb for power of attorney documentation. Defendant certainly had the power to review its own paperwork and documentation. Therefore, Defendant cannot argue merger or estoppel and the court should deny Defendant's motion based on the same.

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<sup>14</sup> See Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001).

Defendants rely primarily on International Paper Co. v. Schwabedissen Maschinen & Anlaeuen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) which held that a party may be estopped from denying arbitration when he has received a “direct benefit” from a contract containing an arbitration clause. Defendants then argue Ms. Nanney’s admission to the Facility was the required “direct benefit.” In doing so, Defendant ties its estoppel argument inextricably to the flawed merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home’s “equitable estoppel argument is premised on [the home’s] contention that, under state law, the admission agreements and the [arbitration agreements] merged”). Admission can be the “direct benefit” that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Ms. Nanney’s admission does not support equitable estoppel.

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals held in Thompson that any benefit of admission “is of no moment” for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson’s estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.<sup>15</sup> Since admission is unavailable as a “direct benefit” to support estoppel, Defendant would be required to point to some benefit Ms. Nanney received from the Arbitration Agreement alone. However, Ms. Nanney derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident’s estate “received no benefit from the Arbitration Agreement”). Even if they had, “any possible benefit emanating from the Arbitration Agreement alone is offset by the Arbitration

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<sup>15</sup> Hodge was also skeptical of the notion that admission was a benefit to the resident considering Complaint allegations that the nursing home’s acts during the admission caused the resident’s death. 422 S.C. at 563, 813 S.E.2d at 303 (“we find it difficult to find [resident] benefitted even from being admitted”).

Agreement's requirement that Ms. Nanney waive her right to access the courts and her right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688. In sum, Defendants cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

Defendants then argue ratification simply by her continued residency in Defendants' facility. To establish a ratification of the Arbitration Agreement Defendants must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. *Lincoln v. Aetna Gas. & Sur. Co.*, 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989). It is doubtful that the resident received a benefit from the Arbitration Agreement.

This argument is flawed for several reasons. First, Ms. Nanney's presence alone cannot constitute an affirmative representation. See Hodge where the court rejected the notion that a nursing home resident represents her/her family member has authority to enter an arbitration agreement on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent"). Defendants make the precise argument Hodge rejected.

Defendants argue Ms. Nanney accepted the benefits of the contracts. However, the only "benefit" Defendants cite is admission itself, a benefit Defendants have admitted to be separate from arbitration. Defendants never attempt to explain what supposed "benefit" of the independent Arbitration Agreement Ms. Nanney derived during her time as a resident in Defendants' facility.

Any such attempt would have been futile given the Court of Appeals' unambiguous ruling in Thompson, which held that **"any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial."** 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

Unmoored from logic and precedent Defendants then make a broader argument that it would be "manifestly inequitable" for Plaintiff to pursue a tort claim based on the Admission Agreement while denying Kaileb's authority to sign the Arbitration Agreement. Defendant misunderstands the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, Defendant misrepresents Plaintiff's claims. Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement). Since Ms. Nanney made no affirmative representations that Kaileb had authority to sign the Arbitration Agreement on her behalf, Defendant's motion to compel arbitration must be denied.

Lastly, Defendants claims that the agreement is enforceable under a theory of third-party beneficiary. *But See Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (holding "[a]s to the [arbitration agreement] between [the] [a]ppellants and Son in his individual capacity, 'a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.'" With no valid underlying contract, there could be no third-party beneficiary. First, Plaintiff's action sounds solely in tort. There is no breach of contract claim asserted. Plaintiff's pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiff's tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the Arbitration Agreement is a separate and distinct agreement from the Admission Agreement. Plaintiff is not and would have no reason to rely upon the terms of the Arbitration Agreement to establish his tort claims. Assuming, *arguendo*, that Plaintiff did rely on language contained in the separate Admission Agreement to establish some element of Plaintiff's claims, the theories of third-party beneficiary and estoppel would relate only to Plaintiff's denial of the existence of the remainder of the terms of the Admission Agreement and not to the terms of the Arbitration Agreement.

**C. Lack of consideration and mutuality**

The Arbitration Agreement is not a valid and enforceable agreement due to a lack of consideration and mutuality. Every contract must contain an offer, acceptance, and valuable consideration.<sup>16</sup> "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,

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<sup>16</sup> *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 166 (S.C. 2003).

suffered or undertaken by the other.”<sup>17</sup> Where a contract lacks valuable consideration, the contract must fail. Courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. However, in determining whether adequate consideration exists in a contract, the court must examine and stay within the confines of the four corners of the instrument.<sup>18</sup> Therefore, the court must assess whether the contract itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. Here, the Arbitration Agreement does not contain the required consideration. There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the “direct benefit” that forces Plaintiff to arbitrate **only if admission and arbitration are governed by the same contract.** In this case, even assuming Kaileb had authority, there is no valuable consideration in agreeing to the Arbitration Agreement. The one-page agreement contains no benefit or detriment to the parties. Therefore, the Arbitration Agreement lacks consideration, and the court should deny Defendant’s Motion. Moreover, Defendant was prohibited from asking or receiving any consideration from Ms. Nanney. **Facilities must “not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual’s continued stay at the facility.”** 42 U.S.C. § 1396r(c)(5)(A)(iii). Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility.

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<sup>17</sup> *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).

<sup>18</sup> *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)).

In the instant case, it is undisputed Ms. Nanney was a Medicare and Medicaid beneficiary while residing at the Facility and the Facility was billing and accepting payment from Medicare and Medicaid for Ms. Nanney's care. Therefore, the question of enforceability turns, in part, on whether the jury waiver provision was a mandatory part of the Admission Agreement and a required pre-condition to admission.

Defendant has admitted the Arbitration Agreement was not a condition of admission. Under similar circumstances, the Honorable Judge Perry Buckner held in Holmes v. Bayview that an arbitration contract was not enforceable. Judge Buckner's Order (**Exhibit 4**) states:

**Alternatively, if the jury waiver was not a precondition to admission, then it fails for lack of consideration.** As noted, the waiver, as written, works only in one direction. When asked during arguments what the consideration for the waiver might be, counsel for Defendants argued only that the admission was the consideration for the waiver. When pushed on whether any additional consideration was present (separate and apart from the admission and care) counsel agreed there was none. Here, Defendants cannot have it both ways. They cannot, on the one hand, argue that the waiver was not consideration for the admission but, on the other, argue that the admission was valuable consideration for the waiver. For the waiver to be enforceable as a non-pre-condition to admission, it must be supported by some other valuable consideration, which it is not.

The Honorable Judge Diane Goodstein recently had a similar analysis in Rawl v. West Ashley (**Exhibit 5**):

The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement.

Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. **Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement.** In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the

confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

**D. No meeting of the minds due to missing material terms**

A valid contract under South Carolina law requires a meeting of the minds between the parties **with regard to all essential and material terms of the agreement**.<sup>19</sup> The forum chosen for the arbitration to take place is an essential and material term. A contract lacking material terms may be found unenforceable for indefiniteness.<sup>20</sup> “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.* Here, even if the contract was validly executed, there was no "meeting of the minds" as to (1) the choice of arbitrator; (2) the rules of evidence; or (3) allowance of pre-hearing discovery. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, to say otherwise undermines the purpose of the arbitration process. See the Honorable Judge Kristi Lee Harrington’s Order in Powell v. Fundamental Long-Term Care Holdings, LLC. (**Exhibit 6**). No rules for arbitration were included in or attached to the Arbitration Agreement. The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court. But, “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.”<sup>21</sup> As a result, the promise that the dispute “shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules” is moot and ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and

<sup>19</sup> Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards, 265 S.C.529 (1975)).

<sup>20</sup> Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

<sup>21</sup> Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

appeals. None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists.

Further the cost of arbitration far outweighs the cost of proceeding in Court and therefore the agreement is unconscionable. Also, the cost of the arbitration must be paid by the parties including Betty Nanney who has no money or assets. Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff.

Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, since *Green Tree* the issue of the prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement. See *Zephyr Haven*, 122 So.3d at 921–22. “[W]here ‘a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.’ ” Id. at 921 (quoting *Green Tree*, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case analysis is appropriate. Id. at 922. The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims. Id. In order to invalidate the arbitration agreement, the plaintiff, at an evidentiary hearing, must show the expected cost of arbitrating the specific claim is greater than litigating it and that the cost of arbitration would be prohibitively expensive. Id.

*Fi-Tampa, LLC v. Kelly-Hall*, 135 So.3d 563 (Fla. App., 2014)

An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to “deny a potential litigant the opportunity to vindicate his or her rights.” [Cite omitted] *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. [cites omitted] Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case. See *Harrington*, 119 P.3d at 1055 (explaining that “the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights”) (citing *Randolph*, 531 U.S. at 92, 121 S.Ct. 513). In determining whether arbitration costs are prohibitively expensive, courts have

considered several factors. First, the party seeking to invalidate the arbitration agreement must present evidence concerning the cost to arbitrate. [cite omitted]. This evidence cannot be speculative; it must be based on specific facts showing with reasonable certainty the likely costs of arbitration. [cite omitted]see also *Phillips v. Assocs. Home Equity Servs., Inc.*, 179 F.Supp.2d 840, 847 (N.D.Ill.2002) (party must make “a reasonable, good faith effort to estimate” arbitration costs). Second, a party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. This evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration. Third, a court must consider whether the arbitration agreement or the applicable arbitration rules referenced in the arbitration agreement permit a party to waive or reduce the costs of arbitration based on financial hardship. *Id.* (holding an arbitration agreement was not substantively unconscionable because, in part, the agreement provided that any claim or dispute would be resolved under the American Arbitration Rules (“AAA”); the applicable AAA rules provided for waiver or reduction in arbitration fees based on “extreme hardship”); *Jones v. Gen. Motors Corp.*, 640 F.Supp.2d 1124, 1134 (D.Ariz.2009) (finding arbitration fee not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship). We conclude there is reasonable evidence to support the trial court's finding that “[i]n this particular case, Plaintiff has established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim.”

*Clark v. Renaissance W., LLC*, 232 Ariz. 510, 307 P.3d 77, 666 Ariz. Adv. Rep. 29 (Ariz. App., 2013).

**E. The Arbitration Agreement should not be enforced because it is both procedurally and substantively unconscionable.**

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))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

The choice of a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.<sup>22</sup> The need to find a placement arises quickly<sup>23</sup> and nursing home admissions are often unplanned; there is little

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<sup>22</sup> See, e.g., Podolosky v. First Healthcare Corp., 58 Cal.Rptr. 2d 89, 101 (Cal. Ct. App. 1996) (citing Donna Ambrogio, *Legal Issues in Nursing Home Admissions*, 18 Law Med. & Health Care 254, 258 (1990)); see also Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 N.E. J. on Crim. & Civ. Confinement. 1, 3 (1998) (stating that an older person's move to a nursing home also follows a period of acute hospitalization, when their care giving family is unable to adequately manage the demands of home care).

<sup>23</sup> In the 1980's, the government changed the way hospitals were paid for their Medicare patients; since the change, hospital discharge planning occurs "quicker and sicker." Linda S. Whitton, *Navigating the Hazards of the Eldercare Continuum*, 6 J. Mental Health and Aging 145, 150 (2000). See also Maureen Armour, *A Nursing Home's Good Faith Duty "to" Care: Redefining A Fragile Relationship Using the Law of Contract*, 39 St. Louis L.J. 217, 222 (1994).

time to investigate options or to wait for an opening at a nursing home of choice.<sup>24</sup> Time pressure significantly impairs the ability to seek and carefully consider alternatives.<sup>25</sup> Ms. Nanney had no choice or time in making such a decision. Many facilities lack a coherent admissions process, adding to the chaos surrounding the admission of a resident.<sup>26</sup> Residents and their family members do not have time to read and deliberate on complex or obscure contract terms. An arbitration clause is not part of the core transaction involved in a contract for medical care or service.<sup>27</sup> It is not, therefore, likely to get much attention from the non-drafting party.<sup>28</sup> As is true in the present action, facilities often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual can assess the rights affected by the contract.<sup>29</sup>

The Honorable Judge Diane Goodstein found an arbitration agreement unconscionable in a similar circumstance in Rawl v. West Ashley Rehab (**Exhibit 5**) based on the following facts that also apply to the circumstances in this case:

1. Resident lacked a meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms.
2. Upon admission the standard Arbitration Agreement form was presented on a take-it-or leave it basis.
3. Resident did not contribute to the drafting of the Arbitration Agreement
4. Resident did possess the bargaining power to negotiate the terms of the Arbitration Agreement.
5. An inherent disparity in bargaining power between the parties to the transaction.

<sup>24</sup> Denise Ashbugh Vlosky, et al., “Say-so” as a *Predictor of Nursing Home Readiness*, 93 J. of Family & Consumer Science 59 (2001).

<sup>25</sup> Potential residents and their family members can experience panic when they feel there is insufficient time to consider different facilities, and they may choose a facility they would not have chosen if they had more time to weigh their options. Whitton, *supra*, at 150.

<sup>26</sup> Donna Ambrogi & Frances Leonard, *The Impact of Nursing Home Admission Agreements on Resident Autonomy*, 28 The Gerontologist 82, 83-88 (1988).

<sup>27</sup> See Stanley D. Henderson, *Contractual Problems in the Enforcement of Agreements to Arbitrate Medical Malpractice*, 58 VA. L. REV. 947, 987 (1972) (“The arbitration provision, viewed from the perspective of the patient, is indeed subsidiary to the primary exchange of medical services for an undertaking of payment.”)

<sup>28</sup> The drafting party, on the other hand, has a great deal of information about these repetitive transactions and a great deal of incentive to prepare form contracts so that they are optimal from the drafter’s perspective. Melvin Aaron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan.L.Rev. 211, 243 (1995).

<sup>29</sup> California Advocates for Nursing Home Reform, *Better Read the Small Print! An Analysis of Admission Agreements in California’s Residential Care Facilities for the Elderly* 1 (Mar. 2003).

6. The Arbitration Agreement was inconspicuous.
7. Resident did not have sufficient time to allow any meaningful explanation of the terms and significance of the alleged arbitration agreement, considering the number and complexity of admission documents other than that alleged arbitration agreement.

The terms of the Arbitration Agreement are unfair and no person would voluntarily agree to them. For example, it does not allow for any discovery or provide the rules of the arbitration including the types of evidence that will be considered. Nor are the costs of the arbitration disclosed. The lack of discovery alone makes the agreement unconscionable ***when Defendants possess all the material information about the operation of the nursing home and what happened to Ms. Nanney at their facility.***

For arbitration contracts governed by the FAA that are silent on arbitration, the FAA prohibits **any** pre-hearing discovery. Under the sole discovery provision of the FAA, arbitrators may summon, in writing, any person as a witness and, in a proper case, may require the witness to bring tangible things and documents to the hearing. 9 U.S.C. § 7. In pertinent part, § 7 reads:

The arbitrators may summon in writing any person to *attend before them* or any of them as a witness and in a proper case to bring with them any book, record, document, or paper which may be deemed material as evidence in the case ... Said summons shall issue in the name of the arbitrator or arbitrators ... and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify *before the court*. If any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators ... are sitting *may compel the attendance of such persons before said arbitrator* ... in the same manner provided by law for securing the attendance of witnesses ... for neglect or refusal to attend in the courts of the United States. (emphasis added).

No other FAA provision discusses any allowed compulsion of witnesses or discovery by the parties. See 9 U.S.C. § 1, *et seq.* In fact, parties to a private arbitration agreement “relinquish the right to certain procedural niceties which are normally associated with a formal trial...*one of these accoutrements is the right to pre-trial discovery.*” See Burton v. Bush, 614 F.2d 389, 390-91 (4th Cir. 1980) (emphasis added). A hallmark of arbitration is its limited discovery process. See

Id. at 391. The “essence of arbitration is its freedom from the formality of ordinary judicial procedure.” Harvey Aluminum, Inc. v. United Steelworkers of Am., AFL-CIO, 263 F. Supp. 488, 491 (C.D. Cal. 1967) (quoting Canuso v. City of Philadelphia, 326 Pa. 302, 307, 192 A. 133, 136).

Arbitration, by its very nature, does not lend itself to discovery outside the parameters set by § 7: “The fundamental differences between the fact-finding process of a judicial tribunal and those of a panel of arbitrators demonstrate the need of pretrial discovery in the one *and its superfluity and utter incompatibility in the other.*” Commercial Solvents Corp v. Louisiana Liquid Fertilizer Co, 20 F.R.D. 359, 362 (S.D.N.Y. 1957) (emphasis added). As Judge Learned Hand eloquently stated, when [parties] have adopted [arbitration], they must be content with its informalities; *they may not hedge it with those procedural limitations which is precisely its purpose to avoid.* They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery. Am. Almond Products Co. v. Consol. Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944) (emphasis added).

