THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-43-1495

Dianne B. Sprott as Personal Representative
of the Estate of Gladys Hanna Brown, ... Petitioner,

v.

Brookdale Senior Living, Inc.; FEBC-ALT
Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
d/b/a Sterling House of Sumter, ... Respondents.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dianne B. Sprott as Personal Representative of the Estate of Gladys Brown, Appellant,

v.

Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter, Respondents.

Appellate Case No. 2011-199987

Appeal From Sumter County
W. Jeffrey Young, Circuit Court Judge

Unpublished Opinion No. 2012-UP-679
Submitted November 1, 2012 – Filed December 28, 2012

AFFIRMED

John S. Nichols, of Bluestein, Nichols, Thompson & Delgado, LLC, of Columbia; and Lara Pettiss Harrill, of McGowan, Hood & Felder, LLC, of Rock Hill, for Appellant.

Luanne Lambert Runge, of Gallivan, White & Boyd, P.A., of Greenville, for Respondents.

PER CURIAM: The defendants in this personal injury action against a dependent care assisted living facility made a motion in the circuit court "to dismiss and to compel arbitration, or alternatively, to stay the action pending arbitration." The defendants asked the court to enforce an arbitration clause in the contract between the parties, and sought alternative remedies—dismissal or a stay. The circuit court heard arguments on whether to enforce the arbitration clause, and granted the motion by dismissing the action. On appeal, Appellant does not address the merits of whether the circuit court should have enforced the arbitration clause, conceding that question must first be addressed by the arbitrator. Rather, Appellant contends the circuit court should not have granted the remedy of dismissal, but should instead have granted the alternative remedy of staying the action. While the circuit court clearly ruled on whether to enforce the arbitration clause, the court never ruled on the question of whether to employ the remedy of a stay instead of dismissal. To preserve the issue of which remedy was appropriate, the only issue Appellant now seeks to address on appeal, it was incumbent on Appellant to specifically ask the circuit court in a Rule 59(e) motion to consider employing the remedy of a stay instead of dismissal. We affirm. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

AFFIRMED.[1]

FEW, C.J., and WILLIAMS and PIEPER, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-43-1495

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v.

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Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
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PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Appellant Dianne B. Sprott as Personal Representative of the Estate of Gladys Hanna Brown ("Appellant") brings this Petition for Rehearing, requesting that the Court withdraw its prior opinion and issue a new opinion reversing the trial court's decision.

The Court's opinion stated, "While the circuit court clearly ruled on whether to enforce the arbitration clause, the court never ruled on the question of whether to employ the remedy of a stay instead of dismissal." Slip, p. 2. In making this statement, the Court overlooked the argument Appellant made in her Reply Brief that the issue presented on appeal was, in fact, preserved for this Court's review. (Reply Brief, pp. 1-4). The Court also misapprehended the nature of the trial court's ruling and applicable Supreme Court precedent on error preservation in finding the issue presented on appeal was not preserved for this Court's review.

The circuit court's order states:

> This matter is before the Court pursuant to the [defendants'] timely filed motion to dismiss and compel arbitration, *or alternatively, to stay the action pending arbitration*, in the above case. The defendant seeks to have this Court compel arbitration, *or alternatively, to stay the present action pending arbitration*, pursuant to the terms of the residency agreement entered into between the parties on July 10, 2006. A hearing was held on the instant motion. After carefully considering the arguments made in the memoranda submitted by the [defendants] and plaintiff, the [defendants'] motion to dismiss and compel arbitration is granted.

(R. p. 1) (emphasis added). The circuit court twice acknowledged that the alternative of a stay as opposed to dismissal was before the court. The court then granted dismissal, which is necessarily a rejection of the assertion that the matter should be stayed. That is, based upon the arguments before it, the circuit court could have employed either

dismissal or a stay, but not both. The court employed dismissal, and as Appellant points out, this was error as a matter of law. This Court's opinion in *Widener v. Fort Mill Ford* is directly on point. *See* 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009) (holding trial court should have stayed matter pending arbitration rather than dismissed).

The issue of the alternative relief of a stay as opposed to dismissal was squarely before the trial court, who dismissed rather than stayed the action. It was not incumbent upon Appellant's counsel to harass the judge by parading the issue before him again by way of a Rule 59, SCRCP motion. *E.g.*, *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 273 (2009) (so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon counsel to harass the judge by parading the issue before him again); *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993) (same); *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) (same).

Although the circuit court did not expressly state "the alternative relief requested of a stay is denied," that result necessarily flows from the circuit court's order dismissing and compelling arbitration. That is, under the arguments presented to the circuit court, there can be *no* other result but that a grant of a dismissal is the denial of a stay – any other contention is illogical. It would be a futile act to move the trial court to reconsider and include an express ruling under these circumstances. *Bennett*; *Dunn*. *See also Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (finding order sufficiently addressed argument even though order did not restate ground upon which relief granted); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (finding issue sufficient preserved following review of filings before circuit court).

In holding the issue was not preserved, this Court relied upon *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) for the rule that "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." It is true that the Supreme Court in *Wilder* made this general statement of error preservation in its opinion, but the actual *holding* in *Wilder* was that the objection by the appellant in that case "was specific enough to allow the trial judge to understand and rule upon the alleged error." *Wilder*, at 76, 497 S.E.2d at 734. That is, the Supreme Court rejected the argument that the issue in that case was not preserved for appellate review because the issues were presented to the trial court (as the court below acknowledged in this case in its one-paragraph order).

The *Wilder* Court also held that the trial court's adoption of a contrary position in its order acted as an implied ruling on the appellant's objections – "the trial court ruled on Seller's objections by expressly adopting Buyer's amortization schedule in its order. Consequently, it was unnecessary for Seller to make any post-trial motions." *Id.* at 77, 497 S.E.2d at 734. The same is true here - by acknowledging the alternative remedies before the trial court, and then selecting the remedy of dismissal, the trial court implicitly rejected the alternative remedy of a stay. *Wilder* actually supports the contentions Appellant made in the Reply Brief in response to Respondent's contention that the issue was not preserved.

Accordingly, the Court should withdraw its prior opinion, address the merits of the appeal, and reverse the trial court's decision which is erroneous as a matter of law.

CONCLUSION

For the reasons presented, this Court should withdraw its prior opinion, grant rehearing, and issue a new opinion reversing the trial court's ruling and remanding the matter for further proceedings.[1]

Respectfully submitted,

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January 14, 2013

[1] Of course, the narrow scope of this appeal does not preclude the parties from proceeding with discovery and arbitration even while this portion of the case is on appeal. The lower court retains jurisdiction to proceed with matters not affected by the matters on appeal. Rule 205, SCACR; Rule 241(a), SCACR.

The South Carolina Court of Appeals

Diane B. Sprott as Personal Representative of the Estate of Gladys Hanna Brown, Appellant,

v.

Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter, Respondents.

Appellate Case No. 2011-199987

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

cc: Lara Pettiss Harrill
Luanne Lambert Runge

FILED
January 25, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-43-1495

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Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
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TABLE OF AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

Did the circuit court err in dismissing this action instead of holding the matter in abeyance pending the outcome in the pending arbitration?

STATEMENT OF THE CASE

On July 16, 2010, Dianne B. Sprott, as Conservator and Attorney in Fact for Gladys Hanna Brown (collectively "Plaintiff"), filed an action against Brookdale Senior Living, Inc., FEBC-ALT Investors, LLC, FEBC-ALT Holdings, Inc., and Brookdale Senior Living Communities, Inc., d/b/a Sterling House of Sumter (collectively "Defendants"). (R. pp. 2-11). Plaintiff asserted claims arising out of personal injuries Brown suffered during her admission at a dependent care assisted living facility owned and operated by Defendants. Plaintiff stated causes of action for negligence, corporate negligence, and gross negligence, and sought actual and punitive damages and other relief.

On September 17, 2010, all Defendants sent numerous subpoenas for the production of medical records related to Plaintiff. On September 22, 2010, Plaintiff sent discovery in the form of interrogatories and requests for production to the Defendants.

On September 27, 2010, Defendants filed a Motion to Dismiss and to Compel Arbitration or, Alternatively, to Stay the Action Pending Arbitration. The basis of the motion was the "Alterra Residency Agreement" signed by Brown's conservator, Sprott, on July 10, 2006. Defendants filed a Motion to Stay Discovery and for Protective Order on October 26, 2010.

On February 25, 2011, Plaintiff filed a Memorandum in Opposition to the Defendants' Motion to Dismiss and to Compel Arbitration. Plaintiff contended the trial court rather than the arbitrator should determine the validity of the arbitration clause. Plaintiff also attacked the validity of the clause, contending the provisions were unconscionable or void as against public policy. On March 2, 2011, Defendants filed a Memorandum in Support of the motion.

The court heard arguments on the Defendants' motion and on August 24, 2011, the circuit court entered its order granting the motion to dismiss and compel arbitration.

On September 21, 2011, Plaintiffs served a notice of appeal from that order.

FACTS

On July 11, 2006, Brown was admitted to Sterling House of Sumter. (R. p. 5, ¶ 20). Sprott signed a "Residency Agreement" as part of the admission to the facility.

The Residency Agreement noted on the front page "THIS AGREEMENT IS SUBJECT TO ARBITRATION." (R. p. 20). The Agreement contained a five-page clause governing "Arbitration and Limitation of Liability Provision." (R. pp. 31-35, ¶ V). The clause provided, in part:

> V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION
>
> Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.
>
> A. ARBITRATION PROVISION
>
> 1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at Alterra, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a jury will not decide their case.** The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that

> are known, or reasonably should have been known, by the date of the demand for arbitration and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.