Arbitrators alone are afforded the power to call witnesses and subpoena tangible evidence and documents at the hearing. 9 U.S.C. § 7. Arbitration parties do not have this right. Burton, 614 F.2d at 390-91; CIGNA HealthCare of St. Louis, Inc. v. Kaiser, 294 F.3d 849, (7th Cir. 2002) (“[F]or the sake of economy and in contrast to the practice in adjudication, “*parties to an arbitration do not conduct discovery, the arbitrators do.*”) (emphasis added). Put simply, because an arbitrator controls discovery pursuant to the strictures of § 7, Plaintiff has no right to serve discovery requests on Defendant. The power granted to the Arbitrator is simply to compel attendance at hearings of witnesses and documents at the hearing.

The FAA does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship. See Comsat Corp. v. Nat'l Science

Foundation, 190 F.3d 269 (4th Cir. 1999). The subpoena powers of an arbitrator are limited to those created by the FAA's express provisions. The statute provides, in pertinent part: "arbitrators may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material" 9 U.S.C.A. § 7. Nowhere does the FAA grant an arbitrator authority to order non-parties to appear at depositions, or the authority to demand non-parties provide the litigating parties with documents during prehearing discovery. By its own terms, the FAA's subpoena authority is defined as the power of the arbitration panel to compel non-parties to appear "before them;" that is, to compel testimony by non-parties at the arbitration hearing. Id. The enforcement provision does not expand the arbitrator's subpoena authority, which remains simply the power to compel non-parties to appear before the arbitration tribunal. Arbitrators also lack authority to issue a deposition subpoena or a subpoena *duces tecum* prior to the arbitration hearing itself. In the litigation setting, the power to issue subpoenas derives from the applicable rule of civil procedure. See Rule 45, SCRCP; Fed. R. Civ. P. 45. The rules speak specifically of "courts" and do not confer similar power to cases in alternative dispute resolution. Power to issue pre-hearing subpoenas is also not provided by the other authorities governing arbitration proceedings.

Then-Judge Samuel Alito agreed with the Fourth Circuit's position when, writing for the Third Circuit, he concluded FAA Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); see also CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("we reject the proposition that section 7 [of the FAA] grants arbitrators implicit powers to order document discovery from third parties prior to a hearing"); Life

Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (citing Hay Group and finding FAA “does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding”).

Defendants have previously taken the position that this very Arbitration Agreement does not allow for ANY discovery outside the limited powers of the arbitrators under FAA. (See **Exhibit 7 - Campsen v. THI of SC Motion for Clarification and/or Protection from Discovery** and **Exhibit 8 - Campsen v. THI of SC Brief in Opposition to Plaintiff's Motion to Compel** (outlining Defendants' believed position that the arbitration agreement precludes any pre-hearing discovery)). This is unconscionable considering the Defendants possess relevant and material information, and the Stay they seek would prevent discovery of that information.

Failing to have all the Defendants in one forum makes the agreement unconscionable. Plaintiff will be unable to recover full justice. Judge Nettles' Order in Coleman (**Exhibit 9**) covers this issue as well:

Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. **Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.**

Instructive on this issue is the matter of Birl v. Heritage Care, LLC, 172 Cal.App.4<sup>th</sup> 1313, 91 Cal. Rptr.3d 777. In Birl a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility sought to compel arbitration. Of relevance, the Court here noted that “(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement.” In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that “the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not joined to the court action with

the other defendants... Different triers of fact in different proceedings could come to different conclusions...” Id. at 1321.

While the circumstances of the current actions differ slightly from those of Birl, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in Birl. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson’s estate would be effectively forced to litigate claims arising from the same or related events in two separate forums.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of similar related entities arguing that “The arbitration agreement contractually ***is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances*** and Pennsylvania law in any event.” Defendants also argued Ms. Nanney and her attorney-in-fact are equitably estopped from arguing that the arbitration agreement is not “binding and enforceable ***by each of the defendants.***” The Honorable Judge Cercone’s Order in Hawthorne (**Exhibit 10**) which states:

Each of the moving defendants are entitled to enforce the arbitration agreement. Plaintiff essentially alleges that each defendant may be held accountable under theories of ownership and control, agency, joint venture and integrated enterprise. Specifically, it is averred that defendants collectively managed the (1) operation, (2) planning and (3) quality control of the facility, which included control over the quality of care provided.

THI of Pennsylvania is a parent corporation of the facility and THI of Baltimore is the parent corporation of THI of Pennsylvania. Fundamental Clinical and Operational Services, LLC, and Fundamental Clinical Consulting, LLC, were agents providing services to the facility. The arbitration agreement is expressly applicable to plaintiff's claims against the facility's parent entities, purposes underlying enactment of the [FAA].”).

Each Defendant is said to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party “where the interests of such parties are directly related to, if not congruent with, those of a signatory.” Pritzker v. Merrill Lynch,

Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993)). Under all accounts advanced by plaintiff each of the moving parties is an agent or employee of the facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against these defendants and in turn each can rely on the principles of agent law and the broad scope of the FAA to compel and participate in the arbitration agreement. Cf. Id. (“Where the parties to such a clause unmistakably intend to arbitrate all controversies, which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories.”); Sharp Properties, 998 F.2d at 155 (“Applying Barrowclough [v. Kidder, Peabody & Co.], 752 F.2d 923 (3d Cir. 1985)]’s logic here, because Bared’s and ARI’s interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared’s interests. There is, therefore, no reason to conclude that the Federal Arbitration Act’s overarching policy favoring the enforcement of arbitration awards does not apply to this case.”).

In summary, there is no basis for any Stay of the claims against any of the Defendants. Plaintiff will show the Arbitration Agreement is not valid as to any Defendant. However, should the Court determine the arbitration clause is valid as to claims against the Facility, then Plaintiff’s claims against the other Defendants should proceed, in one forum or another.

### **CONCLUSION**

For the foregoing reasons, Defendants’ Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, must be denied. Ms. Nanney did not sign the Arbitration Agreement and Kaileb lacked any legal authority to sign on her behalf. In the absence of a valid Arbitration Agreement, Defendants’ motion must be denied. The claims in this

case are not subject to arbitration. Under no scenario would a Stay be appropriate. All claims should proceed in the same forum.

Respectfully Submitted,

s/ E. John Waelde

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Dated: December 12, 2019  
Spartanburg, S.C.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF PICKENS )

AFFIDAVIT OF PAIGE SWATMAN, RN, LNC

RE: Betty Nanney

DOB: \*\*/\*\*/\*\*\*\*

1. My name is Paige Swatman. I am a Registered Nurse with 25 years' experience in the long-term care field. My experience includes Director of Nursing Service, Regional Clinical consultant, Vice President of Clinical services, and Long-term care surveyor for the South Carolina Department of Health and Environmental Control.
2. I have reviewed the medical records of Betty Nanney for the time period of 10/28/2016 through 11/16/16. These records include Magnolia Manor Spartanburg and Spartanburg Regional Medical Center.
3. Based on the medical records review, it is my professional opinion that during the time period of 10/28/2016 and 11/07/2016 Magnolia Manor Spartanburg deviated from the standard of care for accurate assessment of pain and injury, and timely recognition and treatment of an acute injury.

My findings are based on review of the medical records as follows:

1. Ms. Nanney was admitted to Magnolia Manor Spartanburg on 10/28/16 for continued therapy after an emergent Left Hemispherectomy following a ruptured aneurysm of the brain while exercising at home. Her admitting diagnoses also included right sided paralysis.
2. The Physical Therapy assessment done on 10/29/16 states,
  - "bed mobility, rolling side to side=moderate assist (one person)
  - Supine to sit in bed=moderate assist (one person)
  - Gait=unable
  - Transfers, bed to chair=maximum assist (two persons)
  - Transfers, sit to stand=maximum assist (two persons)
  - Balance Standing=Requires handhold support and maximum assist (two persons)
  - Balance, Fall risk=High risk
3. The skilled nursing daily notes stated that Ms. Nanney was "two-person physical assist with all transfers.

4. The admission nursing fall risk assessment score =20. Any score above 10 is high risk. Interventions were listed as, "Helmet, side rails, position, Hoyer lift".
5. Physical Therapy at Magnolia Manor began treatment on 10/29/16. The initial evaluation states that Ms. Nanney had "no pain" during the assessment.
6. On 10/30/16, the nurse's note states, "No pain or distress noted".
7. On 11/1/16, the nurse's note states, "Out of bed with lift. More pain noted today."
8. On 11/3/16, the nurse's note states, "Resident tearful when flexing right leg. Pain at inner thigh area near groin. Once leg moved back to extended position, relief from pain. Pain med given. On MD book for evaluation. Facial grimacing, tearful."
9. On 11/3/16, the Nurse Practitioner wrote, "The patient appears to be in more discomfort with passive range of motion of the right lower extremity than anywhere else. Diagnosis: acute pain. Plan: Continue scheduled Tylenol. Start scheduled Tramadol 25 mg. via PEG before meals and at bedtime with the Tylenol."
10. On 11/4/16, the Physical therapist documented, "Nursing reports increase in pain in right lower extremity to touch in hip area." Update to treatment approach, "continue with transfer, bed mobility, and core strengthening to improve bed mobility."
11. On 11/6/16, the nurse wrote, "Right leg pain. On MD book."
12. On 11/7/16, the Nurse Practitioner wrote, "I was asked to provide reevaluation of right leg pain with recent medication adjustments. This the patient was placed on Tylenol and tramadol 25 mg via PEG a.c. and at bedtime. The Physician came and saw the patient and increased her baclophen. She still has significant pain to her right leg which appears to be towards the right hip however due to her globally aphasic it is difficult to ascertain where exactly her discomfort is. Therapy and nursing of both seen the same. She appears comfortable at rest however she appears significantly uncomfortable with some palpation and range of motion of the upper leg." PLAN: X-Ray of the right hip and pelvis.
13. On 11/7/16, Six days after Ms. Nanney first complained of right leg and hip pain, an X-ray revealed a closed fracture of the neck of the right femur.
14. There is no documentation regarding how the fracture occurred; however, per the medical record, Ms. Nanney was unable to move herself to sustain an injury.
15. Ms. Nanney was transferred to Spartanburg Regional Hospital where she underwent surgery to repair the fracture. The emergency room Physician documented, "Comes from Mag Manor with suspected fall."

## **References:**

### **Federal regulation Appendix PP State Operations Manual (2016 version) 483.25 (d) states:**

Each resident receives adequate supervision and assistance devices to prevent avoidable accidents. "Avoidable accidents" is defined in this regulation as, "an accident occurred because the facility failed to identify environmental hazards and individual resident risks of an accident including the need for supervision."

### **Healthline.com lists causes of hip fractures in a healthy adult as:**

Falling on a hard surface or from great height  
 Blunt trauma  
 Diseases such as osteoporosis

### **Mayo Clinic lists causes of hip fracture in a healthy adult as:**

Severe impact  
 Standing and being twisted

### **Cleveland Clinic lists causes of hip fracture in a healthy adult as:**

typically caused by a fall.

## **Summary:**

- Ms. Nanney was unable to move her right arm and leg, to stand, transfer or move without the assistance of two caregivers. She was lifted with a Hoyer lift.
- Ms. Nanney began to complain of pain in her right leg and hip on 11/3/16. This pain was so severe she had facial grimacing and crying with any examination or movement. The nurse did not assess for a fracture or immediately notify the Physician of this change in condition, but instead wrote in the MD book to be seen on a future visit.
- The Nurse Practitioner saw Ms. Nanney on 11/3/16, but did not order any tests to determine the new onset of pain. The documentation states, "The patient appears to have more discomfort with passive range of motion of the right lower extremity than anywhere else."
- On 11/4/16, the Physical therapist documented about the pain, but continued therapy.
- On 11/6/16, the nurse documented about the right leg pain and again did not call the Physician, but documented "on MD book".
- On 11/7/16, Six (6) days after Ms. Nanney complained of pain, the nurse Practitioner wrote, "I was asked to provide reevaluation of right leg pain with recent med adjustment." An x-ray was ordered that revealed the fracture.
- The staff at Magnolia Manor Spartanburg failed to report and investigate a fall resulting in a fractured hip. The staff allowed Ms. Betty Nanney to suffer pain and anxiety without following the accepted standard of care for assessment of pain and injury for six (6)

days. The nursing and therapy staff did not notify the Physician in a timely manner of the injury. Thus, Ms. Nanney was moved, transferred, and continued therapy with a fractured hip.

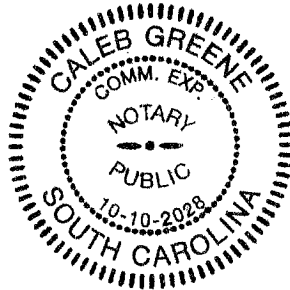
**Conclusion:**

It is my professional opinion that the staff at Magnolia Manor Spartanburg contributed in a direct and proximate way to the injury, pain and suffering of Betty Nanney.

Sworn to and subscribed before me,  
This 26<sup>th</sup> day of March, 2019.

Caleb Greene  
Notary Public for South Carolina

Paige Swatman RN LNC  
Paige Swatman, RN, LNC



State of South Carolina  
County of Cherokee

General Durable Power of Attorney

DATED: June, 23, 2017

Instrument Volume Page  
201700003162 95 1150

I, **Betty R. Nanney**, **REDACTED** Gaffney, South Carolina **REDACT** the undersigned, a resident of **do** hereby fully confer full power of attorney to her daughter, **Leslie Nanney**, to act as my true and lawful attorney-in-fact for me and in my name place and stead, and on behalf, and for my use and benefit, regarding the following:

**1) Authority to Act.** The Agent is authorized to act for me under this Power of Attorney and shall exercise all powers in my best interests and for my welfare, to ask demand, litigate, recover and receive all manner of goods, chattels, debts, rents, and owing or belonging to me, to make, give and execute acquaintances, receipts, satisfactions or other discharges for the same, whether under seal or otherwise.

**2) Powers of Agent.** The Agent shall have the full power and authority to manage and conduct all of my affairs, and to exercise my legal rights and powers, including those rights and powers that I may acquire in the future, including the following:

**i) Collect and Manage.** To collect, hold, maintain, improve, invest, lease, or otherwise manage any or all of my real or personal property or any interest therein;

**ii) Buy and Sell.** To purchase, sell, mortgage, grant options, or otherwise deal in any way in any real property or personal property, tangible or intangible, or any interest therein, upon such terms as the Agent considers proper, including the power to buy United States Treasury Bonds that may be redeemed at par to pay federal estate tax and to sell or transfer Treasury securities;

**iii) Borrow.** To borrow money, to execute promissory notes therefore, and to secure any obligation by mortgage or pledge.

**iv) Business and Banking.** To conduct and participate in any kind of lawful business of any nature or kind, including the right to sign partnership agreements, continue, reorganize, merge, consolidate, recapitalize, close, liquidate, sell, or dissolve any business and to vote stock, including the exercise of any stock options and the carrying out of

any buy sell agreement; to receive and endorse checks and other negotiable paper, deposit and withdraw funds (by check or withdrawal slips) that I now have on deposit or to which I may be entitled in the future in or from any bank, savings and loan, or other institution;

**v) Tax Returns and Reports.** To prepare, sign, and file separate or joint income, gift, and other tax returns and other governmental reports and documents; to consent to any gift; to file any claim for tax refund; and to represent me in all matters before the Internal Revenue Service;

**vi) Safe Deposit Boxes.** To have access to any safety deposit box registered in my name alone or jointly with others, and to remove any property or papers located therein;

**vii) Proxy Rights.** To act as my agent or proxy for any stocks, bonds, shares, or other investments, rights, or interests I may now or hereafter hold;

**viii) Legal and Administrative Proceedings.** To engage in any administrative or legal proceedings or lawsuits in connection with any matter herein;

**ix) Transfers in Trust.** To transfer any interest I may have in property, whether real or personal, tangible or intangible, to the trustee of any trust that I have created for my benefit;

**x) Delegation of Authority.** To engage and dismiss agents, counsel, and employees, in connection with any matter, upon such terms as my agent determines;

**3) Durability.** This durable Power of Attorney shall be irrevocable until the trust corpus is surrendered by the trustees, shall not be affected by my death or disability except as provided by law, and shall continue in effect after the surrender of the trust corpus until my death or until revoked by me in writing.