(R. p. 31, ¶ V(A)(1)). The arbitration clause contained a number of oppressive provisions, including that "[t]he only depositions allowed shall be of experts. No other individuals may be deposed." (R. p. 32, ¶ 6(c)). Sprott signed the contract as the "responsible party" for Brown.

On May 29, 2009, Brown fell and suffered serious personal injuries during a fire drill at Sterling House. She brought suit and Defendants moved to dismiss the action and compel arbitration or, alternatively, to stay the action pending arbitration.

The parties filed memoranda in support of their positions and the circuit court held a hearing on the motion. On August 24, 2011, the circuit court issued its order granting the Defendants' motion to dismiss and compelling arbitration.

This appeal follows.

ARGUMENTS

The Circuit Court Erred in Dismissing this Action Instead of Holding the Matter in Abeyance Pending the Outcome in the Pending Arbitration

The Defendants moved the circuit court to dismiss the matter or, alternatively, to hold the matter in abeyance pending arbitration. Instead of staying the matter pending arbitration, the circuit court dismissed.

Other plaintiffs have brought numerous challenges to this arbitration clause, asserting several of the provisions are unconscionable or void as against public policy. These include limitations on discovery as well as limitations on damages. The clauses in this same contract have been declared void by other courts. See, e.g., *Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities*, 1 A.3d 806 (N.J. Super. Ct. App. Div. 2010) (Alterra residency agreement identical to one in this case; court found arbitration clause that limited liability and discovery void as unconscionable and against public policy); *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp.2d 538 (E.D. Pa. 2006) (finding identical Alterra residency agreement procedurally and substantively unconscionable).

However, this appeal raises a very narrow issue: Whether the circuit court erred in dismissing this matter rather than issuing a stay of the proceedings pending the outcome of the arbitration.

As this Court stated in *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009):

> Widener argues the trial court erred in dismissing his action. He asserts the dismissal prejudices him because any future action will be barred by the statute of limitations. We agree.

Although South Carolina courts have not addressed this issue, the Alabama Supreme Court dealt with a similar situation in *Johnson v. Jefferson County Racing Ass'n*, 1 So.3d 960, 969-70 (Ala. 2008). The *Johnson* court pointed to the following discussion, which appears in *Porter v. Colonial Life & Accident Insurance Co.*, 828 So.2d 907, 908 (Ala. 2002):

> We note a potential for injustice. If a plaintiff's court action be dismissed to enforce an arbitration agreement, but, through no fault of the plaintiff's, the arbitration be not concluded or some of the plaintiffs claims be not arbitrated, a statute of limitations could bar a refiling of the unarbitrated claims in court. Sometimes, for instance, an arbitrator's first duty under an arbitration agreement is to determine the arbitrability of a plaintiff's claims. In such a case, the arbitrator could rule that some or all of the plaintiff's claims should be litigated and not arbitrated. Moreover, a stay, as distinguished from a dismissal, would likely better conserve the time and resources of the parties and the trial court even in the event of a successful arbitration, inasmuch as the winner commonly wants the arbitration award reduced to a judgment.

Here, as in *Johnson*, there is a potential the statute of limitations could bar refiling of any unarbitrated claims in court. See S.C. Code Ann. §§ 39-5-150 & 56-15-120 (Supp. 2007).

> Accordingly, we reverse the decision of the trial court and remand this case for the trial court to vacate its dismissal of Widener's claims and to enter an order staying his action pending the outcome of the arbitration proceedings.

Id. at 525, 674 S.E.2d at 174.

Pursuant to *Widener*, the circuit court should not have dismissed this matter in ordering the parties to arbitration. Instead, because of the potential for injustice by the running of the statute of limitations, the court should have held the matter in abeyance pending the outcome of the arbitration.

Likewise, Plaintiff's attacks on the arbitration clause must await the outcome of the arbitration proceeding. *Id.* at 526, 674 S.E.2d 174. Once that proceeding is had, then Plaintiff will proceed with her attacks on the Agreement and the oppressive and unconscionable clauses contained therein.

CONCLUSION

For the reasons stated the Court should reverse the trial court's order dismissing this matter and should remand for the trial court to stay the action pending arbitration.

Respectfully submitted,

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August 28, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
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W. Jeffrey Young, Circuit Court Judge

C.A. No. 2010-CP-43-1495

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FINAL BRIEF OF RESPONDENTS

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CASES

STATUTES AND RULES

STATEMENT OF ISSUES ON APPEAL

I. DID THE APPELLANT FAIL TO PRESERVE THE ISSUE WHICH SHE APPEALS SINCE SHE DID NOT ARGUE FOR A STAY AND DID NOT FILE A MOTION TO ALTER OR AMEND PURSUANT TO RULE 59(E) OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE?

II. DID THE CIRCUIT COURT PROPERLY DISMISS THE LITIGATION INSTEAD OF STAYING IT WHEN COMPELLING ARBITRATION?

STATEMENT OF THE CASE

Appellant, Diane B. Sprott ("Appellant" or "Sprott"), initiated this action against the Respondents, Brookdale Senior Living, Inc., FEBC-ALT Investors, LLC, FEBC-ALT Holdings, Inc., and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter (collectively "Respondents" or "Brookdale"), by filing a summons and complaint in the Sumter County Court of Common Pleas on July 16, 2010, asserting various causes of action for negligence. See *Compl.* (R. pp. 2-11). On October 7, 2010, Brookdale filed a Notice of Motion and Motion to Dismiss and to Compel Arbitration, or Alternatively, to Stay the Action Pending Arbitration, pursuant to the terms of a Residency Agreement entered into between the parties on July 10, 2006 ("Residency Agreement"). See *Brookdale's Mot. to Compel Arb.* (R. pp. 12-50). Brookdale also submitted a Memorandum of Law in support of this motion on March 3, 2011. See *Brookdale's Mem. Sptg. Mot. to Compel Arb.* (R. pp. 64-75). In turn, Sprott filed a Memorandum of Law opposing this motion. See *Sprott's Mem. Opp. Mot. to Compel Arb.* (R. pp. 51-63).

A hearing on Brookdale's motion was held on July 6, 2011 before the Honorable W. Jeffrey Young in Sumter, South Carolina. (R. pp. 76-87). Following arguments from both parties, Judge Young took the motion under advisement. Subsequently, he granted

Brookdale's motion by Order dated August 23, 2011 ("Order"). (R. p. 1). In compelling arbitration, Judge Young also dismissed the pending lawsuit. See *Order*. (R. p. 1).

Rather than filing a Motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Sprott served a Notice of Appeal from the Order on September 21, 2011. In her brief, Sprott limits the issue on appeal to whether the circuit court properly dismissed the litigation rather than issuing a stay of the proceedings pending the outcome of arbitration. *Appellant's Br. p. 5.*

STATEMENT OF THE FACTS

From July 10, 2006 until May 29, 2009, Sprott's mother, Gladys Hanna Brown ("Brown"), resided at Sterling House of Sumter, a Community Residential Care Facility, pursuant to the terms of the Residency Agreement, which was signed by both Sprott and Brown on July 10, 2006.[1] See *Attach. A to Cesar Am. Aff. 3/2/11 ("Res. Agmt.")*. (R. pp. 19-50).

The first page of the Residency Agreement provides, "THIS AGREEMENT IS SUBJECT TO ARBITRATION". *Res. Agmt. 1.* (R. p. 20). Section V. of the Residency Agreement is titled "**ARBITRATION AND LIMITATION OF LIABILITY PROVISION**" and provides, among other terms, that:

> [a]ny and all claims or controversies arising out of or in any way relating to [the Residency Agreement] or the Resident's stay . . . shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law.

[1] The Residency Agreement is between Brown, Sprott and Alterra Heathcare Corporation, which was the lessee, manager, and license holder of Sterling House when Brown was admitted to Sterling House. In February, 2009, Alterra formerly changed its name to Brookdale Senior Living Communities, Inc., one of the Respondents. See *Cesar Am. Aff. 3/2/11*. (R. pp. 14-18). Sprott has not challenged Brookdale's ability to enforce this Residency Agreement.

Res. Agmt. 12. (R. p. 31). The claims covered by the Residency Agreement include:

> statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted.

Res. Agmt. p. 12. (R. p. 31). Sprott's initials are on the Residency Agreement at the end of Subsection V.A., entitled "**ARBITRATION PROVISION**" indicating that she "read and understood [these] provisions..." *Res. Agmt. p. 15.* (R. p. 34). Sprott's initials are found again at the end of Subsection V.B. entitled "**LIMITATION OF LIABILITY PROVISION:** *Read carefully before signing*" and Subsection V.C. titled "**BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS**" indicating that she read and understood the provisions of these subsections. *Res. Agmt. pp. 15-16.* (R. pp. 34-35). The presence of her initials also indicates that Sprott read and understood the following sentence in Subsection V.C.: "**The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.**" *Res. Agmt. p. 16.* (R. p. 35).

Despite the plain language of the Residency Agreement requiring that claims arising out of or in any way connected to Brown's residency at Sterling House be arbitrated, Sprott filed a complaint alleging Brookdale was negligent in the care and treatment of Brown in connection with a fall which occurred at Sterling House on May 29, 2009. See *Compl.* (R. pp. 2-11). Because Sprott would not consent to arbitrate after the institution of the litigation, Brookdale filed a Motion to Compel Arbitration of all claims Sprott raised in her complaint which was granted. See *Brookdale's Mot. to Compel. Arb.* (R. pp. 12-50); *Order* (R. p. 1).