**4) Reliance by Third Parties.** Third parties may rely upon the representations of the Agent as to all matters regarding powers granted to the Agent. No person who acts in reliance on the representations of the Agent or the authority granted under this Power of Attorney shall incur any liability to me or to my estate for permitting the Agent to exercise any power prior to actual knowledge that the Power of Attorney has been revoked or terminated by operation of law or otherwise.

- 5) **Indemnification of Agent.** No agent named or substituted in this power shall incur any liability to me for acting or refraining from acting under this power, except for such agent's own misconduct or negligence.
- 6) **Original Counterparts.** Photocopies of this signed Power of Attorney shall be treated as original counterparts.
- 7) **Revocation.** I hereby revoke any previous Power of Attorney that I may have given to deal with my property and affairs as set forth herein.
- 8) **Compensation.** The Agent shall be reimbursed for reasonable expenses incurred while acting as Agent and may receive reasonable compensation for acting as Agent.

IN WITNESS WHEREOF, as Principal, I have executed this Power of Attorney as of the 23<sup>rd</sup> day of June, 2017.

Betty R. Nanney

Betty R. Nanney

Signed, Sealed and Declared by the undersigned, as and for his Power of Attorney in the presence of each of us, who in her presence, and in the presence of each other, and at her request, have subscribed our names as witnesses this 23<sup>rd</sup> day of June, 2017.

Witnesses:

Austin C. News

Witness 1

Carolyn Boyd-Kneer

Witness 2

Addresses:

REDACTED

Spartanburg SC REDACTED  
GAFFNEY, SOUTH CAROLINA

REDACTED

Spartanburg SC REDACTED  
GAFFNEY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA )  
COUNTY OF CHEROKEE )

PROBATE

PERSONALLY appeared before me the undersigned, who made oath that (s) he saw the within named BETTY R. NANNEY sign, seal and as her act and deed, deliver the foregoing, Durable Power of Attorney, and that (s)her with the other witness subscribed above, witnessed the execution thereof.

Carolyn Boyd-Greer

SWORN TO BEFORE ME this 26<sup>th</sup>  
day of June, 2017.

Sherlonda Y. Copeland  
Notary Public for South Carolina  
My Commission Expires: 7/20/2025

Sherlonda Y. Copeland  
State of South Carolina Notary Public  
My Commission Expires on  
July 20, 2025

JAM

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

Betty Nanney, by and through her Attorney-  
In-Fact, Leslie Nanney

Plaintiff,

v.

THI of South Carolina at Spartanburg, LLC  
d/b/a Magnolia Manor- Spartanburg; Rusty  
Flathmann; Laura Anne Winn; and Olishia  
Gaffney

Defendants.

IN THE COURT OF COMMON PLEAS

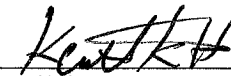
C.A. No: 2019-CP-42-03075

**AFFIDAVIT OF KAILEB HORN**

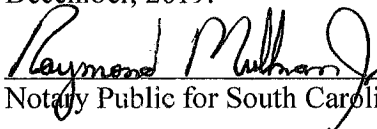
**PERSONALLY APPEARED BEFORE ME, THE UNDERSIGNED, AFTER DULY  
BEING SWORN, STATES THAT THE FOLLOWING IS TRUE AND CORRECT  
UNDER PENALTIES OF PERJURY:**

1. I am the son of Betty Nanney. I was never Betty Nanney's power of attorney, agent, or legal representative.
2. I did not say I was her agent. I made no statements as to my legal authority over my mother.
3. My mother was not in the room and could not and did not make any indication or statement that I was her agent or power of attorney during the admission process.
4. The admission process was quick and occurred while my mother was already transferred into her room. I did not review the dozens of pages shown to me.
5. No one explained the alleged Arbitration Agreement to me.
6. I do not recall signing the alleged Arbitration Agreement. I was under a lot of pressure to sign all the paperwork so I could return to my mother.
7. My mother lives on a fixed income and has no money to spare for arbitration proceedings.

Executed this 7<sup>th</sup> day of December, 2019.

  
\_\_\_\_\_  
Kaileb Horn

SWORN and subscribed  
before me this 7 day of  
December, 2019.

 (SEAL)  
Notary Public for South Carolina

My Commission Expires: 8/14/24

|                              |   |                              |
|------------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA      | ) | IN THE COURT OF COMMON PLEAS |
|                              | ) |                              |
| COUNTY OF SPARTANBURG        | ) | SEVENTH JUDICIAL CIRCUIT     |
|                              | ) |                              |
| BETTY NANNEY, BY AND THROUGH | ) | CASE NO. 2019-CP-42-03075    |
| HER ATTORNEY-IN-FACT, LESLIE | ) |                              |
| NANNEY,                      | ) |                              |
|                              | ) |                              |
| PLAINTIFFS,                  | ) |                              |
|                              | ) |                              |
| vs.                          | ) |                              |
|                              | ) |                              |
| THI OF SOUTH CAROLINA AT     | ) |                              |
| MAGNOLIA MANOR-              | ) |                              |
| SPARTANBURG, LLC D/B/A       | ) |                              |
| MAGNOLIA MANOR-              | ) |                              |
| SPARTANBURG; RUSTY           | ) |                              |
| FLATHMANN; LAURA ANNE WINN   | ) |                              |
| AND OLISHIA GAFFNEY,         | ) |                              |
|                              | ) |                              |
| DEFENDANTS.                  | ) |                              |
|                              | ) |                              |

**DEFENDANT THI OF SOUTH  
CAROLINA AT MAGNOLIA MANOR –  
SPARTANBURG, LLC’S D/B/A  
MAGNOLIA MANOR – SPARTANBURG’S  
MEMORANDUM OF LAW IN SUPPORT  
OF ITS MOTION TO DISMISS  
PLAINTIFF’S COMPLAINT, COMPEL  
ARBITRATION AND STAY STATE  
COURT PROCEEDINGS AND REPLY TO  
PLAINTIFF’S MEMORANDUM IN  
OPPOSITION**

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

**COMES NOW** the Defendant, THI of South Carolina at Magnolia Manor - Spartanburg, LLC d/b/a Magnolia Manor - Spartanburg (“this Defendant”), by and through its undersigned counsel, hereby respectfully submits this Memorandum of Law in Support of its Motion to Dismiss and Compel Arbitration and Stay Court Proceedings pursuant to the Federal Arbitration Act (“FAA”) 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff has sued this Defendant for “Negligence”, “Neglect of a Vulnerable Adult” and “Negligent Administration” allegedly arising out of Plaintiff’s residency at this Defendant’s skilled nursing facility (hereinafter the “Facility” or “Magnolia Manor”). However, this Defendant and Plaintiff entered into an arbitration agreement prior to her admission to the Facility which covers all allegations raised in the Complaint (the “Arbitration Agreement”).

Accordingly, and for the reasons set forth herein, this Defendant respectfully requests that Plaintiff's Complaint be dismissed and that this matter be compelled to arbitration, or in the alternative stayed, pursuant to 9 U.S.C. §1, et seq.

### **FACTUAL BACKGROUND**

On October 28, 2016, Plaintiff, Betty Nanney, was admitted to Magnolia Manor after a stay at an acute care facility for treatment related to a stroke. In connection with her admission to the Facility, Plaintiff entered into a number of contracts with Magnolia Manor. The contracts were each signed by Plaintiff's son, Kaileb Horn ("Mr. Horn"), as her representative on October 28, 2016. These executed contracts included an Admission Agreement and Arbitration Agreement (attached hereto as **Exhibit 1** and **Exhibit 2**, respectively), and he signed various consents – and expressly declined at least one other (*Consent for Influenza Vaccine*) – all of which were also related to her admission (attached hereto as **Exhibit 3**). Notably, Plaintiff's daughter and attorney-in-fact in bringing this lawsuit, Leslie Nanney, also signed additional consents on behalf of Plaintiff on October 30, 2016 (*Consent for Psychoactive Medications; Inventory of Personal Effects*) and on November 2, 2016 (*Consent for Use of Side Rails*) (attached hereto as **Exhibit 4**), also as Plaintiff's representative.

Based on the Admission Agreement and pursuant to the representations and agreements set forth therein, Ms. Nanney was admitted to the Facility and received skilled nursing care and treatment. Ms. Nanney resided at the Facility from October 28<sup>th</sup> until November 7, 2016, at which time she was discharged to the hospital. Ms. Nanney returned to the Facility on November 16, 2016 and was discharged on November 22, 2016.

Plaintiff accepted the benefits of the contracts entered into on her behalf by her son, Kaileb Horn. Such benefits included, but are not limited to, Plaintiff's admission to the Facility and receipt

of the skilled nursing care and treatment provided by the Facility. Neither Ms. Nanney nor any of her family, including her daughter Leslie Nanney who serves presently as her attorney-in-fact, have challenged the validity of any of the various agreements Plaintiff's representative entered into on her behalf until now.

Upon admission, Mr. Horn explicitly represented to Magnolia Manor that he was authorized to admit his mother to the Facility and to execute the various documents related to her residency there, including the Arbitration Agreement. See **Ex. 1**. Indeed, the very first provision of the Admission Agreement states that all information provided to the Facility, including Mr. Horn's representation that he was authorized to bind his mother to certain agreements, is truthful and correct. See **Id.**, ¶1. Further, Mr. Horn acknowledged and agreed that providing false information to the Facility would constitute a breach of the Agreement. **Id.**

Mr. Horn signed the Arbitration Agreement at the same time as the Admission Agreement and in connection with the same transaction – the admission of his mother to the Facility for skilled nursing care. The Arbitration Agreement defines Magnolia Manor as the "Facility," Ms. Nanney as the "Resident," and Mr. Horn as the "Representative." Further, Mr. Horn signed the Arbitration Agreement as Ms. Nanney's "Representative." The Arbitration Agreement instructs at the top: **PLEASE READ CAREFULLY**.

The relevant provisions of the Arbitration Agreement that Ms. Nanney entered into state the following:

It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident, including but not limited to any alleged tort, personal 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.

To ensure that the parties understand in plain language what each is agreeing to, the Arbitration Agreement also states in a stand-alone paragraph and in bold font: “**I understand and agree that I am giving up my right to a jury trial.**” **Id.**

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.

**Id. (emphasis added).** Regarding his authority to sign the Arbitration Agreement on behalf of his mother and to bind her to the terms of the Agreement, Mr. Horn expressly represented to the Facility that he possessed sufficient authority:

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.

**Id.** Mr. Horn executed the Arbitration Agreement as Ms. Nanney’s Representative and Kris Milner, the Admissions Director for the Facility, counter-signed on behalf of this Defendant. **Id.**

Because the acts complained of by the Plaintiff clearly fall within the scope of the Arbitration Agreement, the Court should dismiss the Plaintiff’s action, or stay these proceedings, and compel this matter to arbitration.

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

Plaintiff’s opposition to the instant Motion and enforcement of the Arbitration Agreement rests entirely upon the following arguments: (1) that the Arbitration Agreement is unenforceable because Mr. Horn did not have authority to bind Plaintiff; (2) that affirmative defenses of

equitable estoppel, ratification and third party beneficiary do not apply; (3) that the Arbitration Agreement is not enforceable for lack of consideration of mutuality; (3) that the Arbitration Agreement should be invalidated because it is missing material and definitive terms; (4) that wrongful death claims cannot be submitted to arbitration; and (5) that the Arbitration Agreement is unconscionable. The Defendant addresses each of these claims in their respective order.

## **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 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 Plaintiff’s claims should be dismissed and compelled to arbitration.

### III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

#### A. The Plain Language of the Agreement Binds Plaintiff

Plaintiff's son, Kaileb Horn, represented to the Facility's staff and admissions personnel that he was his mother's representative and had authority to sign documents and agreements on her behalf and bind her pursuant to those agreements. It was clearly Mr. Horn's intention to bind Ms. Nanney (and himself) to the terms of the Admission Agreement and Arbitration Agreement and neither Ms. Nanney nor her other family members evinced no intentions or directions to the contrary. The express terms of the Arbitration Agreement clearly apply to the instant dispute. Notably, this Court faced facts similar to the ones at the bar in *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (*See Price* decision, attached hereto as **Exhibit 4**). In both *Price*, a family member of the skilled nursing facility resident executed a number of documents on the resident's behalf related his admission to the facility, including an admission agreement and arbitration agreement identical to the ones in the case at bar, as such resident's representative. **Ex. 4, p. 2-3** (emphasis added). Ultimately, this Court determined that "the terms of the Arbitration Agreement clearly apply to the instant dispute" because it was clearly the intent of the family member to bind the resident (and herself, as representative) according to the terms of the admission agreement and arbitration agreement. **Ex. 4, p. 5.**

#### B. Mr. Horn possessed the apparent and inherent authority to bind Betty Nanney to the Arbitration Agreement and Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

##### i. Agency Relationship

A true agency relationship may be established by evidence of apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). “Agency is the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another person (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control.” *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). “An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties.” *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992.) The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007), the facts are substantially similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the time. Nevertheless, as in this case, the admissions agreement in *Carraway* provided that plaintiff was his sister's legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. The arbitration

agreement in *Carraway* was a separate document and was not a condition of admission to the facility. *Id.*

When signing the arbitration agreement, the brother in *Carraway* left the resident signature line blank and signed it as the “authorized representative” of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. *Id.* See also, *Tenn. Health Mgmt. v. Johnson*, 49 So. 3d 175 (Ala. 2010) (holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in *Carraway* was applied as “persuasive authority” by this Court in *Price*, *supra*. See **Ex. 4, p. 8.**

As in *Carraway* and in *Price*, Mr. Horn held himself out as an agent for his mother without any indication to the contrary when he executed various admission documents on behalf of his mother, including the Arbitration Agreement. He executed these documents in his capacity as “representative.” It was the Facility's reasonable and justified belief that Mr. Horn was his mother's authorized representative and that he had the authority to execute the documents on her behalf. Neither Plaintiff or Mr. Horn or any other family, including Leslie Nanney, ever gave any indication to the Facility that Mr. Horn was not authorized to admit his mother and to enter into agreements on her behalf as her representative throughout the approximate three weeks she resided at the Facility and thereafter. Indeed, there still is no contention by Plaintiff that Mr. Horn was not authorized to admit her to the Facility or to consent to the various other documents

he signed on her behalf. See **Ex. 1 and Ex. 3**. Furthermore, as evidenced by Leslie Nanney's signing of additional consents related to her mother's admission to and care provided by the Facility (see **Ex. 4**), Leslie Nanney – as attorney-in-fact for the Plaintiff in this matter – was undoubtedly aware of Mr. Horn's execution of the various other documents related to her mother's admission, including the Arbitration Agreement, and by not repudiating the same but in fact executing additional documents in furtherance of the care and treatment of the Plaintiff, ratified her brother's actions. Leslie Nanney certainly is not now repudiating her own authority to have consented to psychoactive medication administration and use of side rails (*i.e.* which may be considered a restraint in some circumstances) and to have acknowledged the inventory of her mother's personal belongings as Plaintiff's "Representative." She clearly had would have had the opportunity to repudiate her brother's authority to sign other admissions related documents at that time and did not do so until the present opposition to arbitration.

Moreover, by allowing Mr. Horn to procure his mother's admission to the Facility and thereafter by accepting the benefits of the contracts entered into in connection with that admission, Plaintiff (Betty Nanney) and her attorney-in-fact in this matter, Leslie Nanney who is the sister of Mr. Horn, represented that Mr. Horn was Ms. Nanney's authorized representative to act on her behalf in connection with admission. See *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000) (If a principal holds another out as having the authority to act on his behalf or knowingly permits another to act as his agent, "either **generally** or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances") (emphasis added).

A holding to the contrary would go against the fundamental concept of apparent agency: that an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act. The Facility had reason to believe that by permitting Ms. Horn to sign the admissions paperwork, including the documents providing for Plaintiff's stay and skilled nursing care, Plaintiff cloaked her son with the authority to execute those documents. Further, Plaintiff did not repudiate or invalidate her son's actions – and neither did Plaintiff's attorney-in-fact in this matter, Leslie Nanney; instead, Plaintiff accepted the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services thereby ratifying Mrs. Spears' actions. Because no one attempted to repudiate the Arbitration Agreement or even question it, including the current power-of-attorney and Mr. Horn's sister – Leslie Nanney, the Facility was further justified in believing Mr. Horn was authorized to execute the Arbitration Agreement.

It is clear that an apparent agency relationship existed at the time of execution and as a result of ratification by Betty Nanney and Leslie Nanney thereafter such that the Arbitration Agreement should be deemed enforceable.

Even if the Court does not find apparent agency, Mr. Horn undoubtedly possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the agent is authorized to conduct....” See, §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975) (*abrogated on unrelated grounds*) (examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r*, 309 P.3d 372 (Wash. 2013);

*Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.*, 826 F.2d 581, 591 (7<sup>th</sup> Cir. 1987) (“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”) (citing *Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7<sup>th</sup> Cir. 1949)).

The basis for the doctrine of inherent agency is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as to whether Mr. Horn was authorized to admit his mother to Magnolia Manor. To the extent Plaintiff takes issue with Mr. Horn's authority to bind his mother to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to his authority to admit Plaintiff as a resident at the Facility – which is not disputed by Plaintiff or Leslie Nanney. Magnolia Manor should not be disadvantaged for acting in accordance with the express representations of Mr. Horn's authority.

## **ii. Agency by Estoppel**

“When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.” *R & G*, supra, 343 S.C. at 433, 540 S.E.2d at 118. To establish estoppel in South Carolina, this Defendant must show: “(1) lack of knowledge and of the means of knowledge of the truth as to the facts in

question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.” *Boyd v. Bellsouth Tel.Co.*, 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

In *Price, supra*, this Court ruled that the plaintiff was estopped from denying that she was her husband’s authorized agent during the latter’s admission to the skilled nursing facility:

In the case at the bar, [the facility] had no knowledge or reason to believe that Plaintiff was not [her husband’s] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

Ex. 3, p. 9. Accordingly, the court concluded that the arbitration agreement was valid and enforceable.

Similarly, in *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) the United States District Court of South Carolina concluded the plaintiff was estopped from denying he had authority to bind his wife to arbitration. (Attached hereto as **Exhibit 5**). As in the present case, the plaintiff in *McCutcheon* executed a number of documents on behalf of his next-of-kin upon her admission to a nursing home facility, including an admissions agreement and an arbitration agreement. As in this case, the admissions agreement in *McCutcheon* provided that plaintiff was the resident’s legal representative for the purposes of admission, as he was her next-of-kin and represented himself as authorized to make health care decisions on her behalf. The Court reasoned that, “It would be inequitable . . . to allow plaintiff to assert that [plaintiff] had authority to sign the Admissions

Agreement on behalf of [his wife/next-of-kin], but lacked such authority to sign the Arbitration Agreement.” Therefore, the court concluded that the plaintiff was estopped from denying authority to sign the arbitration agreement on behalf of his wife. *Id.* at \*3.

Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow Plaintiff in this case to assert that Mr. Horn was her authorized agent as to the Admissions Agreement, but not the Arbitration Agreement. In the case at bar, Magnolia Manor had no knowledge or reason to believe that Mr. Horn was not his mother’s authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Magnolia Manor relied on the affirmative representations of Mr. Horn, as ratified by Plaintiff and Leslie Nanney, in admitting his mother to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Magnolia Manor, only for the instant lawsuit filed in this Court to violate the binding Arbitration Agreement. Accordingly, Plaintiff should be estopped from denying the validity of the Arbitration Agreement.

**C. The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties’ Mutual Right to Arbitration**

**i. Merger**

As additional grounds to compel arbitration and in the alternative, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate her claims against the Facility. The Arbitration Agreement and Admission Agreement were executed by Mr. Horn on behalf of Plaintiff. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general

principles of contract law and agency law that would apply to any other contract. *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement provides that “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement . . . or relating in any way to Resident’s stay at Facility” shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. See **Ex. 2** (emphasis added). The Arbitration Agreement and the Admissions Agreement were both signed by Mr. Horn, as representative on behalf of his mother on the same day, at the same time and related to the same subject matter - Plaintiff’s admission to Magnolia Manor and Magnolia Manor’s provision of care and treatment to her.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id.* See also *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. See *Plaza*

*Development Services v. Joe Hardin Builder, Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *accord Cafe Associates, Ltd v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

As indicated previously, the court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575, attached hereto as **Ex. 5**. Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (*See Abrams, Campsen* attached hereto as **Exhibits 6 and 7**).

Accordingly, Plaintiff Betty Nanney, by and through the acts of her representative, Mr. Horn, and the Facility, both contemplated that the terms of the agreement to admit Plaintiff were contained in the Admission Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admission Agreement; the Arbitration Agreement and the Admission Agreement both covered the same subject matter and transaction (Ms. Nanney's residency at the Facility); the Arbitration Agreement and Admission Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; the Admission Agreement specifically references that all representations made are truthful and correct; and, thus, the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

## ii. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” *Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)); see also *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290–297, 733 S.E.2d 597, 601–605 (Ct. App. 2012) (applying the direct benefits test as set forth in *International Paper Co.* to reverse the circuit court’s denial of a motion to compel arbitration); *Wilson v. Willis*, 426 S.C. 326, 339–345, 827 S.E.2d 167, 174–177 (2019) (discussing direct benefits test).

Because of the doctrine of merger referenced above, equitable estoppel is properly applied in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” *S. Ill. Bev., Inc. v. Hansen Bev. Co.*, 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” *United States v. Bankers Ins. Co.*, 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001)(citing *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in *Jackson v. Iris.com*:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

. . . .

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007) (quoting in part *Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) (citing in part *Int'l Paper Co.*, 206 F.3d at 416) (internal quotations omitted)).<sup>1</sup>

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<sup>1</sup> See also *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at \*6 (D.S.C. Sept.13, 2011) (“Hall’s care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); accord *THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert*, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at \*4 (D.S.C. Oct. 31, 2014), report and recommendation adopted, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

In the present case, Plaintiff embraced all aspects of the Admission Agreement with the Facility. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that same party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot “have it both ways” by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As outlined above, the Plaintiff’s allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against this Defendant based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which Plaintiff certainly did, the non-signatory is estopped from denying an arbitration agreement merely because she did not sign the contract under and pursuant to which she received all of the benefits.

**iii. Coleman, Thompson, and Hodge are Distinguishable**

To the extent Plaintiff argues the Admission Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at

452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

Similarly, in *Hodge*, the admission agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the Patient/Resident's Admission Agreement." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.* In *Thompson*, the arbitration agreement also contained a disclaimer provision but the admission agreement did not.

Unlike the arbitration agreements in *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman*, *Thompson*, and *Hodge*, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the documents pertaining to admission and arbitration of disputes thereof “were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts*, *supra*, 268 S.C. at 88, 232 S.E.2d at 24).<sup>2</sup> Specifically, the Admission and Arbitration Agreements were signed by Mr. Horn, on his mother’s behalf, and the Facility on October 28, 2016. The documents were signed by the exact same people: Mr. Horn as representative for his mother and by the Admissions Director for the Facility, as representative for the Facility. The documents were signed for the same purpose and transaction of establishing Plaintiff’s residency at the skilled nursing facility

While the Admission Agreement in this case does contain an “Entire Agreement” clause, unlike the admission agreements in those other cases, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn’t refer to it at all). Moreover, the Arbitration Agreement at issue contains no disclaimer provision, unlike *Coleman*, *Thompson*, and *Hodge*. 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* **Ex. 1**, 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* **Ex. 2**, Arbitration Agreement (providing that, “because the services and reimbursement thereof effect

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<sup>2</sup> To be clear, even though the *Coleman* Court found evidence of an intent contrary to merger on the particular facts before it, it nonetheless recognized as *correct* the general proposition of law on which the *Coleman* Appellants’ based their merger argument, i.e., the *Coleman* Court expressly observed that the admission agreements and arbitration agreements before it (which, in this respect, are no different than the instant agreements — though that is not the case in regard to the material facts bearing on the question of merger), “the documents were [indeed] executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction.” 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added).

a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Act” but also providing that arbitration shall be “as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules”).)

Further still, it must be remembered that the merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”<sup>3</sup> as indeed the Admission Agreement and Arbitration Agreement were here, there is evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract. As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place — *i.e.*, same time, parties, purpose, and transaction - a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. Such superficial things as the fact that the admission and arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. To point to such things is really to do no more than to point out that the Admission Agreement and Arbitration Agreement are physically 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.

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<sup>3</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

Even though, as noted above, the Arbitration Agreement was not a precondition to Plaintiff's admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (*i.e.*, once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; *but that is not what happened*. The Arbitration Agreement was in fact executed, of course – after express and unambiguous guidance to **PLEASE READ CAREFULLY** and explanation of its terms in plain language - and it was executed under circumstances giving rise to a presumption of merger – that is, *same time, parties, purpose, and transaction*. **Ex. 2** (emphasis in original). 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.

It matters not whether the Arbitration Agreement was a condition of admission, only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement — once agreed upon — was intended by the parties to be considered and construed together with the Admission Agreement, such that the two effectively became and are one instrument, governing various interrelated aspects of Plaintiff's relationship with this Defendant. Indeed, this conclusion finds direct support in the Admission Agreement's "Entire Agreement" provision, which states, "The undersigned further acknowledges that he/she has received and read the Admission Handbook and *other Admissions materials* and understand that

*these documents are made a part of this Agreement by reference herein.” (Ex. 1, Admission Agreement p. 12 (emphasis added).) Had the Arbitration Agreement not been executed, it would not constitute admissions material, but, of course, it was executed in this case, and it irrefutably constitutes “admissions material”; most respectfully, to conclude otherwise simply does not make sense.*

Respectfully, the material facts of *Coleman, Thompson, and Hodge*, are different from the material facts of the instant case, and those other cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

**D. The Arbitration Agreement is Supported by Valid, Legal Consideration and Contains Complete Mutuality of Remedies.**

Contrary to Plaintiff’s contention, the Arbitration Agreement is supported by valid, legal consideration because the parties exchanged mutual promises by voluntarily agreeing to waive their respective right to a jury trial and by voluntarily bestowing upon each other a right to an alternative dispute resolution process. The promises by Magnolia Manor and Plaintiff, respectively, are mutual and concurrent.

It is well-settled under South Carolina law that mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate that contract. *Furman v. Walker*, 124 S.C. 68, 117 S.E.2d 356 (1923); *Johnson v. Spartanburg County Fair Ass’n*, 201 S.C. 56, 41 S.E.2d 599 (1947); *O’Neil*, 115 F.3d 272, 275 (4th Cir. 1997)(applying South Carolina Law). This undisputed notion is bedrock, black-letter contract law. Moreover, this long-standing principle is of equal application in the context of arbitration agreements, where both parties mutually assent to arbitration. *O’Neil*, 115 F.3d 272 (4th Cir. 1997). In *O’Neil*, the court specifically held that **“a mutual promise to arbitrate is sufficient consideration for [an]**

**arbitration agreement.”** 115 F.3d at 275 (4th Cir. 1997)(citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996)(emphasis added); *see also Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999)(citing *O’Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration).

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both Magnolia Manor and Plaintiff and their respective representatives (among others). *See Ex. 2, ¶ 1* (“It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving claims through or on behalf of Resident.”). Accordingly, the Arbitration Agreement contains adequate consideration in the form of mutual promises to arbitrate, and Plaintiff’s claims to the contrary should be disregarded.

In support of her argument that the Arbitration Agreement is void for lack of consideration, Plaintiff does not cite to any caselaw for her assertion that “Courts have held that where there is a mutual promise to arbitrate, there must be additional consideration.” *See* Memorandum in Opposition, p. 16. Plaintiff’s contention is misleading and incorrect. Indeed, in *Riedman Corp. v. Jarosh*, 290 S.C. 252, 349 S.E.2d 404 (1986), the Supreme Court summarily affirmed the Court of Appeals in holding “that a covenant not to compete may be enforced where the consideration is based solely upon the at-will employment itself.” 290 S.C. 253, 329 S.E.2d at 405. Furthermore, in *O’Neil*, the Fourth Circuit held, in direct contradiction to Plaintiff’s assertions, that “[a] **mutual promise to arbitrate is sufficient consideration for [an] arbitration agreement.**” 115 F.3d at 275 (4th Cir. 1997)(citing *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996)(emphasis added); *accord Johnson v. Circuit City Stores*, 148 F.3d 373, 378 (4th Cir. 1998)(“[N]o consideration above and beyond the

agreement to be bound by the arbitration process [is] required.”). Obviously, Plaintiff’s counsel’s claim that consideration beyond the mutual promise to arbitrate is necessary for a valid arbitration agreement is unfounded and not supported by the law.

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both the Defendant and the Plaintiff. See **Ex. 2, ¶ 1**. Accordingly, the Arbitration Agreement contains adequate consideration in the form of mutual promises to arbitrate, and the mutual benefits derived therefrom, and Plaintiff’s unsupported claims to the contrary should be disregarded.<sup>4</sup>

It is unclear how Plaintiff could concoct any form of a “lack of mutuality” argument. Undoubtedly, there is complete mutuality of submission to arbitration and complete mutuality of remedy by the plain and express terms of the Arbitration Agreement. Plaintiff may not now unilaterally claim, over three years after execution of a contract, the lack of any “direct benefit” in order to invalidate the agreement under a lack of mutuality argument. To be sure, proving a mutuality of promises requires no showing of a “direct benefit.” Additionally, Plaintiff cites to no precedent whatsoever, much less binding precedent, to support the lack of mutuality argument.

Plaintiff’s Memorandum in Opposition also suggests the Arbitration Agreement is illegal and, therefore is void, because the Arbitration Agreement constitutes “other consideration” in violation of pertinent Medicare and Medicaid regulations. This argument has been dispensed by

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<sup>4</sup> The Plaintiff also cites to Judge Diane Goodstein’s trial court order in *Rawl v. West Ashley Nursing & Rehab* for the proposition that more is needed for valid, legal consideration than a mutual promise to arbitrate. After careful study, it is clear that this trial court order errantly cited to *Reidman* and *O’Neil* in reaching such a holding. However, more recently, in *Jenkins v. THI at South Carolina at Charleston, LLC et al.*, Judge Goodstein, in recognition of this error, found that a mutual exchange of promises is, in fact, valid, legal consideration in the nursing home arbitration context. See **Circuit Court Order, attached hereto as Exhibit 8)**

seemingly every single court who has ever addressed it. *See Benson v. THI of South Carolina at Magnolia Place at Spartanburg, LLC*, No. CA 7:11-2613- HMH (D.S.C. Nov. 3, 2011)(citing cases from Indiana, Alabama, Tennessee, Ohio, and Florida for the ruling that arbitration agreements do not violate 42 U.S.C. 1396r(c)(5)(A)(iii) or 42 C.F.R. §483.12(d)(3)). Again, Plaintiff cites to no legal precedent to support her argument. As a result, such an argument should similarly fail and arbitration should be compelled accordingly.

To require further, additional consideration above and beyond the mutual exchange of promises would be to impose a rule in violation of the United States Supreme Court's holdings in *Concepcion, Marmet Healthcare Center, Inc. v. Brown* 565 U.S. 530 (2012), and *Kindred*, all of which stand for the proposition that arbitration agreements must be put on "equal footing with all other contracts." *See Kindred* at 1423. As a result, valid legal consideration is present as to this contract and this Court cannot deny enforcement of the Arbitration Agreement on grounds of lack of consideration.

**E. The Arbitration Agreement Contains All Essential and Material Terms and, therefore, is Clear and Unambiguous with Respect to the Intent of the Parties.**

The Plaintiff next contends that the Arbitration Agreement lacks material terms and is unenforceable because there was no meeting of the minds. Specifically, the Plaintiff argues that because the Arbitration Agreement does not name a specific individual as arbitrator and does not mention the specific rules of evidence or the allowance of pre-hearing discovery, it should be void for vagueness. Such an argument lacks merit and must be rejected.

Contrary to Plaintiff's assertions, this Defendant submits to the Court that the Arbitration Agreement is clear, unambiguous, and represents an unequivocal understanding between this Defendant and Plaintiff with respect to its essential and material terms such that enforcement of

these terms is required. There is a meeting of the minds between the parties as to the essential terms of the parties' agreement. Contrary to Plaintiff's contentions in her Memorandum in Opposition, there is not a single "blank line" pertaining to the material terms of the Arbitration Agreement. *See Ex. 2.* As previously noted, Mr. Horn reviewed, considered and agreed to the same terms that the Facility presented to him – clearly establishing a *meeting of the minds* and intent to agree the Arbitration Agreement. Mr. Horn reviewed, considered and declined another consent related to his mother's residency at Magnolia Manor on the same date that he reviewed, considered and accepted the Arbitration Agreement. *See Ex. 3 – Decline of Influenza Vaccine.* Mr. Horn could have likewise declined the terms of the Arbitration Agreement on his mother's behalf, but he did not. The context of Plaintiff's representative's refusal to provide consent to other documents related to her admission to Magnolia Manor further supports the clear intent to *agree* to the terms of the Arbitration Agreement.