ARGUMENT

Sprott's appeal is without merit because she categorically failed to preserve for this Court's review the issue on which she seeks reversal of the circuit court's Order. Even assuming she preserved this issue, the circuit court's decision to dismiss was appropriate. Accordingly, the circuit court's Order dismissing the underlying action must be affirmed.

I. SPROTT CANNOT APPEAL THIS ISSUE WHICH SHE FAILED TO PRESERVE FOR REVIEW.

As Appellant, Sprott has the burden of ensuring that the issue she seeks to have this Court consider was both *raised to and ruled upon* by the lower court to properly preserve it for appellate review. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). In the present case, because Sprott failed to ask the circuit court to stay this matter instead of dismiss the litigation pending arbitration, she cannot now seek reversal of the circuit court's decision to dismiss this action.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues" and provide this Court with a platform for "meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). To preserve an issue for appellate review, the issue must be (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity. Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011); see also, e.g., Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

It is "axiomatic that an issue cannot be raised for the first time on appeal." Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733. As the Supreme Court has explained:

> The losing party must first try to convince the lower court it ... has ruled wrongly and *then, if that effort fails*, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court *and* obtain a ruling before an appellate court will review those issues and arguments.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added) (citing Roche v. S.C. Alcoholic Beverage Control Comm'n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975)) ("purpose of appeal is to determine whether the judge erroneously acted or failed to act, and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal.") Further, "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (citing Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733).

Further, "[a]n issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." Doe v. Roe, 369 S.C. 351, 376, 631 S.E.2d 317, 330 (Ct. App. 2006) (citing Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct. App. 2004)); Nicholson v. Nicholson, 378 S.C. 523, 537, 663 S.E.2d 74, 82 (Ct. App. 2008). Since Sprott failed to preserve the issue she presents, this Court cannot address it.

A. Sprott failed to present this issue to the circuit court prior to issuance of the Order.

Sprott's "appeal raises a very narrow issue." *Appellant's Br. p. 5.* She seeks reversal of the circuit court's decision to dismiss the litigation rather than to stay it pending the arbitration based upon this Court's decision in Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009) and undefined potential injustice from the expiration of the statute of limitations. See *Appellant's Br. p. 6.* However, this issue is not preserved on appeal since it was not raised by Appellant, not presented to the circuit court with sufficient specificity and not ruled upon by the circuit court. See, e.g., Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733.

This Court, as well as the South Carolina Supreme Court, has repeatedly held that an issue is not preserved when the lower court does not explicitly rule on an argument. Recently, the Supreme Court held that because a petitioner did not argue to the master in equity that she should retain the security deposit at issue and did not raise the issue until appeal, this issue was not preserved for appellate review. Atlantic Coast Builders and Contractors v. Lewis, 396 S.C. 479, 483-84, 722 S.E.2d 213, 215 & n.2 (2011). Similarly, in Platt v. CSX Transp., Inc., 388 S.C. 441, 446, 697 S.E.2d 575, 577-78 (2010), the Supreme Court held that the issue of whether the common law presented a basis to establish a duty on the Department of Transportation, although pled in complaint, was not preserved since petitioner did not fully assert this as a basis for a duty until submitting his reply brief to this Court. Further, this Court also held that although a respondent raised a particular issue at trial, the appellant could not raise that issue on appeal since the appellant failed to present any argument on that issue to the trial court. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 381-82, 597 S.E.2d 181, 186-87

(Ct. App. 2004). Noting that the purpose of error preservation requirements is to "enable the lower court to rule properly after it has considered all relevant facts, law, and arguments," the McCall Court held that the issue of the application of the door closing statute was not preserved when appellant "advanced no arguments on this issue to the circuit court." Id. at 381-82, 597 S.E.2d at 186.

Likewise, the trial court here was never given an opportunity to rule upon the issue which Sprott now presents to this Court. While Brookdale's motion sought dismissal or stay of the litigation, and the Order dismissed the litigation, the trial court was never presented with an argument by either party as to whether dismissal or stay was appropriate. At no time did Sprott argue to the circuit court that if arbitration was compelled, the litigation should be stayed rather than dismissed. See *Sprott's Mem. Opp. to Compel Arb.* (R. pp. 51-63); *Tr. of hearing* (R. pp. 76-87). The only mention of alternative disposition of the litigation is found in Brookdale's motion which sought a dismissal or alternatively, a stay of the litigation, and later in its supporting memorandum. See *Brookdale's Mot. to Compel Arb.* (R. pp. 12-13); *Brookdale's Mem. Sptg. Mot. to Compel Arb.* (R. p. 64). However, Brookdale did not present an argument for one outcome over the other in either its written or oral arguments. See *Brookdale's Mem. Sptg. Mot. to Compel Arb.* (R. pp. 64-75); *Tr. of hearing* (R. pp. 76-87). Therefore, the record lacks any reference to the effect of a dismissal on the statute of limitations or this Court's decision in Widener v. Fort Mill Ford, 381 S.C 522, 674 S.E.2d 172 (Ct. App. 2009), despite the availability of this argument which is now presented for the first time.

B. Sprott failed to file a motion pursuant to Rule 59(e) asking the lower court to consider this issue or to reconsider its Order.

It is well-established that when an issue or argument has been raised to but not ruled upon by the trial court, a party must file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to preserve the issue for appeal. See, e.g., Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)). As noted by the Supreme Court in I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), imposing this preservation requirement on appellant ensures the lower court has considered "all relevant facts, law, and arguments." "Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation." Home Medical Systems, Inc. v. South Carolina Dept. of Revenue, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

Sprott failed to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure asking the circuit court to address the only issue now presented to this Court: the disposition of the litigation in light of the order to arbitrate. Instead, Sprott chose to present her argument in support of a stay for the first time to this Court. Thus, although the circuit court ruled that the case should be dismissed, at no time did Sprott argue for a stay, rather than dismissal, on any ground. Sprott's appeal falls squarely outside this Court's long-standing rules on issue preservation cited above which make it incumbent on Sprott to file a Rule 59(e) motion to secure a ruling from the circuit court, and, consequently, preserve the disputed issue for appeal. This Court must therefore reach the same conclusion reached by the Supreme Court in Atlantic Coast Builders and Contractors v. Lewis, 396 S.C. 479, 483, 722 S.E.2d 213, 215 (2011): it cannot address this issue because it is not preserved for the Court's review.

II. THE CIRCUIT COURT PROPERLY DISMISSED THE LITIGATION INSTEAD OF ISSUING A STAY WHEN IT COMPELLED ARBITRATION.

Even assuming that the issue now presented by Sprott was preserved and can be considered by this Court, the circuit court properly dismissed the action because there are no further issues which could be presented to the circuit court.

By her own admission, Sprott's appeal presents only one "very narrow" issue: whether the circuit court erred in dismissing the litigation when granting Brookdale's motion to compel arbitration. *Appellant's Br. pp. 1, 5.* Her argument is based solely on Widener v. Fort Mill Ford, 381 S.C. 522, 525, 674 S.E.2d 172, 174 (Ct. App. 2009) which held that litigation should be stayed when potential for injustice exists with a dismissal due to the expiration of the statute of limitations. While Sprott's argument on such potential injustice is largely absent and not entirely clear in her brief, she foreshadows an attack on the arbitration clause in the Residency Agreement as oppressive and unconscionable and perhaps also upon other provisions in the Residency Agreement. See *Appellant's Br. pp. 6-7.* However, any issue which Sprott could try to raise now regarding the Residency Agreement either goes to: the validity of the arbitration clause which was addressed by the circuit court and is now the law of the case; or the validity of the contract as a whole which is an issue decided by the arbitrator. Therefore, there are no remaining claims which would be barred after the statute of limitations expires.

A. The unappealed parts of the Order are the law of the case and cannot be raised in the future.

The issue on appeal as defined by Sprott excludes the issue of whether the circuit court properly compelled arbitration in its Order. See *Appellant's Br. pp. 1, 5.* As this Court has held, "[a] portion of a judgment that is not appealed presents no issue for

determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 378, 597 S.E.2d 181, 184 (Ct. App. 2004) (quoting Austin v. Specialty Transp. Servs., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004)); see also Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) (holding the findings of the lower court to be the law of the case because neither party took issue with that finding and the unappealed ruling is law of the case). Any portions of the Order other than the disposition of the litigation are unappealed. As such, they are now the law of the case and cannot be raised in the future to any tribunal.

Although expressly not an issue on appeal, Sprott claims she will make future "attacks on the arbitration clause" and attack the "Agreement and the oppressive and unconscionable clauses contained therein." *Appellant's Br. pp. 6-7.* Sprott vigorously argued to the circuit court that arbitration could not be compelled since the arbitration and limitation of liability provisions of the Residency Agreement were not enforceable for multiple reasons, including their unconscionable and oppressive nature. See *Sprott's Mem. Opp. Mot. to Compel Arb. pp. 4-12* (R. pp. 54-62); *Tr. of hearing* (R. pp. 76-87). Sprott cited the same cases in her memoranda to the circuit court in support of her position on the unenforceability of the arbitration clause as she now also presents to this Court. See *Sprott's Mem. Opp. Mot. to Compel Arb. p. 5* (R. p. 55); *Tr. of hearing pp. 7-8* (R. pp. 82-83). Sprott also correctly argued that the circuit court, rather than the arbitrator, should decide the validity of the parties' arbitration provision. See *Sprott's Mem. Opp. Mot. to Compel Arb. pp. 2-3* (R. pp. 52-53); See, e.g., Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the

abritrability of a claim is an issue for judicial determination..."); Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) (holding while the validity of a contract as a whole is an issue for an arbitrator, the validity of an arbitration agreement is an issue for judicial determination); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 215, 659 S.E.2d 209, 212 (Ct. App. 2008) ("If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide..."); McCutcheon v. THI of S.C., No. 2:11-CV-02861, 2011 WL 6318575, at *4 (D.S.C. Dec. 15, 2011) (finding unconscionability of nursing home residency agreement to be issue properly decided by court).

Despite these arguments, the circuit court, in ordering arbitration, found the claims in Sprott's complaint fall within the scope of the arbitration provisions in the Residency Agreement, therefore implicitly, rejecting Sprott's argument they are unconscionable and/or oppressive. See *Order*. (R. p. 1). The issue of validity of the agreement to arbitrate was properly presented to the circuit court, decided by the circuit court,[2] and is the law of the case since it is not contested now on appeal. Further, to the extent Sprott intends to challenge the validity of the contract as a whole or other contractual provisions, that question is presented to and decided by the arbitrator.

B. Sprott's reliance on Widener v. Fort Mill Ford is misplaced.

In support of her argument that the circuit court should have held the matter in abeyance pending the outcome of the arbitration, Sprott cites to this Court's decision in Widener v. Ford Mill Ford, 381 S.C 522, 674 S.E.2d 172 (Ct. App. 2009). The rationale

[2] The cases Sprott cites involving similar arbitration provisions which were not upheld based upon a finding of unconscionability were decided by courts on a motion to compel arbitration. See *Appellant's Br. p. 5* (citing Estate of Ruszala ex rel. Mizerak v. Brookdale Living Communities, 1 A.3d 806 (N.J. Super. Ct. App. Div. 2010); Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538 (E.D. Pa. 2006)).

articulated for the conclusion that litigation should be stayed, rather than dismissed, pending arbitration where future action would be barred by the statute of limitations was simply "a potential the statute of limitations could bar refiling of any unarbitrated claims in court." Id. at 525, 674 S.E.2d at 174 (citing S.C. Code Ann. §§ 39-5-150 and 56-15-120, the statutes of limitations for South Carolina's Unfair Trade Practices Act and Regulation of Manufacturers, Distributors and Dealers Act). There is no discussion of how or under what facts and circumstances such a potential might have arisen in that case.

Noting that South Carolina had not previously addressed the issue, the Widener decision refers to the Alabama Supreme Court opinion, Johnson v. Jefferson County Racing Ass'n, 1 So. 3d 960, 969-70 (Ala. 2008), a purported class action. Adopting that court's rationale, the Widener court quoted from Johnson which in turn, had quoted from an earlier Alabama decision, Porter v. Colonial Life & Accident Ins. Co., 828 So. 2d 907, 908 (Ala. 2002). However, the Porter court did not decide this issue since the plaintiff in Porter failed to argue to the trial court that a dismissal, as distinguished from a stay, was not the appropriate form of relief. Porter, 828 So. 2d at 908.[3]

The present situation is distinguishable from Johnson. As noted above, the circuit court has already determined that Sprott's claims should be arbitrated and she has not challenged that decision, unlike the plaintiff in Johnson, who did challenge arbitrability and was concerned about a bar of putative class members' claims. See Johnson, 1 So. 3d at 967, 969. Also, unlike Johnson, there are no further issues for a court to decide.

[3] On that basis, the Porter court declined to decide the "stay-versus-dismissal" issue as it was presented for the first time on appeal, and accordingly, compelled the plaintiff to arbitrate his claims and dismissed his action. Porter, 828 So. 2d at 908.

Further, Sprott's argument lacks any explanation of how she might be prejudiced or how the possibility of future action for the court following arbitration would arise and be barred by the statute of limitations.

In circumstances like these, where all claims have been held to be arbitrable and there are no issues remaining to present to a court, it is appropriate to dismiss the underlying litigation, rather than to stay it. "Dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc., 252 F.3d 707, 709-10 (4th Cir. 2001) (declining to dismiss because complaint contained at least one non-arbitrable claim); Aggaro v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 376 (4th Cir. 2012) (acknowledging holding in Choice Hotels but because specific defense was not subject to arbitration, party could not pursue that defense until after arbitration award); see also Alford v. Dean Witter Reynolds, Inc., 975 F.2d 1161, 1164 (5th Cir. 1992) ("[W]eight of authority clearly supports dismissal of the case when *all* of the issues raised in the district court must be submitted to arbitration."). Since the issues Sprott raised in her complaint have been ordered to be arbitrated, there is nothing left for a circuit court to decide. Thus, the circuit court's decision to dismiss the litigation should be affirmed.

CONCLUSION

Based on the foregoing authorities and arguments, Respondents respectfully request that the Order dismissing the underlying action be affirmed.

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August 15, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

C.A. No. 2010-CP-43-1495

Diane B. Sprott as Personal Representative
of the Estate of Gladys Hanna Brown, ... Appellant,

v.

Brookdale Senior Living, Inc.; FEBC-ALT
Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
d/b/a Sterling House of Sumter, ... Respondents.

RULE 211, SCACR CERTIFICATION
FINAL BRIEF OF RESPONDENTS

I, Mary A. Giorgi, Esquire, hereby certify that the *Final Brief of Respondents* complies with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

Mary A. Giorgi

Mary A. Giorgi, Esquire

Greenville, South Carolina

August 15, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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v.

Brookdale Senior Living, Inc.; FEBC-ALT
Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
d/b/a Sterling House of Sumter, ... Respondents.

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ARGUMENTS

I. The Issue Argued on Appeal, That the Circuit Court Erred in Dismissing this Matter Rather Than Staying the Matter Pending Arbitration, is Preserved for This Court's Review

Respondents contend Appellant failed to preserve the lone issue in this appeal of whether the circuit court erred in dismissing the action. Respondents assert that the issue was not presented to the circuit court, and the circuit court did not have an opportunity to rule upon it. Respondents also contend Appellant should have moved pursuant to Rule 59, SCACR, to alter or amend the judgment to consider this issue. These arguments should not be persuasive.

In their motion to dismiss this action, Respondents sought an order of dismissal "or alternatively, staying the action pending arbitration." (R. p. 12). Respondents also moved to stay discovery and for a protective order until "after the hearing and disposition of Defendants' pending Motion to Dismiss and to Compel Arbitration, *or Alternatively, to Stay the Action Pending Arbitration.*" (Supp. R. p. 1) (emphasis added).

Appellant filed a Memorandum in Opposition to the Motion to Dismiss and To Compel Arbitration or, Alternatively, to Stay the Pending Arbitration. Appellant argued the court should decide the validity of the arbitration clause first rather than leave that decision to the arbitrator. (R. pp. 52-53). Appellant also argued the arbitration provisions are unconscionable and invalid. (R. pp. 54-59). Appellant contended further that the arbitration terms were void against South Carolina public policy. (R. pp. 60-61). Next, Appellant asserted that the invalid provisions so pervaded the agreement as to render the entire agreement invalid. (R. pp. 61-62). The substance of the memorandum was the

assertion that the court should deny the motion to dismiss and compel arbitration because the clause on its face is unconscionable, oppressive and invalid as against public policy. (R. p. 63).

Respondents filed a Memorandum in Support of the Motion to Dismiss and to Compel Arbitration or, Alternatively, to Stay the Action Pending Arbitration. They contended the agreement was a valid expression of the parties' intent. (R. pp. 64-75).

Importantly, the court's order in its entirety states:

> This matter is before the Court pursuant to the [defendants'] timely filed motion to dismiss and compel arbitration, *or alternatively, to stay the action pending arbitration*, in the above case. The defendant seeks to have this Court compel arbitration, *or alternatively, to stay the present action pending arbitration*, pursuant to the terms of the residency agreement entered into between the parties on July 10, 2006. A hearing was held on the instant motion. After carefully considering the arguments made in the memoranda submitted by the [defendants] and plaintiff, the [defendants'] motion to dismiss and compel arbitration is granted.

(R. p. 1) (emphasis added).

The key to error preservation in South Carolina is whether the court below had a fair opportunity to address an issue before the court, acknowledged that the issue was before the court, and issued a ruling that disposed of the issue. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000) (imposing preservation requirement on appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments). As our Supreme Court recently stated:

> [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.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (emphasis by the Court).

In this case, the circuit court twice acknowledged that the alternative of a stay as opposed to dismissal was before the court. The court then granted dismissal, which is necessarily a rejection of the assertion that the matter should be stayed. This issue was squarely before the trial court, who dismissed rather than stayed the action. It was not incumbent upon Appellant's counsel to harass the judge by parading the issue before him again. *E.g.*, *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 273 (2009) (so long as the judge had an opportunity to rule on an issue, and did so, it was not incumbent upon counsel to harass the judge by parading the issue before him again); *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993) (same); *Long v. Norris & Associates, Ltd.*, 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000) (same).

Although the circuit court did not expressly state "the alternative relief requested of a stay is denied," that result necessarily flows from the circuit court's order dismissing and compelling arbitration. The issue was sufficiently preserved for appellate review. *See, e.g.*, *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009) (finding order sufficiently addressed argument even though order did not restate ground upon which relief granted); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 691 S.E.2d 135 (2010) (finding issue sufficient preserved following review of filings before circuit court).

This Court should reject Respondents' argument and find that the issue of whether

the court should have stayed the matter rather than dismissing the matter is properly preserved for this Court's review.

II. The Circuit Court Should Have Stayed the Matter Rather Than Dismissed

Respondents contend this issue is unavailing because any issue regarding the validity of the arbitration clause is: (1) the "law of the case" because the circuit court addressed the validity of the arbitration clause in the Residency Agreement and Appellant did not appeal that ruling; or (2) the validity of the contract as a whole is an issue to be decided by the arbitrator. (Respondents' Brief p. 9) These arguments should not be persuasive.