The Arbitration Agreement includes specific provisions regarding (i) governing law, (ii) how an arbitrator is chosen, (iii) the type of claims that the parties agreed must be submitted to arbitration, (iv) the rules that apply to the arbitration, (v) which persons are bound by the parties' agreement to arbitrate and other particulars. Indeed, the Agreement expressly provides that the arbitration must be conducted in accordance with the South Carolina Alternative Dispute Resolution Rules, which provide for exacting details such as the location of the arbitration, how evidentiary rulings should be made, when subpoenas can be issued, rules for confidentiality of the proceedings, compensation of arbitrators, and nearly every conceivable aspect of the arbitration itself.

The Arbitration Agreement provides for a mutual process for selecting an arbitrator when a Dispute (as that term is defined therein) arises. *See Ex. 2, ¶ 4.* Plaintiff erroneously maintains

that providing for a mutual process of selection of an arbitrator instead of hardwiring a *specific arbitrator* into the Arbitration Agreement is somehow an omission of a material term. Providing for a mutual *process* of selecting an arbitrator is equally fair to both parties – and, certainly, is more fair to Plaintiff than identifying a specific arbitrator would have been. Moreover, this mutuality of process is consistent with the spirit and intent of alternative dispute resolution, the subject matter of the contract. The Agreement provides for a mutual and cooperative process wherein the parties attempt to mutually agree upon an arbitrator and, only if that process does not succeed, are the parties to seek court assistance. Indeed, this mutual and cooperative process definitively leads to identification of a *specific arbitrator* once the process is complete. Contrary to Plaintiff's claims, there is definitiveness and the lack of a *specifically* delineated arbitrator should not weigh against enforcement of the Arbitration Agreement for these reasons.

Plaintiff attempts to argue vagueness by noting that details such as scheduling, discovery process, and rules of evidence are not contained within the four corners of the Arbitration Agreement. However, Rule 12 of the South Carolina ADR Rules provides for the issuance of subpoenas, the compelling of witnesses, and how evidentiary rulings are to be conducted. The extensive detail which Plaintiff apparently demands in order to declare a meeting of the minds is not supported by any case law, much less in the arbitration context.

Moreover, the Plaintiff has failed to cite to, and the Defendant is unaware of, any binding precedent mandating that an arbitration agreement must contain such terms to be enforceable. have been held to be enforceable and were not void because they because they lacked the terms that the plaintiff urges are required.. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011) (Norton, C.J.)(attached hereto as **Exhibit 5**); *Benson v. THI of S.C. at Lake Emory at Spartanburg, LLC*, C.A. 7:11-2613-HMH (attached

hereto as **Exhibit 9**); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012)(attached hereto as **Exhibit 6**); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012)(attached hereto as **Exhibit 7**); *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al*, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (See *Price* decision, attached hereto as **Exhibit 10**).

**F. The Arbitration Agreement is Not Unconscionable**

The Arbitration Agreement at issue cannot be invalidated upon grounds of unconscionability. An arbitration agreement may only be found invalid for "unconscionability" if this Court makes a two-fold determination: (1) that there is "absence of meaningful choice on the part of one party due to one-sided contract provisions" and (2) that the "terms [of the agreement] are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

The party alleging that the enforcement of a contract would be unconscionable bears the burden of proving both prongs of the definition. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000); accord *Marzulli v. Tenet S.C., Inc.*, No. 2015-002363, 2018 WL 1531507, at \*3 (S.C. Ct. App. Mar. 28, 2018). In this instance, it is therefore Plaintiff's burden to prove unconscionability.

Regarding the absence of a meaningful choice, Plaintiff resorts to a multitude of generalized complaints about nursing home arbitration contracts that are not tailored to this case and are entirely unsupported with regard to Mr. Horn's execution of the Arbitration Agreement,

as Plaintiff's representative, at issue in this case. Given Plaintiff's burden, this shortcoming is fatal to Plaintiff.

"Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Simpson*, 373 S.C. 14, 25, 644 S.E.2d 663, 669. As such, "meaningful choice" refers specifically to the bargaining process involved in entering into the Arbitration Agreement. The Arbitration Agreement clearly articulates that the resident entering into the Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

It is understood by Resident/Representative that he/she is not required to use the aforesaid Health Care Center for Resident's healthcare needs and that there are numerous other health care providers in the State where Health Care Center is located that are qualified to provide such care to Resident. See **Ex. 2, ¶ 2.**

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" See **Ex. 2, ¶ 6.**

By entering into the Arbitration Agreement and Admission Agreement, Plaintiff's representative represented that he understood and assented to their terms. Indeed, Plaintiff, by and through Mr. Horn, was given the option of entering into the Arbitration Agreement – *or not* – and he freely and voluntarily made the decision to proceed. The record is clear that Mr. Horn expressly refused to agree to other documents related to his mother's residency at Magnolia Manor. See **Ex. 3.** Considering Mr. Horn's express agreement to the Arbitration Agreement in the context of his refusals to provide consent in other areas demonstrates that Mr. Horn was aware of his ability to likewise refuse the Arbitration Agreement and that his agreement thereto on behalf of his mother was completely voluntary and intentional. There were meaningful choices available to Plaintiff, by and through Mr. Horn, and he was clearly aware of the same.

The Arbitration Agreement by its plain language was not a precondition of admission to Magnolia Manor and simply could not have been an adhesion or “take it or leave it” contract. Plaintiff, by and through Mr. Horn, had the option not to enter into the Arbitration Agreement, yet he voluntarily did so, voluntarily did not retract his agreement thereto and Plaintiff continued to stay at Magnolia Manor and voluntarily receive skilled nursing care after admission.

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

Furthermore, the Arbitration Agreement was not “forced” or mandatory. To the contrary, this Admission Agreement was not a pre-condition for admission. The Arbitration Agreement was, in fact, a separate document from the admissions agreement – something even Plaintiff does not dispute. Additionally, by executing and consenting to the Arbitration Agreement, Mr. Horn, as Plaintiff’s representative, expressly acknowledged that Plaintiff “is not required to use the aforesaid facility for [her] healthcare needs and that there are numerous other health care providers in the State where [Magnolia Manor] is located that are qualified to provide such care to [her].” *See Ex. 2, ¶ 2.*

Mr. Horn was given the option of entering into the Arbitration Agreement or not enter into it on his mother’s behalf, and he made the decision to proceed. Mr. Horn did not have to

accept this offer nor has there been any allegation or evidence that he was actually coerced by the Facility into signing this agreement on Plaintiff's behalf. The waiver of the right to a jury trial as contained in the Arbitration Agreement was presented as a separate document, and Mr. Horn was expressly and conspicuously instructed to read carefully before executing the Arbitration Agreement.

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

When determining this aspect of unconscionability, this Court must focus on "whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision maker." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668. Under the terms of the Arbitration Agreement, the parties are to select a third party arbitrator *jointly* "from a panel having experience and knowledge of the health care industry." See **Ex. 2, ¶ 4**. If the parties are unable to agree upon such an arbitrator, the Court is vested with authority to make such a selection. The selected neutral arbitrator is vested with authority to hear the case and make a decision which is "binding on all parties." As a result, it can only be said that the Arbitration Agreement allows for complete mutuality of remedies. Neither party is given an advantage by its terms. These provisions cannot be deemed oppressive or unjust. As a result, the Arbitration Agreement cannot be deemed unconscionable.

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969).

Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether or not he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Notwithstanding the duty being on Mr. Horn, he Mr. Horn clearly had time to read the various admissions documents he signed, as he chose to decline at least one of them, and any argument by Plaintiff that the she agreed to the Arbitration Agreement only because it was in the midst of a crisis does not comport with how the various Facility admissions documents were executed by Mr. Horn and then Ms. Nanney, both on behalf of Plaintiff. See **Ex. 3 and Ex. 4.**<sup>5</sup>

Lastly, the United States District Court of South Carolina and this very Court have repeatedly upheld the validity of arbitration agreements nearly identical to the one at issue in this matter. In evaluating these arbitration agreements in the context of nursing home admissions, federal courts in South Carolina have all agreed that these agreements are not unconscionable. *McCutcheon, supra*, at \*3; *THI of S.C. at Columbia, LLC v. Wiggins*, C/A No. 3:11-888-CMC, 2011 WL 4089435, at \*6 (D.S.C. Sept. 13, 2011) (Currie, J.); *Benson, supra*; *See McCutcheon v. THI of S.C. at Charleston, LLC, supra*, at 6\* - \*8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v.*

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<sup>5</sup> Plaintiff cites to Judge Goodstein's order in *Rawl* as being factually similar to the case at bar. This comparison is misleading and, simply, incorrect, for the factual differences described herein.

*Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012)(See also *Benson*, attached hereto as **Exhibit 9**).

Along similar lines, any holding that the Arbitration Agreement at issue is unconscionable simply because it was executed in the context of an admission to the skilled nursing facility would be in violation of the clear precedent under *Kindred* and the FAA, both which instruct that arbitration agreements must be placed on equal footing with all other types of contracts. Accordingly, any argument by Plaintiff that the Arbitration Agreement is unconscionable is unfounded and therefore fails.

**G. Should the Court decide to Deny this Defendant's Motion, the Parties Should be Permitted to Conduct Additional Discovery.**

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 alternatively requests that the parties be permitted to conduct additional discovery on the issues raised herein or at the hearing, and in particular, the nature of Mr. Horn's agency relationship with Plaintiff and the circumstances surrounding the admissions process. In a case involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an arbitration agreement on her son's behalf 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)(attached hereto as **Exhibit 11**). Likewise, the Honorable Alison Lee has also allowed the parties to conduct additional discovery on these same issues of authority to execute an arbitration agreement identical to this one. See *Priscilla Brown, as Personal Representative of the Estate of James E. Brown v. THIS of*

*South Carolina at Columbia, LLC*, 2019-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019)(attached hereto as **Exhibit 12**).

Critical to the court's decision in both *Boyd* and *Brown* was whether the signatory's and the resident's conduct and admissions director's understanding of that conduct created apparent agency so as to bind the resident/plaintiff to the arbitration agreement at issue. In *Boyd*, the Court permitted the parties to take the depositions of the mother, the son, the admissions coordinator for the skilled nursing facility, and the case manager for the hospital the son was transferred from. After considering the testimony of those individuals, the Court found there was evidence to support a finding of apparent agency. In *Brown*, the parties are just beginning this additional discovery and, accordingly, there has not yet been a subsequent finding by Judge Lee.

The case at the bar involves Mr. Horn's authority to execute the Arbitration Agreement and the circumstances surrounding its execution. As in *Boyd* and in *Brown*, if the Court determines the present record is insufficient to properly rule on the issues before it, additional discovery should be permitted as necessary.

Most respectfully, if the Court should make such a determination, it is only fair to allow this Defendant to engage in some appropriately limited discovery to attempt to protect its arbitration rights. It must be remembered that this Defendant moved to compel arbitration under a facially valid arbitration agreement, which was not called into question until Plaintiff, by and through daughter, disavowed Plaintiff's son's authority (*vis a vis* apparent agency or inherent agency) – which Plaintiff and Leslie Nanney both ratified (and this Defendant submits actually was conferred in the first place). This Defendant had no reason to conduct discovery until this dispute arose, and even then, it still maintained its primary position that the Arbitration Agreement was enforceable based on the record as is. If further development of the record is

needed on any point material to arbitrability, the Court should expressly allow this Defendant to protect its legitimate interests through discovery into the relevant subject matter without exposing itself to a claim of waiver by Plaintiff, *i.e.*, without having to expose itself to a potential Catch-22 where it could be said to have waived its arbitration rights simply by endeavoring to prove them.

### **CONCLUSION**

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

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*Attorneys for the Defendant THI of South  
Carolina at Magnolia Manor – Spartanburg, LLC  
d/b/a Magnolia Manor - Spartanburg*

Charleston, South Carolina

Dated: December 13, 2019

ADMISSION AGREEMENT – SOUTH CAROLINA

RESIDENT NAME:

Betty Nanney

RESIDENT NUMBER:

300995-01

DATE OF ADMISSION:

10/28/16

THIS ADMISSION AGREEMENT ("Agreement") as above dated is, by and among magnolia Manor Spartanburg ("Facility"), Betty Nanney ("Resident") and/or Kaileb Horn ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

**I. GENERAL CONDITIONS**

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

Original: Business File • Photocopy: Resident/Representative

FFSC001 South Carolina Admission Agreement (Rev. 6/2009)

**DEFENDANT'S  
EXHIBIT**

Page 1 of 12

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## II. AGREEMENT FOR CARE

### A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.
2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.
3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.
4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.
5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.
6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.
8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
9. Provide an activities program for Resident, components of which will be at the discretion of Facility.
10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

Original: Business File • Photocopy: Resident/Representative

**B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:**

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.
2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.
3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.
4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.
5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold*.
6. Provide and be responsible for personal items of clothing and property.
7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.
8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.
9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

Original: Business File • Photocopy: Resident/Representative

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.
11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.
12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.
13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.
14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.
15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.
16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.
17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.
18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.
19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.

Original: Business File • Photocopy: Resident/Representative

20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

### III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☒semi-private) accommodations, for a basic fee of \$ 1107.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.
  - a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.
  - b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.
  - c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.
2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.
3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with

Original: Business File • Photocopy: Resident/Representative

state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

#### IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

- a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
- b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
- c. Resident's death
- d. The safety or health of individuals in the Facility is endangered.
- e. Resident and/or his/her legal representative has failed to pay for his/her stay.
- f. Facility ceases to operate or is no longer able to provide services to Resident.
- g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

#### V. MEDICAID BENEFICIARIES

1. **Eligibility.** Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission. This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.

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2. **Covered Services.** If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services.**

- a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.
- b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VI. MEDICARE BENEFICIARIES

1. **Covered Services.** If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,

Original: Business File • Photocopy: Resident/Representative

toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

- a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.
- b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (e.g., a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.
- c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10<sup>th</sup> day of the month.

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2. Ancillary Services. Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. Assignment of Benefits. In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. Benefit Disallowance. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. Application/ Appeals. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

### VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

Magnolia Manor Spartanburg  
375 Serpentine Dr.  
Spartanburg, SC 29303

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative

## IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

## X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

## XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

## XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

## XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

## XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

## XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.

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## XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

## XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

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5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

### XVIII. ENTIRE AGREEMENT

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

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident \_\_\_\_\_ Date \_\_\_\_\_

Printed Name of Resident \_\_\_\_\_

Resident Social Security Number \_\_\_\_\_

Witness Signature \_\_\_\_\_ Date \_\_\_\_\_

Printed Name of Witness \_\_\_\_\_

OR

 10-28-16  
Signature of Representative, if any \_\_\_\_\_ Date \_\_\_\_\_

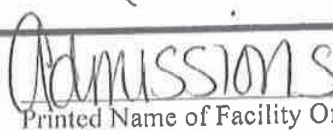
Printed Name of Representative \_\_\_\_\_

Witness Signature \_\_\_\_\_ Date \_\_\_\_\_

Printed Name of Witness \_\_\_\_\_

Representative Social Security No. (Voluntary Info.) \_\_\_\_\_

  
Signature of Facility Official \_\_\_\_\_

  
Printed Name of Facility Official & Title \_\_\_\_\_

10/28/16  
Date \_\_\_\_\_

Original: Business File • Photocopy: Resident/Representative

# INFORMED CONSENT FOR INFLUENZA VACCINE Inactivated or Recombinant

## Why should you get an influenza vaccine?

Influenza (flu) is a contagious disease which spreads from person to person through coughing, sneezing and close contact. Symptoms come on suddenly and may last several days. Symptoms can include:

- Fever/Chills
- Sore throat
- Muscle aches
- Runny or stuffy nose
- Cough
- Headache
- Fatigue

Complications of influenza can include: • Pneumonia • Worsening of existing medical condition

The influenza vaccine is recommended for everyone 6 months and older. It's especially important that a person gets vaccinated if he/she is at risk for complications from influenza or he/she can spread influenza to those at risk. People at higher risk for complications from influenza include:

- People 65 and older
- People with a weakened immune system
- People with certain health conditions, such as heart, lung or kidney disease

For most people, the influenza vaccine prevents serious influenza-related illness. The vaccine will not prevent disease from other viruses, including influenza viruses not contained in the vaccine.

## When should you get vaccinated?

Influenza viruses are always changing, so the vaccine is updated every year. **An annual vaccination is recommended.** Get the vaccine as soon as it is available. This should provide protection if the flu season comes early. It takes about 2 weeks for protection to develop after the vaccination and lasts through the flu season.

## Potential Adverse Effects/Negative Outcomes of Receiving the Vaccine

Most people who get a flu shot do not have any problems; however, as with any medicine, there is a very remote chance of a vaccine causing serious reaction, injury or death. **If you have a severe egg allergy, severe allergy to any vaccine component, or have had a severe reaction to a previous dose of influenza vaccine, tell your doctor.** Also, tell your doctor if you have ever had Guillain-Barre Syndrome (GBS) or you are presently ill.