A. There Is No "Law of the Case" Situation Here

Contrary to Respondents' contention, the circuit court did not explicitly or implicitly address the validity of the arbitration agreement. Rather, the only issues the court ruled upon were whether to stay the matter, dismiss it, or deny the motion to dismiss. The circuit court did not address the merits of the Appellant's attack on the provisions of the agreement. These issues must first be addressed by the arbitrator and then by the circuit court upon review following that decision before they can be raised on appeal.

Furthermore, the circuit court's order compelling arbitration is not immediately appealable. *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003). Appellant must wait until she proceeds through the process, including circuit court review, before raising and arguing issues regarding whether this

matter should have properly been submitted to arbitration under the oppressive terms of the agreement. On the other hand, the narrow issue of whether the circuit court should have stayed the matter and compelled arbitration rather than dismissed the matter is something that she may immediately appeal. *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009).

It is true that an appellate court may review an unappealable interlocutory order when the order is coupled with an appealable issue. *E.g.*, *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (an order that is not directly appealable may be considered if there is an appealable issue before the court); *Southeastern Housing Foundation v. Smith*, 380 S.C. 621, 636 n.14, 670 S.E.2d 680, 688 n.14 (Ct. App. 2008) (Court of Appeals may review an interlocutory order when the order is coupled with an appealable issue). The failure to raise these additional issues, however, does not operate to deem the issues the "law of the case" or prevent appellate review at a later date once there is a ruling below.

This Court should reject Respondents' assertion that issues regarding the validity of the oppressive arbitration clause are now the "law of the case" and not available to Appellant in further proceedings.

B. *Widener v. Fort Mill* is Applicable to the Issue Before the Court

Appellant stands on the arguments she made in her opening brief based upon *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009). However, Appellant desires to address arguments Respondents make on this issue.

Respondents assert that there is no "explanation of how she might be prejudiced or how the possibility of future action for the court following arbitration would arise and be barred by the statute of limitations." (Respondents' Brief, p. 12). They assert that because all of the issues have been ordered to arbitration there would be nothing left to assert in claims after arbitration. (Respondents' Brief, p. 13). These arguments should not be persuasive.

Appellant intends to attack the validity of the clause before the arbitrator and again in the circuit court thereafter. Should either entity declare the clause invalid because it is unconscionable or oppressive, then Appellant should be permitted to proceed with her lawsuit. *Cf. Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) (although claim fell within arbitration clause, clause was held not to apply because of alleged fraudulent conduct by defendant).

If the Respondents are representing to this Court that they would not assert a statute of limitations defense, then Appellant would agree that she could re-commence her case in the event the clause is found invalid. That is, however, a highly unlikely scenario. Therefore like the situation in *Widener*, there is the potential that the entity addressing the validity of the agreement could follow recent precedent and declare the oppressive and unconscionable terms to be invalid, and the statute of limitations could bar refiling of the unarbitrated claims in court.

Accordingly, the Court should reject Respondents' contention that there is nothing left for the circuit court to decide. The Court should reverse the circuit court's decision to dismiss rather than stay the proceedings and should remand for further proceedings.

CONCLUSION

This Court should reverse the circuit court's order dismissing the case and compelling arbitration rather than staying the matter pending a decision before the arbitrator, and should remand for further proceedings consistent with this Court's decision.

Respectfully submitted,

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August 28, 2012

THE STATE OF SOUTH CAROLINA
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COUNTY OF SUMTER

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JAN CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No: 2010-CP-43-1495

Dianne B. Sprott as Conservator and Attorney in Fact for Gladys Hanna Brown,

Plaintiffs,

vs.

Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter,

Defendants.

ORDER COMPELLING ARBITRATION

CERTIFIED TRUE COPY
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SUMTER COUNTY
SOUTH CAROLINA

This matter is before the Court pursuant to the defendant's timely filed motion to dismiss and compel arbitration, or alternatively, to stay the action pending arbitration, in the above case. The defendant seeks to have this Court compel arbitration, or alternatively, to stay the present action pending arbitration, pursuant to the terms of the residency agreement entered into between the parties on July 10, 2006. A hearing was held on the instant motion. After carefully considering the arguments made in the memoranda submitted by the defendant and plaintiff, the defendant's motion to dismiss and compel arbitration is granted.

W. Jeffrey Young, Circuit Court Judge
Third Judicial Circuit

Date: August 23, 2011
Sumter, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
		2010 JUL 15 PM 1:38 OF THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	
	)	CLERK OF COURT CA No.: 2010-CP-43- 1495
Dianne B. Sprott as Conservator and Attorney in fact for Gladys Hanna Brown,	)	SUMTER COUNTY, S.C.
	)	COMPLAINT
	)	(JURY TRIAL DEMANDED)
Plaintiff,	)	
vs.	)	
Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and, Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter,	)	
Defendants.	)	

The Plaintiff, by and through her undersigned counsel, for her Complaint against the above named Defendant, does hereby respectfully allege as follows:

PARTIES

Plaintiff:

1. That Dianne B. Sprott, at all times pertinent to this cause of action is a citizen and resident of the State of South Carolina, County of Clarendon, and has been appointed Conservator for and Attorney in Fact for Gladys Hanna Brown.

2. That Gladys Hanna Brown, at all times pertinent to this cause of action is a citizen and resident of the State of South Carolina, County of Sumter.

3. That at all times relevant to this action, Gladys Hanna Brown has been a senior

citizen and a vulnerable adult.

Defendants:

4. Upon information and belief, Defendant Brookdale Senior Living, Inc. (hereinafter "Brookdale, Inc.") is an entity incorporated under the laws of the State of Delaware, and is doing business in the State of South Carolina, County of Sumter at all times complained of herein.

5. Upon information and belief, Defendant FEBC-ALT Investors, LLC (hereinafter "FEBC-I") is an entity incorporated under the laws of the State of Delaware, and is doing business in the State of South Carolina, County of Sumter at all times complained of herein.

6. Upon information and belief, Defendant FEBC-ALT Holdings, Inc. (hereinafter "FEBC-H") is an entity incorporated under the laws of the State of Delaware, and is doing business in the state of South Carolina, County of Sumter at all times complained of herein.

7. Upon information and belief, Defendant Brookdale Senior Living Communities, Inc. (hereinafter "Brookdale SLC") is an entity incorporated under the laws of the State of Delaware, and is licensed and doing business in the State of South Carolina, County of Sumter as the assisted living facility, Sterling House of Sumter. (hereinafter Sterling)

8. Upon information and belief, Defendants Brookdale, Inc., FEBC-I, FEBC-H, and Brookdale SLC are involved in the ownership, operation, and day-to-day management of the assisted living facility Sterling House of Sumter.

9. Upon information and belief, Defendants Brookdale, Inc., FEBC-I, FEBC-H, and Brookdale SLC had the right and/or power to direct and control the manner in which its employees and/or agents provided medical care and operated the business of delivering health care for a fee to Gladys Hanna Brown.

10. That at all times herein, Brookdale, Inc., was a licensed community residential care provider doing business as Sterling House of Sumter.

11. At all times relevant to this action, physicians, nurses, residents, interns and staff health care providers for Mrs. Brown were employees and/or agents of the Defendants, or were apparent agents and were acting within the course and scope of their employment and/or agency or apparent agency.

12. The negligent acts, omissions and liability of the Defendants includes its agents, principals, employees and/or servants, both directly and vicariously, pursuant to principals of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or respondeat superior.

13. Defendants deliver assisted living care for a fee and has authority, express or implied, to control the means and the agencies employed to execute that care at all times during the residency of Mrs. Brown.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

14. The Plaintiff is informed and believes that at all times material to this Complaint the Defendant Sterling's employees and/or agents were acting on behalf of or in place of Defendant in making decisions regarding the care of Gladys Hanna Brown. Additionally, the Plaintiff is informed and believes that at all times material to this

Complaint that all of the employees of Sterling were acting within the course and scope of their employment in regard to the care and treatment of Mrs. Brown.

15. At the time of her admission to Sterling, Mrs. Brown was dependant upon the care provided by the employees and agents of Defendants in order to live her life.

16. Upon information and belief, Defendants assisted living facility was licensed under the laws of the State of South Carolina and was required to provide reasonable and prudent care to Mrs. Brown.

17. Upon information and belief, upon admission to Sterling House of Sumter the Plaintiff understood Mrs. Brown would be provided with the care that her medical conditions reasonably required.

18. 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.

19. That while under the care of the defendants, the decedent was damaged and injured, as a result of neglect, negligence, negligence per se, and violations of nursing care.

20. Upon information and belief, Ms. Brown was admitted to Sterling House of Sumter on July 11, 2006 with diagnoses including macular degeneration and senile dementia.

21. Upon information and belief, Ms. Brown walked with a walker due to her unsteady gait and her vision deficits.

22. Upon information and belief, on May 29, 2009, Mrs. Brown suffered a fall with resulting head injury and hip fracture during a fire drill at shift change.

23. That upon information and belief, Mrs. Brown was evacuated from the building by unlicensed facility personnel unsupervised by licensed personnel.

24. That upon information and belief, Mrs. Brown was either left standing with her walker, unsupervised in the parking lot in the extreme heat, or was fallen on by other residents during the evacuation of the building.

25. That Mrs. Brown was transferred to Toumey Healthcare and diagnosed with a subdural hematoma, left hip fracture and a urinary tract infection.

26. That Mrs. Brown was transferred to Palmetto Health Richland in Columbia South Carolina to their trauma service to treat her acute subdural hematoma.

27. That Mrs Brown was admitted to Surgical Trauma Intensive Care Unit at Palmetto Health Richland.

28. That on May 31, 2009, Mrs. Brown was cleared by neurosurgery for orthopaedic surgery to fix the left femur intertrochanteric fracture.

29. That on June 8, 2009, it was discovered that Mrs. Brown's subdural hematoma was increasing in size, and the decision was made to perform a bur hole procedure in order to evacuate the hematoma and release the pressure on her brain.

30. That she remained at Palmetto Health Richland until June 23, 2009 when she was transferred to National Healthcare Sumter, a skilled nursing facility.

31. That since the injuries sustained at Sterling House Sumter, Mrs. Brown has rarely recognized her family members, is unable to walk, is unable to feed herself, and has had a significant decline in her quality of life.

FOR A FIRST CAUSE OF ACTION

Negligence

32. That Plaintiff re-alleges and reiterates paragraphs 1 through 31 as though fully set forth herein verbatim and further alleges:

33. At all times relevant hereto, Defendant was 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.

34. Defendant was under an obligation to follow all applicable state and federal laws, rules, regulations, and guidelines including S.C. Regulations 61-84 and the South Carolina Nurse Practice Act, S.C. Code § 40-33-5 et. seq.

35. The Defendant holds itself out as a specialist in its field with the expertise necessary to maintain the health, safety, and highest practicable quality of life of persons unable to adequately care for themselves.

36. The Defendant was under a contractual duty to provide reasonable, appropriate and adequate care to Mrs. Brown pursuant to state and federal laws, rules, regulations, guidelines and existing industry standards.

37. The Defendant, its officers, agents, servants, and employees failed, refused, or neglected to perform the duties to provide reasonable and adequate health care to Mrs. Brown, who was unable to attend to her own health and safety.

38. The Defendant, its officers, agents, servants, and employees negligently, recklessly and carelessly failed to provide care and treatment to Mrs. Brown.

39. Defendant did undertake the duty to render assisted living care to Mrs. Brown in accordance with the prevailing and acceptable professional standards of care for residential care communities and its employees and agents in the national community.

40. Defendant 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.

41. Notwithstanding said undertaking and while Mrs. Brown was under the care of Defendant by and through its agents, servants, and employees, was negligent, willful, wanton, reckless, careless and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Mrs. Brown. More particularly the Defendant was negligent in the following particulars:

a. failing to provide the care, supervision and monitoring of patients, residents, and in particular Mrs. Brown, which was required by law and which was necessary for her health and safety;

b. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Mrs. Brown;

c. failing to abide by applicable federal and state laws governing nursing care in general;

d. failing to follow the licensing and regulatory rules of the State of South Carolina;

e. failing to provide adequate funding to ensure proper safety, training and supervision;

f. failing to properly supervise and train staff who were present;

g. failing to protect Decedent from neglect;

h. failing to properly document the medical records of the resident;

i. failing to appropriately communicate with the family regarding Decedent's conditions;

g. by other negligent acts and/or omissions yet to be determined or defined.

42. That as a direct and proximate result of the negligence and carelessness of Defendants, Mrs. Brown experienced injuries to her mind and body, causing her to experience pain and suffering as well as extensive monetary damages.

43. The Plaintiff, is also entitled to punitive damages for the Defendant's wilful and wanton conduct, and the Defendant's recklessness which was such as to evince a conscious disregard for the safety of others.

FOR A THIRD CAUSE OF ACTION

Corporate Negligence

44. That Plaintiff re-alleges and reiterates paragraphs 1 through 43 as though fully set forth herein verbatim and further alleges:

45. That Defendants are owners and operators of a facility entrusted with the care of vulnerable adults, and had a duty to manage and operate Sterling House of Sumter in a manner that provided maximum safety from injury and maltreatment to the residents of Sterling House of Sumter, including Mrs. Brown.

46. That the duty of Defendants to protect Mrs. Brown from injury and maltreatment includes, but it not limited to:

a. A duty to establish and enforce an ongoing written policy and procedure in compliance with applicable licensing rules to ensure that all staff and residents are familiar with and trained on the evacuation plans;

b. A duty to establish and enforce and ongoing written accident and incident

procedure;

c. A duty to assure that staff is appropriately trained to suit the needs and conditions of the residents and to meet the demands of effective emergency on-site action that might arise;

c. A duty to ensure that residents are monitored and safe when outside the facility and during evacuations;

d. A duty to ensure that unlicensed personnel providing care to the residents of Sterling House are competent in the areas of:

i. Supervising residents at risk for falls;

ii. Plans for evacuation of residents;

iii. Recognizing the extent to which residents can help themselves.

e. by other negligent acts and/or omissions yet to be determined or defined.

FOR A FOURTH CAUSE OF ACTION

Gross Negligence

47. The Plaintiff re-alleges and reiterates paragraphs 1 through 45 as though fully set forth herein verbatim and further alleges:

48. Mrs. Brown experienced prolonged conscious pain and suffering, mental anguish, and incurred substantial medical bills and disability.

49. The aforesaid acts and delicts were the sole and proximate cause of Gladys Hanna Brown's damages and injuries.

50. The wrongful conduct of Defendant set forth in the negligence and negligence per se counts of this complaint was undertaken without regard to the health and safety

consequences of Mrs. Brown who was entrusted to Defendant's care, and rises to the level of gross negligence in that Defendant's conduct was wilful, wanton, reckless, and clearly shows a conscious disregard for the health and safety of Gladys Hanna Brown.

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendant for actual damages, punitive damages, special damages, and consequential damages, in an amount to be determined by the jury at the trial of this action, fees, the costs and disbursements of this actions, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

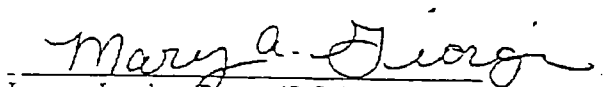
Lara Pettiss Harrill, Esquire
MCGOWAN, HOOD & FELDER, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
Telephone: (803) 327-7800
Facsimile: (803) 328-5656
Lharrill@mcgowanhood.com

Rock Hill, South Carolina
July 16, 2010

STATE OF SOUTH CAROLINA COUNTY OF SUMTER	)	IN THE COURT OF COMMON PLEAS
Dianne B. Sprott as Conservator and Attorney in Fact for Gladys Hanna Brown, Plaintiffs, v. Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter, Defendants.	)	**MOTION TO DISMISS AND TO COMPEL ARBITRATION, OR ALTERNATIVELY, TO STAY THE ACTION PENDING ARBITRATION** C.A. No. 2010-CP-43-1495

TO: DIANNE B. SPROTT AS CONSERVATOR AND ATTORNEY IN FACT FOR GLADYS HANNA BROWN AND HER ATTORNEY, LARA PETTIS HARRILL OF MCGOWAN HOOD & FELDER, LLC

PLEASE TAKE NOTICE that Defendants, Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter ("Defendants" or "Brookdale"), by and through their undersigned counsel, move the Court for an order, pursuant to Rule 12(b)(1), (2), and (6) of the South Carolina Rules of Civil Procedure, dismissing the Complaint of Diane B. Sprott ("Sprott") as conservator and attorney in fact for Gladys Hanna Brown ("Plaintiff" or "Brown") and compelling arbitration between Plaintiff and Defendants, or alternatively, staying the action pending arbitration. This motion is based upon affidavits filed or to be filed in this case, including the Affidavit of Timothy J. Cesar, attached hereto as Exhibit A; the arbitration agreement between Brown, Sprott and Brookdale, which is an attachment to Exhibit A; South Carolina common and statutory law; the Federal Arbitration Act 9 U.S.C. § 1 *et. seq.*; and the pleadings in this case.



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Attorneys for Defendants

Greenville, S.C.
September 27, 2010

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Dianne B. Sprott as Conservator and Attorney in Fact for Gladys Hanna Brown,	)	AFFIDAVIT OF TIMOTHY J. CESAR
Plaintiffs,	)	
	)	C.A. No. 2010-CP-43-1495
v.	)	
Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter,	)	
Defendants.	)	

Before me, personally appeared Timothy J. Cesar, Esq., J.D., M.B.A., who is the Vice President of Legal Affairs of Brookdale Senior Living Inc. and who, being by me duly sworn on his oath, says and deposes as follows:

1. My name is Timothy Cesar. I am over 21 years of age, of sound mind, in all respects qualified to make this Affidavit, and I have personal knowledge of all facts stated in this Affidavit.

2. I am the Vice President of Legal Affairs of Brookdale Senior Living Inc., a Defendant in the above-captioned lawsuit, and have been employed by Brookdale since 2005.

3. Alterra Healthcare Corporation ("Alterra") is a Delaware corporation, which subsequently underwent a name change and also merged with several companies to become Brookdale Senior Living Inc. I have been employed by Alterra since 2001. Alterra, now known as Brookdale Living Communities, Inc. was the lessee, manager, and license holder of Sterling House of Sumter until 2005.

4. Brookdale Senior Living Communities, Inc. ("Brookdale SLC") is a Delaware corporation. Brookdale SLC is the current lessee, manager, and license holder of Sterling House of Sumter.

5. Brookdale Senior Living Inc., FEBC-ALT Investors, LLC, and FEBC-ALT Holding, Inc. are all foreign corporations and Defendants in the above-captioned lawsuit.

6. Brookdale Senior Living Inc. is sole owner of FEBC-ALT Investors, LLC. FEBC-ALT Investors, LLC is sole owner of FEBC-ALT Holdings, Inc. FEBC-ALT Holders, Inc. is sole owner of Brookdale SLC.