The following **mild side effects** may occur soon after the shot and last 1 to 2 days:

- Hoarseness
- Cough
- Red or itchy eyes
- Fever
- Aches
- Fatigue
- Headaches
- Itching
- Soreness, redness, or swelling where the shot was given

**Signs of severe allergic reaction can include: hives, swelling of face and throat, difficulty breathing, fast heartbeat, dizziness and weakness. If these reactions occur, call your doctor or seek medical attention immediately.**

## INFORMED CONSENT

I have read the above information or it has been explained to me, and I understand the potential adverse effects and negative outcomes. Understanding the benefits, potential negative outcomes and side effects of receiving an **influenza vaccine**:

### Initial appropriate response

- ☐ I hereby **GIVE** the facility permission to administer an **influenza vaccination**, unless medically contraindicated.
- ☒ I hereby **DO NOT GIVE** the facility permission to administer an **influenza vaccination**.

Resident Signature

Date

☒ Resident Representative and/or ☐ Durable Power of Attorney for Healthcare Signature/Relationship

Date

Facility Representative Signature/Title

Date

Resident Name

ID #

Room #

Physician

DEFENDANT'S  
EXHIBIT

3

See reverse for **Pneumococcal Vaccine Consent**

## INFORMED CONSENT FOR PNEUMOCOCCAL VACCINE

## Why should you get a pneumococcal vaccine?

Pneumococcal disease is an infection caused by a type of bacteria and can lead to serious infections including:

- Pneumococcal Pneumonia (lungs)
- Otitis media (middle ear infection)
- Pneumococcal Meningitis (covering of the brain)
- Pneumococcal Bacteremia (bloodstream infection)

Symptoms of pneumococcal pneumonia can include:

- Fever
- Shortness of breath
- Cough
- Chest pain

Symptoms of otitis media can include:

- Painful ear
- Red or swollen eardrum
- Sometimes sleeplessness, fever and irritability

Symptoms of pneumococcal meningitis can include:

- Stiff neck
- Fever
- Visual sensitivity to light
- Mental confusion and disorientation

Symptoms of pneumococcal bacteremia may be similar to some of the symptoms of pneumonia and meningitis, along with joint pain and chills.

Drugs such as penicillin were once effective in treating pneumococcal infections; but some strains of the disease have become resistant to these drugs, making treatment of pneumococcal infections more difficult. This makes prevention, through vaccination, even more important.

## When should you get vaccinated?

The Advisory Committee on Immunization Practice recommends two pneumococcal vaccines for adults 65 years of age or older. Recent studies have shown that both the pneumococcal conjugate (PCV13) and the pneumococcal polysaccharide (PPSV23) vaccines are needed for the best protection against pneumococcal disease.

If you are 65 or older and have not had a pneumonia vaccine, you should receive one dose of PCV13 now, and in 6-12 months get a dose of PPSV23. If you have had a pneumonia vaccine after the age of 65, then you received the PPSV23 and should receive the second vaccine, PCV13.

## Potential Adverse Effects/Negative Outcomes of Receiving the Vaccine

A vaccine, like any medicine, could possibly cause serious problem, such as severe allergic reaction. The risk of a vaccine causing serious harm, or death, is extremely small. However, **if you have a severe allergy to any vaccine component or you've had a severe reaction after a previous dose of a pneumococcal vaccine, you should tell your doctor.** You should also talk with your doctor if you are presently ill. The vaccine may be less effective in some people, especially those with lower resistance to infection. These people should still be vaccinated, because they are more likely to have serious complications if they get pneumococcal disease.

The following mild side effects may occur after the vaccination:

- Fever
- Muscle aches
- Soreness/redness where the shot was given

**If you experience more severe side effects including: a high fever, difficulty breathing, wheezing, hives, paleness, weakness, fast heart beat or dizziness report these to your doctor immediately.**

## INFORMED CONSENT

I have read the above information or it has been explained to me and I understand the adverse effects and potential negative outcomes. Understanding the benefits, adverse effects and potential negative outcomes of receiving a **pneumococcal vaccine**:

## Initial appropriate response

☐ I hereby **GIVE** the facility permission to administer a **pneumococcal vaccination**, unless medically contraindicated. To the best of my knowledge, I have not received a **pneumococcal vaccination** in the past five years.

☒ I hereby **DO NOT GIVE** the facility permission to administer a **pneumococcal vaccination**. *already had*

Resident Signature

Date

☐ Resident Representative and/or ☐ Durable Power of Attorney for Healthcare Signature/Relationship

Date

Facility Representative Signature/Title

Date

Parts of this document were excerpted from the following CDC Vaccine Information Statements: (08/07/2015) Inactivated Influenza Vaccine, (2/27/13) PCV13 Vaccine, and (4/24/15) PPSV Vaccine.

Resident Name

ID #

Room #

Physician

Betty Nanney

30995-01

108B

LU

**Consent to Administer Inactivated Influenza Vaccine 2016-2017**

According to CDC "inactivated" vaccine influenza VIS may be used for non-live virus formulations

(e.g., trivalent, quadrivalent, cell-culture, recombinant, intradermal, high-dose)

Influenza (flu) is an illness caused by viruses, affecting people of all ages. Among other symptoms, influenza can cause fever, cough, sore throat, chills and headache, and can lead to pneumonia or death. Annual vaccination is recommended for persons 6 months of age or older, including residents of nursing homes and other chronic-care facilities, and health care providers, among others.

Some people should not get influenza vaccine or should wait before getting it. For example, people with severe egg allergy may require an alternative formulation or additional testing. As with any medication, there are potential side effects and risks from use of the influenza vaccine.

A vaccine information statement (VIS) "Influenza Vaccine (Flu Vaccine, Inactivated): "What You Need To Know", has been prepared by the Centers for Disease Control and Prevention, and contains important information regarding influenza and the inactivated influenza vaccine (flu shot). Please read this VIS (particularly items #2 and 4) before signing this Consent and receiving the flu shot. If you do not wish to have the flu shot administered at this time or wish to speak with a physician first, please check the box indicating that you decline to receive the flu shot and sign the line beside the box.

As the individual identified below or his/her responsible party, I hereby confirm that I have received, read and understood this VIS, that I understand the risks and benefits associated with the inactivated influenza vaccine (flu shot) and desire to have the flu shot administered, and accordingly I give my permission for such administration. I understand that the flu shot, like any medication, is capable of causing serious problems such as severe allergic reaction.

Individual to Receive Vaccine:

*Betty Nanney*

Date

Signature of Individual/ Responsible Party

Name (printed) of Individual/Responsible

Consenting to Vaccine Administration

I decline to receive the "flu shot".

*already had*

Signature of Individual/ Responsible Party

Declining Vaccine Administration

**PATIENT'S/RESIDENT'S CONSENT  
TO PARTICIPATE IN FACILITY OUTINGS**

I, Betty Nanney, state and declare that I am a current  
Patient/Resident  
patient/resident of magnolia manor Spartanburg AND that no agent or person has  
Facility  
been authorized by me or any Court to make health care decisions on my behalf.

By my signature below, I hereby notify Facility staff that I wish to be included in off-premises  
community outings/trips sponsored by Facility during my stay.

I state and declare that my treating physician has issued an Order stating I may participate  
in outings.

I understand that I will be advised of an outing in advance and that I will be provided with  
the opportunity to decline participation in any outing.

I agree to adhere to Facility's policies and procedures while participating in any outings.

I understand that I may cancel this *Consent* in writing any any time by notifying Facility in  
writing, except to the extent that action has been taken in reliance on this *Consent* prior to the  
revocation.

I affirm that I have executed this declaration voluntarily and am fully aware of its content.

**Release.** By my signature below, I hereby hold Facility, its parent corporation, subsidiaries,  
divisions, affiliates, officers, directors, employees, attorneys and assigns and any other person  
harmless for any injuries or loss which I may sustain during this outing.

K. Smith  
Patient/Resident Signature

10-28-16  
Date

Kyle Milner  
Witness Signature

10/28/16  
Date

\_\_\_\_\_  
Printed Name of Witness

**AUTHORIZATIONS, CONSENTS & ACKNOWLEDGMENTS**

*Please read, review and acknowledge each the following:*

**Treatment/Health Care Professionals:****Authorization for Treatment**

☒ KH  
(initial)

I hereby authorize Facility's professional staff to administer nursing procedures, podiatric procedures, therapies, skin scrapings, nonsurgical dental procedures and laboratory and x-ray procedures on me/Resident. I understand that I may withdraw this consent at any time by notifying Facility in writing. I further understand that an additional consent will be required for any surgical treatment or for any treatment requiring the use of general anesthesia.

**Medical Treatment**

☒ KH  
(initial)

It is understood and agreed that Resident is under the control of his/her elected physician and/or his/her designee and that Facility is not liable for any act or omission as a result of following instructions of said physician(s)/designee(s). Resident consents to diagnostic imaging procedures, laboratory procedures, or medical treatment rendered to Resident under the general and special instructions of Resident's physician or physician's designee.

**General Duty Nursing**

☒ KH  
(initial)

Facility provides general duty nursing care. Under this system, nurses are called to the resident's bedside by a signal system. If Resident is in such condition as to need continuous or special duty nursing care, it is agreed that Resident, Resident's legal representative or Resident's physician(s) will make the necessary arrangements for such care. It is understood and agreed that Facility shall not, in any way, be responsible for the failure to provide such care and is hereby released from any and all liability arising from the fact Resident is not provided with such care.

**Independent Status of Health Care Providers and their Agents/Designees**

☒ KH  
(initial)

Resident and/or Resident's legal representative acknowledges that any and all health care providers and their agents/designees are not agents or employees of Facility. Resident and/or Resident's legal representative understands and agrees that each health care provider or their agent/designee who renders services to Resident will independently bill and collect fees for these services. Resident and/or Resident's legal representative agrees and understands that the health care provider's bills will be separate and apart from Facility's.

**Selection of Medical Professionals:**

You have the right to use your personal health care providers during your stay. In the event you do not have a current provider, the facility has a list of independent providers who are available to provide on-site care. If you have difficulty contacting any of these professionals, please notify our staff. Please indicate your choice of health care providers below, including the provider's phone number and address.

**PHYSICIAN:**

Name:

Dr. Jonathan Liu

Address:

220 N. Main St. Ste 500 Greenville, SC

Phone:

864-412-0446

29601

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

**DENTAL**☒ Yes☐ No

Examination Charge \$ \_\_\_\_\_

I would like to receive dental services at the above charge and have selected the following provider:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

**VISION**☒ Yes☐ No

Examination Charge \$ \_\_\_\_\_

I would like to receive vision services at the above charge and have selected the following provider:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

**PODIATRY**☒ Yes☐ No

Examination Charge \$ \_\_\_\_\_

I would like to receive podiatry services at the above charge and have selected the following provider:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

**Self-Administration of Medications**

Please indicate whether or not you wish to invoke your right to self-administer medications prescribed by your physician as outlined in the Admission Handbook.

☐ \_\_\_\_\_  
(initial)

I wish to invoke my right to self-administer medications prescribed by my physician. I authorize and consent to an evaluation by the Interdisciplinary Team in order to determine my ability to carry out this responsibility.

☒ KH  
(initial)I wish to waive my right to self-administer medications. I request and authorize Facility's nursing staff to administer medications prescribed by my physician. **I understand that I am entitled to this right and that I may invoke this right any time in the future by written notification to the facility.**

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

**Personal Property/Valuables/Money:**

☒ KH  
(initial)

I acknowledge that I have received, read or had read to me, and understand Facility's policy on personal property, valuables and money. I understand that all personal belongings should be labeled properly and entered on a personal inventory list. I understand that all items removed from or brought into the facility after admission should be documented on the inventory list and that missing items must be reported to appropriate staff as soon as possible.

☒ KH  
(initial)

I acknowledge and understand that Facility is not responsible for damage to or theft/loss of any personal property/valuables/money not kept in compliance with Facility policies.

**Deposit of Personal Funds:**

Please indicate below whether or not you wish to deposit personal funds with Facility in accordance with the *Protection of Resident's Funds* policy outlined in the Admission Handbook. **Please note that you are not required to deposit any funds with the facility.**

☒ KH  
(initial)

I do not wish to deposit personal funds with the facility at this time.

☐ \_\_\_\_\_  
(initial)

I authorize Facility to accept, hold and account for my personal funds in accordance with the policies outlined herein. I acknowledge that I have the right to revoke this authorization at any time upon written notice to Facility. I acknowledge that authorized State agencies may audit this account, regardless of my payer source.

**Beneficiary Designation: (THIS PORTION TO BE FILLED IN BY RESIDENT ONLY)**

In the event of my death, I authorize Facility to transfer all personal funds and property held by Facility to the following person(s): \_\_\_\_\_. If I have not named a beneficiary or the beneficiary cannot be located, I understand that Facility will hold and pay the funds in line with the State's regulations.

**Advance Directive Acknowledgment:**

☐ \_\_\_\_\_  
(initial)

I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have executed the following advance directive measures and **a photocopy has been provided to the facility for inclusion with my Medical Records:**

- ☐ Living Will
- ☐ Durable Power of Attorney for Health Care or similar agent designation
- ☐ "Do-Not-Resuscitate" Identification (CPR)
- ☐ Other: \_\_\_\_\_

☒ KH  
(initial)

I acknowledge that I have received, read or have had read to me, and understand *Facility's Policy and State Requirements for Advance Directives* and have elected **NOT** to execute any advance directive at this time, including DNR Identification. I understand that facility staff will respond to medical emergencies with **CPR measures and a full code will be instituted.**

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

**Special Services:**

Please indicate whether or not you authorize the following services to be provided. All associated fees will be charged to your account:

|                                       |                              |                             |                                         |                 |
|---------------------------------------|------------------------------|-----------------------------|-----------------------------------------|-----------------|
| Telephone                             | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input checked="" type="checkbox"/> N/A | Charge \$ _____ |
| Television                            | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input checked="" type="checkbox"/> N/A | Charge \$ _____ |
| Newspaper                             | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input checked="" type="checkbox"/> N/A | Charge \$ _____ |
| Laundry                               | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input checked="" type="checkbox"/> N/A | Charge \$ _____ |
| Beauty Shop                           | <input type="checkbox"/> Yes | <input type="checkbox"/> No | <input checked="" type="checkbox"/> N/A | See charge list |
| Other(s) (Please Specify Below) _____ |                              |                             |                                         |                 |

|       |                              |                             |                 |
|-------|------------------------------|-----------------------------|-----------------|
| _____ | <input type="checkbox"/> Yes | <input type="checkbox"/> No | Charge \$ _____ |
| _____ | <input type="checkbox"/> Yes | <input type="checkbox"/> No | Charge \$ _____ |

**Photographs by State/Federal Survey Agencies**

I acknowledge and understand that, during my/Resident's stay, Federal and/or State surveyors (investigators) may take my/Resident's photograph as part of their independent survey/investigation process and in line with conditions of my/Resident's participation in the Medicare and/or Medicaid program. I understand that, in line with CMS guidelines, the surveyors must obtain written consent from Resident or his/her surrogate **before** any photographs are taken. I understand that the Federal/State Survey Agency is wholly responsible for acquiring and securing any photographs they may take.

☒ KH (initials) I acknowledge and understand that neither Facility nor its parent, affiliates, officers, directors, employees, attorneys, assigns or any other person acting on its behalf, has any oversight or responsibility for the surveyors actions or inactions as it relates to taking photographs for their independent investigations.

**Photograph/Audiotape/Videotape**

☒ Yes KH (initial) ☐ No \_\_\_\_\_ (initial)

I hereby authorize Facility to photograph/audiotape/videotape me/Resident for its use in resident identification, infection control, surveillance and/or other medical purposes. I understand that, if the facility wishes to photograph/audiotape/video tape me for any other reason, (activities, marketing, media coverage, etc.), the facility will secure permission from me through a separate written authorization.

**Posted Information**

☒ Yes KH (initial) ☐ No \_\_\_\_\_ (initial)

To better serve you and meet your health care needs, permission is needed to post information regarding your/Resident's health care needs within your room and the facility as needed. The information to be disclosed will be the minimum amount necessary and shall serve as a means of communication, enabling staff to provide service while, at the same time, ensuring your/Resident's rights to privacy. Information to be disclosed may include, but not be limited to, therapy schedules, activities of daily living, ambulation/mobility parameters, swallowing and aspiration precautions, do-not-resuscitate orders.