7. I have knowledge about the operations of Brookdale SLC, Sterling House, Alterra, Brookdale Senior Living Inc., FEBC-ALT Investors, LLC, and FEBC-ALT Holding, Inc.

8. Gladys Hanna Brown ("Brown") resided at Sterling House of Sumter ("Sterling House") from July 10, 2006 to May 29, 2009.

9. During the period of Brown's residency at Sterling House to the present, certain Sterling House employees attended and continue to attend conferences/training sessions outside the State of South Carolina.

10. During the period of Brown's residency at Sterling House to the present, Sterling House employees are paid out of Wisconsin.

11. During the period of Brown's residency at Sterling House to the present, Sterling House employees communicated and continue to communicate with existing and prospective residents and/or their families who are living outside the State of South Carolina.

12. During the period of Brown's residency at Sterling House to the present, Sterling House has received and accepted and continues to receive and accept out of state residents as residents of Sterling House.

13. Brookdale SLC owns and/or operates assisted living facilities in many states, including South Carolina.

14. A wide variety of suppliers were used directly or indirectly in the provisions of goods and services for the care of Brown at Sterling House, and many of these goods and services were received from vendors outside the State of South Carolina. For example, see the following chart:

Vendor	Location	Type of Goods or Services
Sysco Corporation	Texas	Food supplies
Direct Supply	Wisconsin	Medical supplies
Vallentine	Georgia	Diabetes supplies
Staples	Outside South Carolina	Office supplies

15. During the period of Brown's residency at Sterling House to the present, Sterling House has ordered and continues to order supplies from out of state vendors by mail, electronic mail, telephone and facsimile transmissions. Those supplies are then shipped over various states lines to Sterling House.

16. Upon admission to Sterling House on July 10, 2006, Brown signed a Residency Agreement that contained an "Arbitration and Limitation of Liability Provision" at Section V. of the agreement. This agreement is attached as Attachment A.

17. Dianne B. Sprott, Plaintiff in this action, also signed the Residency Agreement on July 10, 2006 as Brown's Responsible Party. In fact, Dianne B. Sprott initialed each section of the "Arbitration and Limitation of Liability Provision" as having "read and understood the provisions."

18. The facility representative that signed on behalf of Sterling House on July 10, 2006 was authorized to sign this agreement on behalf of Sterling House.

(Signature on following page)

FURTHER, AFFIANT SAYETH NOT.

Timothy J. Cesar, ~~Vice President~~ of Legal for Brookdale Senior Living, Inc.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 27 day of September 2010.

NOTARY PUBLIC FOR WISCONSIN
My Commission expires: 10/16/2011

JENNIFER L. FITZPATRICK NOTARY PUBLIC STATE OF WISCONSIN

ATTACHMENT A

ALTERRA RESIDENCY AGREEMENT

Alterra Healthcare Corporation strongly believes in the importance of fully disclosing all services and fees to the best of our ability and in accordance with state law. As with any legally binding contract, it is our recommendation that you consult your legal counsel to ensure proper understanding of this Agreement before signing.

THIS AGREEMENT IS SUBJECT TO ARBITRATION

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H. AMENDMENTS
I. SEVERANCE
J. RESPONSIBLE PARTY
K. SUBORDINATION
L. NOTICES

RESIDENCY AGREEMENT

This Agreement is entered into as of July 10, 2006 by and between Alterra Healthcare Corporation, a Delaware corporation ("Alterra"), _____ ("You" or "Resident"); and _____ ("Responsible Party"). The terms and conditions of this Agreement are as follows:

I. SERVICES AND ACCOMMODATIONS

A. BASIC SERVICES

You will be entitled to the following Basic Services, which are included in the Basic Service Rate, subject to the terms and conditions of this Agreement:

- Accommodations – You are entitled to the use of the suite described in Exhibit A and to the use of Alterra's personal property located in the suite. You are also entitled to use and enjoy with all other residents the common areas of the residence. You may provide your own furnishings and personal property, however, Alterra reserves the right to limit the number and type of furnishings if Alterra determines that they present a safety hazard or potential safety hazard.

- Daily Meals - Alterra will provide three meals daily. Snacks are available 24 hours a day.

- Utility Service - Alterra will provide gas, electric and water service. Telephone charges are not included in the Basic Service Rate. Costs for basic cable television are described in Exhibit A.

- Weekly Housekeeping Service - Alterra will clean your suite once a week.

- Weekly Laundry and Linen Service - Alterra will launder your personal items and your bed linens once a week.

- Life Enrichment Program - Alterra will provide planned social, educational and recreational programs.

- Staffing 24 hours a day - Alterra will have staff available 24-hours a day, seven days a week.

- Transportation – Alterra will secure or provide transportation for resident when a physician's services are needed. Local transportation for

medical reasons will be provided by Alterra at no additional charge. You understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

Alterra will provide thirty (30) days written notice of any change in Basic Services.

B. PERSONAL SERVICE PLAN

Alterra will make available, at an additional cost, a Personal Service Plan. The Personal Service Plan is designed to provide you greater personal services than those provided under the Basic Services. Alterra will use a personal service assessment to determine the personal services you require prior to moving in and periodically throughout your residency. The results of the assessments and the cost of providing the additional personal services will be shared with you and your Responsible Party. In some circumstances, the provision of outside services may be required for your continued ability to safely remain at the residence. An outside agency or individual will be permitted to provide these services or any related personal services only if Alterra has given prior approval.

C. AVAILABLE AMENITIES AND CONVENIENCES

From time to time, Alterra may make amenities and conveniences available to you at your or your Responsible Party's request. If available, such additional services may include guest meals, transportation, transportation escort services, enhanced cable television, or special events. (See additional information on Transportation in Section I. A of this Agreement.)These additional choices are not included in the Basic Service Rate or the Personal Service Plan. Your Residence Director will provide, upon your request, a listing of the available amenities and conveniences as well as a current fee schedule.

D. SERVICES NOT COVERED BY RESIDENCY AGREEMENT

You and your Responsible Party are responsible for obtaining and paying for all services which are not included in the Basic Services or Personal Services Plan (including, but not limited to, the services of third party health care and medical providers), whether provided by Alterra, its subcontractors, third party health care and medical providers, or others. These services may include, but are not limited to, pharmacy services, newspaper subscriptions, or beauty/barber services. Any fees for services provided by other service providers will be billed directly by the service provider. All third party service providers (including, but not limited to, third party health care and medical providers) must receive Alterra's prior authorization to provide services to you at the residence. All third party providers who enter the residence must sign in with the Residence Director or supervisor on duty and agree to comply with Alterra's policies.

You may not contract with any of Alterra's current employees to perform any services at the residence. You may contract with former employees to perform any services at the residence only with Alterra's consent. Alterra reserves the right to

refuse entry to 1) former employees, 2) persons whose actions may be disruptive to the residence; 3) persons whose actions may threaten the safety of any resident or employee; or 4) persons whose presence may foreseeably result in liability to Alterra.

II. RESIDENT RESPONSIBLITIES AND REPRESENTATIONS

A. CARE OF SUITE

You agree that residence and the suite are in satisfactory, habitable condition. You also agree Alterra has made no promise to decorate, alter or improve the residence or suite, unless otherwise provided in writing by Alterra and attached as part of this Agreement. You agree to maintain the suite and to surrender the suite upon termination of this Agreement in good condition, exclusive of normal wear and tear. You agree to pay all damages, beyond normal wear and tear, including any improvements made without Alterra's consent, which you, your Family, and/or other Guests (including any agent, employee, contractor, or other invitee) cause to residence property.

B. SUITE ACCESS

You agree to give Alterra access to the suite in order to carry out the intent of this Agreement. Such entry includes, but is not limited to, performance of services provided as part of the Basic Services or in your Personal Service Plan; response to emergency situations; and entry by authorized personnel with the reasonable belief that your safety or safety of others is in question or that Alterra's policies and procedures are being violated.

Upon written notice, Alterra reserves the right to relocate you to a more appropriate suite within residence as required for your health or safety, or because the residents of a companion suite are incompatible.

C. HEALTH ASSESSMENT

You agree that Alterra may from time to time assess your health to determine the appropriate Personal Service Plan and/or whether you are appropriate to stay in the residence. Not more than thirty (30) days prior to the date this Agreement is entered into, and at least annually thereafter or upon the request of Alterra, you agree to undergo an examination by your physician (or other licensed provider as allowed by law). You agree that Alterra may require you to undergo examination by a particular specialist, at your cost, as Alterra determines is warranted by your current physical or mental status. You will request the examiner to provide Alterra with recommendations, including a statement attesting to the appropriateness of the placement. Based upon the assessment(s) and Alterra's judgement, Alterra may determine your appropriateness to remain in the residence. You will request the examiner to perform any tests and complete any forms required by Alterra or applicable law.

D. HEALTH CARE PROVIDER NOTIFICATION

You authorize Alterra to contact responsible parties, health care providers, and/or other persons listed in your records:

(1) If Alterra determines it is necessary to advise them of your situation;
(2) To arrange for health care services and other assistance required by you; or
(3) In case of an emergency. If you have a life-threatening emergency, Alterra will contact an emergency rescue service.

If your designated health care providers are unavailable, you authorize Alterra to arrange for the services of other health care providers.

During the term of this Agreement, you agree Alterra may provide such persons with copies of your records, including, but not limited to, resident records to the extent they are needed to assist with treatment, advance directives, living will, and the names of persons empowered to make health care decisions, for the purpose of arranging for health care services.