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

**Authorization to Release and Obtain Information**☒ Yes KH ☐ No \_\_\_\_\_  
(initial) (initial)

I hereby authorize the facility to release and/or obtain medical information or other necessary data which may be necessary for my/Resident's continued treatment and care at the facility, including but not limited to the filing of insurance claims in my/Resident's/Facility's interest. I further authorize the release of information, medical or otherwise, to any government agency without my prior approval or that of my representative, if any.

**Authorization to Receive/Open Mail**☒ Yes KH ☐ No \_\_\_\_\_  
(initial) (initial)

I hereby authorize Facility to open all mail received by me/Resident. Further, I would like this mail to be read to me/Resident upon receipt. You have the right to revoke this authorization at any time upon written notice to the facility.

Resident Signature

Date

Printed Name of Resident

Legal Representative Signature, if any

Date

Printed Name of Representative

Witness Signature

Date

Printed Name of Witness

Facility Representative Signature

Date

Printed Name and Title

Original: Business File • Photocopies: (1) Medical Chart; (1) Resident/Representative

# CONSENT FOR PSYCHOACTIVE MEDICATION THERAPY

Date:

Resident: Nanner Better

Physician: Lee

Psychotropic Medication: [REDACTED]

Diagnosis: [REDACTED]

## The specific condition to be treated:

- |                                              |                                                        |                                               |                                             |
|----------------------------------------------|--------------------------------------------------------|-----------------------------------------------|---------------------------------------------|
| <input type="checkbox"/> Adjustment disorder | <input type="checkbox"/> Delusions                     | <input type="checkbox"/> Obsessive-compulsive | <input type="checkbox"/> Socially withdrawn |
| <input type="checkbox"/> Angers easily       | <input type="checkbox"/> Dementia w/psychotic features | <input type="checkbox"/> Panic                | <input type="checkbox"/> Stress disorder    |
| <input type="checkbox"/> Anxiety             | <input checked="" type="checkbox"/> Depression         | <input type="checkbox"/> Paranoia             | <input type="checkbox"/> Other: _____       |
| <input type="checkbox"/> Agitation           | <input type="checkbox"/> Hallucinations                | <input type="checkbox"/> Schizophrenia        |                                             |
| <input type="checkbox"/> Bipolar disorder    | <input type="checkbox"/> Huntington's disorder         | <input type="checkbox"/> Sexual disorder      |                                             |
| <input type="checkbox"/> Catatonia           | <input type="checkbox"/> Involuntary swearing          | <input type="checkbox"/> Sleeping disorder    |                                             |
| <input type="checkbox"/> Combative           |                                                        |                                               |                                             |

## The beneficial effects expected from this medication:

- ☐ Improved functionability    ☐ Reduced adverse behaviors    ☐ Other: \_\_\_\_\_

## The clinical significant side effects or risks associated with the medication includes:

- |                                               |                                              |                                           |                                            |
|-----------------------------------------------|----------------------------------------------|-------------------------------------------|--------------------------------------------|
| <input type="checkbox"/> <b>Antipsychotic</b> | <input type="checkbox"/> <b>Anti-anxiety</b> | <input type="checkbox"/> <b>Hypnotics</b> | <input type="checkbox"/> <b>Anti-manic</b> |
| • Neck stiffness                              | • Dry mouth                                  | • Hypotension                             | • Confusion                                |
| • Confusion                                   | • Blurred vision                             | • Sedation                                | • Drowsiness                               |
| • Muscle rigidity                             | • Constipation                               | • Dizziness                               | • Hypotension                              |
| • Involuntary movements                       | • Urinary retention                          | • Dry mouth                               | • Nausea/vomiting                          |
| • Drooling                                    | • Hypotension                                | • Blurred vision                          | • Nephrotic syndrome                       |
| • Tremors                                     | • Appetite changes                           | • Urinary retention                       | • Seizures                                 |
| • Restlessness                                | • Headache                                   | • Drowsiness                              | • Impaired cognition                       |
| • Sleep disturbances                          | • Insomnia                                   | • Slurred speech                          | • Tremors                                  |
| • Dry mouth                                   | • Dyspepsia                                  | • Confusion                               | • Visual impairment                        |
| • Blurred vision                              | • Weight changes                             | • Fatigue                                 | • Reduced heart rate                       |
| • Constipation                                |                                              | • Nightmares                              |                                            |
| • Sedation                                    |                                              | • Appetite changes                        |                                            |

## The proposed course of the medication is:

- ☐ 1 month    ☐ 6 months    ☐ 12 months    ☐ Prolonged treatment

☒ **Consent is given** to use psychoactive medications: It is understood that consent may be revoked at any time.

☐ Consent to use psychoactive medication **is NOT given**. I realize the dangers of not taking this med may result in uncontrolled behaviors or conditions which may make it impossible for the nursing staff to appropriately provide care.

☐ Telephone consent obtained    Date: \_\_\_\_\_

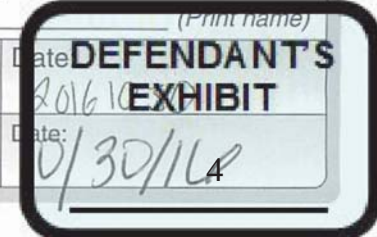
## The above consent was obtained from the appropriate person being:

- ☐ The resident: \_\_\_\_\_ (Print name)
- ☒ The person authorized by law to consent on behalf of the resident (guardian) and the circumstances under which the consent was obtained is: \_\_\_\_\_ (Print name)

Signature of Resident, Guardian, Legal Representative: Lulu Nanner

Signature of person obtaining permission: (nurse, etc.) Kristel Fannon RN

Date: 2016 10 30  
Date: 10/30/16



ELECTRONICALLY FILED - 2019 Dec 13 5:19 PM - SPARTANBURG - COMMON PLEAS - CASE#2019CP4203075

Form # NFF-NP097 (03/09)

Reorder From: MED-PASS 800-438-8884

INH 000009

## DIRECTIONS:

Mark and list items brought for the personal use of the resident/patient.  
Please bring additional items to the Nurse's Station for proper handling.

## INVENTORY OF PERSONAL EFFECTS

Resident's/Patient's washable clothing to be: ☐ taken home for laundering ☐ laundered at facility/community/center

| QTY. | ARTICLES                                                                         | DATE | ITEMS OF SPECIFIC VALUE |              |      |
|------|----------------------------------------------------------------------------------|------|-------------------------|--------------|------|
|      |                                                                                  |      | Description             | Value \$     | Date |
|      | <b>Clothing / Personal Affects</b>                                               |      |                         |              |      |
|      | Belts / Suspenders                                                               |      |                         |              |      |
|      | Billfolds / Wallets                                                              |      |                         |              |      |
| 9    | Blouses / Shirts                                                                 |      |                         |              |      |
|      | Brassieres                                                                       |      |                         |              |      |
|      | Cash (see Items of Specific Value)                                               |      |                         |              |      |
|      | Coats                                                                            |      |                         |              |      |
|      | Comb / Brush                                                                     |      |                         |              |      |
|      | Contact Lenses                                                                   |      |                         |              |      |
|      | Credit Cards / Debit Cards / Checks                                              |      |                         |              |      |
|      | Dresses                                                                          |      |                         |              |      |
|      | Furs                                                                             |      |                         |              |      |
|      | Girdles                                                                          |      |                         |              |      |
|      | Glasses                                                                          |      |                         |              |      |
|      | Gloves                                                                           |      |                         |              |      |
|      | Handkerchiefs                                                                    |      |                         |              |      |
|      | Hats                                                                             |      |                         |              |      |
|      | Hose                                                                             |      |                         |              |      |
|      | Housecoats / Robes                                                               |      |                         |              |      |
|      | Jewelry                                                                          |      |                         |              |      |
|      | Nightgowns / Pajamas                                                             |      |                         |              |      |
| 1    | Overnight Case / Luggage                                                         |      |                         |              |      |
|      | Pocketbooks / Handbags                                                           |      |                         |              |      |
|      | Scarfs                                                                           |      |                         |              |      |
|      | Shaving Kit / Electric Razor                                                     |      |                         |              |      |
| 1    | Shoes                                                                            |      |                         |              |      |
|      | Skirts                                                                           |      |                         |              |      |
|      | Slacks                                                                           |      |                         |              |      |
|      | Slippers                                                                         |      |                         |              |      |
|      | Slips                                                                            |      |                         |              |      |
| 13   | Socks/Nylons                                                                     |      |                         |              |      |
|      | Sports Jackets                                                                   |      |                         |              |      |
|      | Suits                                                                            |      |                         |              |      |
|      | Sweaters                                                                         |      |                         |              |      |
|      | Sweatsuits/Warm Up Suits                                                         |      |                         |              |      |
|      | Ties                                                                             |      |                         |              |      |
|      | Toothbrush                                                                       |      |                         |              |      |
|      | Undershirts                                                                      |      |                         |              |      |
|      | Underwear / Panties BRA                                                          |      |                         |              |      |
|      | Other: FINGERNAIL POLISH                                                         |      |                         |              |      |
|      | Other: STUFFED ANIMALS                                                           |      |                         |              |      |
|      | <b>Appliances / Furniture</b>                                                    |      |                         |              |      |
|      | Radio                                                                            |      |                         |              |      |
|      | Television / DVD / VCR                                                           |      |                         |              |      |
|      | <b>Assistive Devices</b>                                                         |      |                         |              |      |
|      | Commode                                                                          |      |                         |              |      |
|      | Crutches                                                                         |      |                         |              |      |
|      | Dentures: Upper - <input type="checkbox"/> Full <input type="checkbox"/> Partial |      |                         |              |      |
|      | Lower - <input type="checkbox"/> Full <input type="checkbox"/> Partial           |      |                         |              |      |
|      | GeriChair                                                                        |      |                         |              |      |
|      | Hearing Aid:                                                                     |      |                         |              |      |
|      | Right - Make _____ Model _____ Serial # _____                                    |      |                         |              |      |
|      | Left - Make _____ Model _____ Serial # _____                                     |      |                         |              |      |
|      | Prosthesis                                                                       |      |                         |              |      |
|      | Walker / Cane                                                                    |      |                         |              |      |
|      | Wheelchair                                                                       |      |                         |              |      |
|      | Other:                                                                           |      |                         |              |      |
|      | <b>ITEMS STORED IN FACILITY / COMMUNITY / CENTER SAFE</b>                        |      |                         |              |      |
|      |                                                                                  |      | Description             | Value \$     | Date |
|      | <b>ACQUIRED AFTER ORIGINAL ENTRY</b>                                             |      |                         |              |      |
|      |                                                                                  | Date | Item                    | How Received |      |
|      | <b>NOTES ON ARTICLES</b> (Listing of items damaged, etc.)                        |      |                         |              |      |
|      | <b>REMARKS</b>                                                                   |      |                         |              |      |

| ON ADMISSION / MOVE-IN                                                                                                                                                                                                                                                       |       |        | ON DISCHARGE / MOVE-OUT                                                                                                                                                                                                                                           |                           |                |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|--------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------|----------------|
| I agree that the above is a correct listing of the personal belongings that I have chosen to keep in my possession while I am a resident/patient at this facility/community/center. I take full responsibility for these items and any other personal effects brought to me. |       |        | Upon discharge/move-out, personal items are sent with resident/patient or picked up by responsible party. Upon transfer, personal items are to be boxed and placed in designated storage area for safe keeping (or handled per facility/community/center policy). |                           |                |
| Signature of Resident / Patient / Responsible Party                                                                                                                                                                                                                          |       | Date   | Signature of Resident / Patient / Responsible Party                                                                                                                                                                                                               |                           | Date           |
| Signature of Staff                                                                                                                                                                                                                                                           |       | Date   | Signature of Staff                                                                                                                                                                                                                                                |                           | Date           |
| Resident / Patient Name: Last                                                                                                                                                                                                                                                | First | Middle | Room Number                                                                                                                                                                                                                                                       | Resident / Patient Number | Admission Date |
| Nanney                                                                                                                                                                                                                                                                       | Betty |        | 10815                                                                                                                                                                                                                                                             | 300995                    | 10-28-16       |

# 

### BENEFITS

Based on the resident's individual need(s), side rails may be beneficial for/as:

- Security:** Can provide resident with a sense of security if the resident has a fear of falling, his/her movement is compromised or he/she is accustomed to sleeping in a larger bed.
- Mobility Aid:** Can enable resident to reposition self, or assist in repositioning self either side-to-side or upward/downward. Can assist resident in safely entering or exiting bed.
- Safety:** Can act as safety measure by preventing rolling onto floor for resident with, but not limited to, seizure, neurological or movement disorders.

### POTENTIAL NEGATIVE OUTCOMES

I understand that the use of side rail(s) may involve risks such as: getting caught in the rails, getting caught between the rail and mattress, strangulation, hitting against the rail(s) causing skin tears and/or bruising and crawling over the top of a rail risking a fall from a higher level with a risk for greater injury or death.

It is the policy of this facility to use side rail(s) only after assessment and care planning deem it appropriate to treat the resident's medical symptoms and assist the resident in attaining or maintaining his or her highest practicable physical and psychosocial well-being, and other methods or interventions are inadequate. In all instances, the least restrictive device, which is effective, will be used.

The facility will monitor the resident's status and adjust care, as necessary. The facility will have a systematic and gradual process to reduce the use of side rail(s) to ensure the resident's safety while treating the resident's medical symptoms.

*Continued on Side Two*

|               |      |        |           |
|---------------|------|--------|-----------|
| Resident Name | ID # | Room # | Physician |
|---------------|------|--------|-----------|



Form # MP5476 (05/04)

 Recorder From: MED-PASS 800-438-8884  
 MED-PASS

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INH 11230JR

# CONSENT FOR USE OF SIDE RAILS

## RECOMMENDATIONS

| Type                                      | Left: Upper Lower        |                          | Right: Upper Lower       |                          |
|-------------------------------------------|--------------------------|--------------------------|--------------------------|--------------------------|
| <input type="checkbox"/> 1/4 partial rail | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> 1/2 partial rail | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> 3/4 partial rail | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> ___ partial rail | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |
| <input type="checkbox"/> Full side rail   | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

## Frequency

- ☐ Side rail(s) are recommended for resident's use only at night.  
☒ Side rail(s) are recommended at all times when resident is in bed.  
☐ Side rail(s) are recommended only when resident is ill.  
☐ Other: \_\_\_\_\_

## Purpose

Indications for side rail use are:

Positioning assistance

## Release Schedule

Release every \_\_\_\_\_ for \_\_\_\_\_

May also release during:

- ☐ meals    ☐ activities    ☐ supervised visits  
☐ other \_\_\_\_\_

I have read the benefits and potential negative outcomes of side rail(s) use. I have been informed of available alternative methods of treatment including: positioning, placing the mattress on the floor, placing a mat on the floor next to the bed, new specialty beds, etc. Understanding the benefits and potential negative outcomes of side rail use and the healthcare professionals' evaluation/recommendations:

*Initial appropriate response*

- ☒ **I DO** consent to the use of side rail(s) recommended above.  
 I understand that I have the right to refuse the use of side rail(s) or can revoke this consent at anytime.

- ☐ **I DO NOT** consent to the use of side rail(s) recommended above and understand the related liabilities.

Resident Signature

Date

Resident Representative or Durable Power of Attorney for Healthcare Signature/Relationship

Date

Facility Representative Signature/Title

Date

## ADDITIONAL COMMENTS:

- ☐ Physician order has been obtained, including medical symptom/condition.

Resident Name

ID #

Room #

Physician

Nanny B

|                                        |   |                                       |
|----------------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS          |
|                                        | ) | SEVENTH JUDICIAL CIRCUIT              |
| COUNTY OF SPARTANBURG                  | ) | CASE NO. 2019-CP-42-03075             |
| BETTY NANNEY,                          | ) |                                       |
| by and through her attorney-in-fact,   | ) |                                       |
| Leslie Nanney,                         | ) |                                       |
|                                        | ) |                                       |
| Plaintiff,                             | ) | <b>MOTION TO ALTER, AMEND, AND/OR</b> |
|                                        | ) | <b>RECONSIDER ORDER REGARDING</b>     |
| vs.                                    | ) | <b>DEFENDANTS' MOTION</b>             |
|                                        | ) | <b>TO COMPEL ARBITRATION</b>          |
| THI OF SOUTH CAROLINA AT               | ) |                                       |
| MAGNOLIA MANOR-SPARTANBURG,            | ) |                                       |
| LLC, d/b/a Magnolia Manor-Spartanburg; | ) |                                       |
| RUSTY FLATHMANN; LAURA ANNE            | ) |                                       |
| WINN; and OLISHIA GAFFNEY,             | ) |                                       |
|                                        | ) |                                       |
| Defendants.                            | ) |                                       |

TO: THE HONORABLE GRACE GILCHRIST KNIE, Presiding Judge, and GARY W. POLIAKOFF, ESQUIRE, RAYMOND P. MULLMAN, JR., ESQUIRE, and JOHN WAELE, ESQUIRE, POLIAKOFF & ASSOCIATES, P.A., Attorneys for Plaintiff

NOW COME Defendants, THI of South Carolina at Magnolia-Manor Spartanburg, LLC, d/b/a Magnolia Manor – Spartanburg (the “Facility”); Rusty Flathmann (“Flathmann”); Laura Anne Winn (“Winn”); and Olishia Gaffney (“Gaffney”), by and through their undersigned counsel, pursuant to Rule 59(e) and, if necessary, Rule 60(a), SCRCF, and, on the grounds set forth below, hereby move this Honorable Court to alter, amend, and/or reconsider and/or correct its Order Regarding Defendants’ Motion to Compel Arbitration, filed January 7, 2020 (the “Subject Order”).

- Please clarify that the Subject Order does not dispose of Winn’s motion to dismiss and either (a) issue a separate order ruling on the motion (after hearing such oral argument and/or considering such written submissions from the parties as the Court sees fit), (b) place the motion back on the roster for disposition by the judge presiding over the next available term of court, or (c) simply allowing the motion to be withdrawn without prejudice.**

As the Subject Order correctly recited, Winn filed a motion to dismiss on October 11, 2019.

As the Subject Order also correctly recited, the Facility, Flathmann, and Gaffney filed motions on

November 11, 2019, styled motions “to dismiss Plaintiff’s complaint, compel arbitration and stay state court proceedings.” While the latter motions included the word “dismiss” in their titles, their aim was to have this action dismissed or stayed *in favor of arbitration*. Winn’s motion, on the other hand, did not seek to compel arbitration but rather sought her dismissal as a party under Rule 12(b)(6), SCRCF, on the grounds that she was “not a proper party to this action as she did not owe the Plaintiff a legal duty of care with respect to the injuries suffered in this action” because she “was not an employee or agent of [the Facility] during the time period relevant to Plaintiff’s allegations, nor did she have any personal or professional relationship with the Plaintiff or any other defendant in this action during the time period at issue that could give rise to a legal duty of care[] [and,] [m]oreover, [she] did not supervise, monitor, or interact with any staff member at the Facility during the time the alleged events occurred.”

Most respectfully, and with sincere apologies for the confusion, the Subject Order should not dispose of Winn’s motion to dismiss because, quite simply, its subject matter is different from that of the Facility, Flathmann, and Gaffney’s motions to compel arbitration, these latter motions in fact being the only motions the Subject Order really addresses on the merits. Accordingly, *it is asked that the Court clarify that the Subject Order does not dispose of Winn’s motion to dismiss and either (a) issue a separate order ruling on the motion (after hearing such oral argument and/or considering such written submissions from the parties as the Court sees fit), (b) place the motion back on the roster for disposition by the judge presiding over the next available term of court, or (c) simply allowing the motion to be withdrawn without prejudice.*

2. **For all motions disposed of via the Subject Order, it is expressly requested that the Court (re)consider and expressly rule on each and every distinct issue/argument raised in support of thereof (whether raised in writing, to include via proposed order, or via oral argument), all of which is 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).

3. **The Subject Order states, “Defendants did not offer any evidence to contradict [Mr. Horn’s] affidavit,” which asserted the he did not have *actual* authority to sign the Arbitration Agreement for his mother (Betty Nanney) and that it would not have been possible for his mother to have given any indication to the Facility that would have conferred upon him *apparent* authority.<sup>1</sup> Most respectfully, Defendants did not have a full and fair opportunity to gather any such evidence through discovery.**

The Subject Order notes the lack of any affidavit submitted by one or more of the Facility’s personnel contradicting Mr. Horn’s affidavit as to whether he had *apparent* authority. While this is true, it should not be dispositive of the issue; nor, as a practical matter, could it have been. Even were Defendants to have presented such an affidavit, it is not as though it would have sufficed to establish the facts of an *apparent* agency because surely Plaintiff would have demanded the right to depose the Facility’s affiant(s). Moreover, with respect to any *actual* agency, the most probative evidence would not be within the Facility’s control. The chief inquiry with respect to *actual* agency would be communications between Mr. Horn and his mother (or perhaps other family

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<sup>1</sup> This theme (about the lack of such evidence produced by Defendants) is repeated throughout the Subject Order.

members/close friends), not (as in the case of *apparent* agency) communications/representations by his mother to the Facility. Unless the Court allows discovery on this point, Defendants will never have had a chance to conduct any meaningful inquiry in this regard but instead will have been forced simply to take Mr. Horn's word for it. As the Subject Order itself notes, Mr. Horn's affidavit "states that Ms. Nanney, while lucid, was unable to make verbal representation[s]." This alone indicates Mr. Horn was acting as his mother's agent by doing the talking for her, but at a minimum, it provides ample basis for good faith inquiry into the nature of their relationship at the relevant time(s).

4. **Most respectfully, the point made in 3 above (about Defendants' not having a full and fair opportunity to gather evidence through discovery) goes for the Subject Order's treatment of the ratification issue as well.**

Here again, the chief inquiry with respect to ratification would be communications between/conduct observed by Mr. Horn and his mother (or perhaps other family members/close friends).

5. **Most respectfully, to deny Defendants' motions to compel arbitration for lack of evidence of Mr. Horn's authority or ratification of the Arbitration Agreement by Ms. Nanney is to snare Defendants in a patently inequitable Catch-22. In other words, at a minimum, the Court should have granted Defendants limited discovery to address gaps in the evidentiary record.**

As explained previously, whether an agency relationship exists (or whether the facts to support agency by estoppel or ratification exist) is a fact-intensive inquiry. Especially given Plaintiff's assurance that Ms. Nanney was competent and possessed of contractual capacity at all relevant times, there is a good faith and material question as to whether she manifested consent to Mr. Horn's acts (before or after the fact).

The Arbitration Agreement specifically states that Mr. Horn was representing to the Facility that he had "authority to sign on [his mother's] behalf so as to bind the Resident as well

as the Representative[,]”<sup>2</sup> and, even though agency may not be established *solely* by the actions of the agent,<sup>3</sup> “such declarations and conduct [by the agent] are admissible as circumstances in connection with other evidence tending to establish the agency.” *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962).

Moreover, it must be remembered here that Defendants moved to compel arbitration on the basis of a *facially valid* Arbitration Agreement that—without question—Mr. Horn signed, expressly stating that he was authorized to do so on his mother’s behalf. The very fact that Mr. Horn has (thus far) been allowed to disavow this representation on the basis of his as yet *unchecked* affidavit is proof positive of material unfairness in the process of Defendants’ effort to enforce the instant (again, *facially valid*) Arbitration Agreement.

Most respectfully, at a minimum, the Court has erred in denying Defendants’ alternative request for limited discovery to address gaps the in evidentiary record bearing on whether an agency relationship exists (or whether the facts to support agency by estoppel or ratification exist).

**6. Most respectfully, the Subject Order reflects misapprehension of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014).**

According to the Subject Order, in *Coleman*, our Supreme Court “held that a surrogate without proper legal authority cannot bind a person to arbitration.” The *Coleman* Court, however, was not speaking as broadly as the Subject Order would suggest. It was addressing the particular question of whether the Adult Health Care Consent Act (the “AHCCA”) allowed a surrogate to enter into an arbitration agreement on a resident’s behalf. This is a question of statutory construction and the statute at issue, the AHCCA, is not relied on by Defendants in support of their motions.

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<sup>2</sup> (Arbitration Agreement.)

<sup>3</sup> *Cowburn v. Leventis*, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005).

7. **The Subject Order states, “[Mr. Horn] had no legal authority to sign the Arbitration Agreement, and Defendant knew or should have known this fact.” Most respectfully, (a) there is no evidence of record from which the Court could reasonably draw this conclusion about what Defendants knew or should have known—in fact, the only evidence there is contradicts this conclusion—and (b) requiring Defendants to meet the investigatory standard implicit in this conclusion violates the FAA by failing to place the Arbitration Agreement on equal footing with other contracts.**

The only evidence of record on this point is in the form of the Arbitration Agreement itself, which includes (by virtue of his signature upon it) Mr. Horn’s express representation that he had all due authority to sign it for his mother. There is no question raised here as to Mr. Horn’s competency. He is thus “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement,<sup>4</sup> including, of course, the terms whereby he represented himself to the Facility as having authority to act on his mother’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,<sup>5</sup> and Mr. Horn is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party 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 other contracts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

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<sup>4</sup> *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”).

<sup>5</sup> *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

8. The Subject Order states,

**Defendants can . . . not claim to have been misled and cannot rely on equitable estoppel if they, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions.[] Furthermore, Defendants had the capacity to determine whether [Mr. Horn] had authority to sign the Arbitration Agreement on Ms. Nanney’s behalf. Defendants are a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendants are familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask [Mr. Horn] for any power of attorney documentation.**

**Most respectfully, this, too, violates the FAA by failing to place the Arbitration Agreement on equal footing with other contracts.**

Here again, there is no question as to Mr. Horn’s competency. He is thus “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement,<sup>6</sup> including, of course, the terms whereby he represented himself to the Facility as having authority to act on his mother’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,<sup>7</sup> and Mr. Horn is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party 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 other contracts. *Concepcion*, 563 U.S. at 339.

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<sup>6</sup> *Gibson*, 426 S.C. at 352, 827 S.E.2d at 181 (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”).

<sup>7</sup> *Adams*, 320 S.C. at 277, 465 S.E.2d at 86.

**9. Most respectfully, the merger/equitable estoppel analysis in the Subject Order is erroneous.**

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.*

407 S.C. at 354–355, 755 S.E.2d at 455 (emphasis added).

Here, the Court has erred in rejecting Defendants' merger argument, failing 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*.

As argued previously, 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. Also, while the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as being a separate document. 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.” 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.

Here, the Admission Agreement and Arbitration Agreement should be deemed merged, i.e., they should be construed together and bind Plaintiff to arbitrate the instant claims against Defendants. The agreements were 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. Nanney's admission to the Facility and would not have been done at all but for her admission to the Facility.

Respectfully, the Court's finding against merger 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."). Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts.

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. So yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen 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. 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. Nanney's admission. In other words, Mr. Horn 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 he did agree to it, as part and parcel of the admissions paperwork, Ms. Nanney'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 . . .”).)

The Court also points to the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and separately signed. 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 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, as the Court has done here, 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.

Re: Equitable Estoppel

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court’s recent decision in *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). The *Wilson* Court favorably discussed 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, which followed 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 Defendants contend Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Nanney 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. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *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). In other words, contrary to the Court’s analysis in the Subject Order,

*Wilson* supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this, not the six-factor test identified in the Subject Order.

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Nanney (who was, according to Plaintiff herself, competent and possessed contractual capacity at all relevant times) received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. The Court's reference to the *Hodge* Court's skepticism about whether admission "was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death" is misplaced. To rely on this is improperly prejudge Plaintiff's allegations as true—and indeed to expand/exaggerate those allegations so as to wholly discount every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility), which not even Plaintiff herself has alleged.

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement Mr. Horn signed for Ms. Nanney and that Plaintiff is estopped to deny the Arbitration Agreement's enforceability, Ms. Nanney 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.

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

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.

Moreover, the quote from *Thompson* that “any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [the resident] waive her right to access the courts and her right to a jury trial,”<sup>8</sup> is plainly erroneous in that it places arbitration agreements on unequal footing from other contracts.<sup>9</sup> 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. This is plainly improper under the FAA. Moreover, 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. And there is no way to square the logic of the quote from *Thompson*—which reflects an overtly hostile view of arbitration—with the undeniable policy preference in favor of arbitration under both South Carolina and federal law. The whole point of arbitration is to make use of an alternative—i.e., outside the traditional litigation process—form of dispute resolution. The giving up—on both sides—of this process (and all that comes along with it) in favor of the alternative of arbitration is the benefit.

**11. Most respectfully, to the extent the Subject Order relies on the view that the Arbitration Agreement violates federal law regarding Medicare/Medicaid reimbursements, it is erroneous.**

The Subject Order makes reference to Plaintiff's argument that *if* the Arbitration Agreement is a precondition of admission it constitutes an improper benefit or other consideration

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<sup>8</sup> (Subject Order p. 11 (emphasis omitted).)

<sup>9</sup> As explained previously, as an arbitration agreement covered by the FAA, the Arbitration Agreement “must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]” *Concepcion*, 563 U.S. at 339.

under federal law governing Medicare/Medicaid reimbursements. This argument fails of its essential premise: namely, that the Arbitration Agreement was such a precondition, as indeed the Subject Order itself recognizes that it was *not*. Moreover, where the Subject Order states, “Defendant has admitted the Arbitration Agreement was not a condition of admission, thus, there is no separate consideration offered for the arbitration agreement,” it is, most respectfully, erroneous. The fact that the Arbitration Agreement is *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 there certainly was (*see* 10 above). It just means that the Arbitration Agreement itself did not constitute any form of unlawful consideration to the Facility.

**12. 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>10</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. True, the Arbitration Agreement provides for the Court’s appointment of an arbitrator if the parties are not able to agree on one; however, this does not constitute the absence of a term that the Court is asked to *supply*; it constitutes the presence of a term that the Court is merely asked to *enforce*. The

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<sup>10</sup> There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams*, 320 S.C. at 277, 465 S.E.2d at 86.

Arbitration Agreement further provides that the arbitration shall be conducted as provided in the South Carolina ADR Rules, thereby providing a clear answer to the questions of evidence and discovery by entrusting those matters to the arbitrator, 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 Defendants 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* 563 U.S. at 339.

**13. Most respectfully, the unconscionability analysis in the Subject Order is erroneous.**

As an initial matter, although it includes the heading "E. The Arbitration Agreement should not be enforced because it is both procedurally and substantively unconscionable," the Subject Order does not actually include any analysis leading to the conclusion that the Arbitration Agreement is unconscionable. After the aforementioned heading comes two paragraphs of legal citations but nowhere is it actually explained how any of them applies to this case. Additionally, the conclusion of the Subject Order makes no mention of unconscionability. In any event, though, any finding of unconscionability is, most respectfully, erroneous.

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 the Subject Order itself recognizes, the Arbitration Agreement was not a precondition of admission.

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. 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.”).

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of Defendants’ motions, whether in written or oral form, 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 Defendants’ motions and correcting the Subject Order in respect of Winn’s motion to dismiss (*see* 1 above).

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.

**<SIGNED ON THE FOLLOWING PAGE>**

Respectfully submitted,  
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Charleston, South Carolina

January 17, 2020

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

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Appeal from Spartanburg County  
Court of Common Pleas

Grace Gilchrist Knie, Circuit Court Judge

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Case No. 2019-CP-42-03075

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Betty Nanney,  
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,  
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,  
Laura Anne Winn, and Olishia Gaffney,

Appellants.

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**NOTICE OF APPEAL**

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Defendants, THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann, Laura Anne Winn, and Olishia Gaffney (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 7, 2020, and
- Her Honor's **Order regarding Defendants' Motion to Alter, Amend, and/or Reconsideration of the Court's Order denying Defendants' Motion to Dismiss or Compel Arbitration**, filed February 13, 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 13, 2020.

Respectfully submitted,

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*Attorneys for Appellants*

Charleston, South Carolina

Dated: 3/16/20

**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-42-03075

---

Betty Nanney,  
by and through her Attorney-in-Fact, Leslie Nanney,

Respondent,

v.

THI of South Carolina at Spartanburg, LLC,  
d/b/a Magnolia Manor-Spartanburg, Rusty Flathmann,  
Laura Anne Winn, and Olishia Gaffney,

Appellants.

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**PROOF OF SERVICE**

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YOUNG CLEMENT RIVERS, LLP

Stephen L. Brown (SC Bar No. 66468)

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

Russell G. Hines (SC Bar No. 72100)

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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 March 16, 2020, properly posted for delivery to the following addressees:

Gary W. Poliakoff, Esquire  
Raymond P. Mullman, Jr., Esquire  
Edward John Waelde, Esquire  
Poliakoff & Associates, P.A.  
P.O. Box 1571  
Spartanburg, SC 29304  
*Attorneys for Respondent*

I also certify that a copy of this **NOTICE OF APPEAL** is this day, March 16, 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: 3/16/20

### **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.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

**RECEIVED**  
**Oct 15 2020**  
**SC Court of Appeals**

By: s/Russell G. Hines

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Dated: October 15, 2020