E. OBLIGATORY INFORMATION

You will provide Alterra with accurate, complete and current information about yourself, substitute decision-makers and health care providers, including but not limited to addresses and phone numbers, and your health care status and needs. You or your Responsible Party will provide Alterra with copies of any health care power of attorney, power of attorney executed by you or of any court order, guardianship, or other legal action which may (1) affect your status or (2) designate or appoint another person to make health care or financial decisions or to bear financial responsibility on your behalf. You authorize Alterra to rely on the instructions of such designees or appointees. You understand that you must immediately notify Alterra of changes relating to any of the information stated above.

F. ADVANCE DIRECTIVES

Upon admission to Alterra, it is strongly suggested that you have your advance directives in place in the event you become incapacitated. Advance directives include, but are not limited to, Living Wills, Powers of Attorney for Health Care, Guardianships and Do Not Resuscitate Orders. You will notify Alterra and provide copies to Alterra of such advance directives. If you do not have such advance directives in place, you understand that a court may name a guardian upon application of any interested party (including Alterra), subject to all bond, accounting and other legal requirements. Neither Alterra nor any of its employees or agents may be your guardian. If it is necessary for Alterra to petition the court for appointment of a guardian, any costs associated therein shall be paid by you. If you are a Resident in a Clare Bridge or a Clare Bridge Cottage, these designations should be made prior to move-in.

G. MOTORIZED VEHICLES

You are not permitted to use motorized vehicles, such as motorized wheelchairs or scooters. Exceptions to the rule may only be considered if:

(1) You have a physician's order stating that such a vehicle is a medical necessity for you;
(2) The vehicle is equipped with a functioning speed governor;
(3) You carry general liability insurance on the vehicle in the amount of at least $250,000 to cover property and personal injury damages;
(4) You agree to abide by Alterra's safety guidelines for the use of motorized vehicles on its premises; and
(5) Alterra has made a determination that such usage is safe based upon considerations such as the number of residents currently using motorized vehicles, physical layout of residence, etc.

You further understand and agree that Alterra may, at its sole discretion, prohibit your further use of a motorized vehicle at any time.

H. RESPONSIBILITIES UPON TERMINATION

You will vacate premises, removing all belongings on or before the effective date of termination. If you fail to remove your belongings by the effective date of termination, you understand and agree that Alterra may charge you a storage fee for your belongings equal to your Basic Service Rate. You further agree that Alterra may donate any unclaimed property after forty-five (45) days. You will provide written notice of a forwarding address where you can be reached and receive mail.

Termination will not release you or Alterra from any liability or obligation to the other party under the terms of this Agreement.

I. RULE AND REGULATION COMPLIANCE

You acknowledge that Alterra is licensed by the State of South Carolina as a Community Residential Care Facility. You understand that Alterra has shared common areas, and you agree to honor all rules of courtesy and respect for others.

You agree to abide by and conform to the rules, regulations, policies and procedures as they now exist and as amended from time-to-time for the operation and management of the Residence.

J. GUESTS

You understand that as a resident, you have the right to associate with your friends and family ("guests") during reasonable hours. Because Alterra is a licensed building, overnight guests are generally not permitted in a resident's room. Limited exceptions may be granted by the Residence Director based upon the resident's health status or other pertinent factors.

You acknowledge and understand that your guests are subject to Alterra's Rules and Regulations, and if your guests become disruptive to the operations of the Residence and/or are verbally or physically abusive to staff, residents or others, Alterra may request that they leave the Residence until their behavior is under control or may place limitations upon the location and time of their visitation. You understand that, where circumstances warrant, Alterra may exclude such individuals from the residence.

III. RATES

A. MOVE- IN FEE

1. Fee – You will pay Alterra a one-time Move-In Fee in an amount indicated in Exhibit A at the time this Agreement is signed.

2. Refund - Alterra will refund a prorated share of one-half of the Move-In Fee if this Agreement is terminated within ninety (90) days of the date this Agreement is signed and any one of the following circumstances occur:
   (a) Alterra terminates this Agreement;
   (b) Alterra or your physician determines you require care not offered by Alterra; or
   (c) by reason of death.

x _____
(Please initial as having read and understood the above provision.)

B. MONTHLY SERVICE RATE

1. Rate – You agree to pay the Basic Service Rate and, if applicable, the charge for the Personal Service Plan as indicated in Exhibit A (together the "Monthly Service Rate").

2. Refund – Alterra will refund a prorated share of the Monthly Service Rate if this Agreement is terminated before the end of a month:
   (a) following termination in accordance with Section IV;
   (b) because you require care that is not offered by Alterra; or
   (c) by reason of death.

Refunds will be based upon the actual number of days the resident is in the facility and a reasonable number of bed hold days. A storage fee equal to the prorated share of the

Monthly Service Rate will be charged until such time as all of your property is removed from the Suite. Alterra will issue the refund to Resident or Responsible Party within 45 days of the effective date of termination based on Section IV of this Agreement. Unless prohibited by law, you agree Alterra may offset such refunds by any amount due under the terms of this Agreement.

x _____
(Please initial as having read and understood the above provision.)

C. RESIDENT ABSENCE

If the Resident is absent from the Residence for any reason, including, but not limited to, hospitalization, vacation, temporary nursing home care or rehabilitation, the Residency Agreement will remain effective and you will be charged the full Monthly Service Rate until such time that the Resident or Representative provides Alterra with written notice of their intent to terminate the Agreement, pursuant to Section IV of the Agreement. Termination will be effective and charges will cease the later of the end of any applicable notice period or the removal of all of your personal belongings.

D. AMENITIES AND CONVENIENCES

In addition to the Monthly Service Rate, you agree to pay Alterra the established charges for any amenities and conveniences provided to you by Alterra.

E. PAYMENT

Alterra will issue a monthly statement before the first day of the month itemizing the Monthly Service Rate for the upcoming month and, if any, charges incurred for amenities and conveniences provided during the prior month. Payment for all charges shown on the statement is due on the first (1st) calendar day of each month. The first payment of the Monthly Service Rate is due prior to taking occupancy. If you move in after the first of the month, your first Monthly Service Rate will be one thirtieth (1/30) of the usual rate times the number of days remaining in the month.

Alterra will charge a $250.00 late fee if Alterra has not received all fees when due. Alterra will also charge a $25.00 returned payment fee for each check or automatic withdrawal that is returned by a financial institution for any reason, including but not limited to, insufficient funds or incompleteness. After two payments are returned by a financial institution to Alterra, you will thereafter pay the Monthly Service Rate and any other amounts due by cashiers check. You also agree to pay interest on all amounts not paid by the due date. The interest rate will be the lesser of 1.5% per month or the highest rate permitted by law.

F. RATE CHANGES

Alterra will provide thirty (30) days written notice of any change in the Basic Services Rate. Alterra may offer or require a change in the Personal Service Plan when Alterra determines additional services are requested or required. The new charge for the Personal Service Plan will be effective immediately upon the provision of written notice.

X _____
(Please initial as having read and understood the above provision.)

IV. TERM AND TERMINATION

A. TERM

This Agreement will commence on the date set forth above and will continue until terminated as provided below.

B. TERMINATION BY RESIDENT

Alterra requests you or your Responsible Party to provide thirty (30) days written notice of your intent to terminate this Agreement. Termination shall be effective the day after your last date of residence.

X _____
(Please initial as having read and understood the above provision.)

C. TERMINATION BY ALTERRA

Alterra may terminate this Agreement, upon providing you or your Responsible Party thirty (30) days written notice, for any of the following events, as determined by Alterra:

(1) You require care or services that Alterra is unable to provide or which requires staff that are not available at Alterra;
(2) You are disruptive, create unsafe conditions, are physically or verbally abusive to other residents or otherwise impair the welfare of yourself or others in the residence;
(3) You fail to pay fees and charges when due.

X _____
(Please initial as having read and understood the above provision.)

For emergency medical or welfare reasons of you or other residents, Alterra may, upon written notice to you or your Responsible Party, immediately terminate the Agreement, and transfer or discharge you. If the emergency requires your

immediate transfer, Alterra will notify the Responsible Party at the earliest practicable hour, but not later than twenty-four (24) hours following the transfer.

Alterra will provide a written explanation if Alterra terminates this Agreement with less than thirty (30) days notice.

D. TERMINATION BY EITHER PARTY

You, your Responsible Party or Alterra may terminate this agreement immediately in the event of death or if a physician certifies, based upon an examination prior to moving out, that you must be relocated because of your health. Alterra requests you provide written notice of your intent to terminate. Termination shall be effective the day after your last date of residence.

V. ARBITRATION AND LIMITATION OF LIABILITY PROVISION

Should any of sub-sections A, B or C provided below, or any part thereof, be deemed invalid, the validity of the remaining sub-sections, or parts thereof, will not be affected.

A. ARBITRATION PROVISION

1. Any and all claims or controversies arising out of or in any way relating to this Agreement or the Resident's stay at Alterra, excluding any action for eviction, and including disputes regarding interpretation of this Agreement, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. **The parties to this Agreement further understand that a jury will not decide their case.** The Federal Arbitration Act shall govern the procedure, except if inconsistent with this Arbitration Provision or expressly stated otherwise in this Agreement. Further, nothing in this Agreement is to be construed to contradict any applicable South Carolina statutory grievance or mediation procedure. Any party who demands arbitration must do so for all claims or controversies that are known, or reasonably should have been known, by the date of the demand for arbitration, and if learned of during the course of the arbitration proceeding shall amend the claims or controversies to reflect the same. All current damages and reasonably foreseeable damages arising out of such claims or controversies shall also be incorporated into the initial demand or amendment thereto.

2. Demand for Arbitration by Resident, his or her guardian, a person or organization acting on behalf of a Resident with the consent of the Resident or his or her guardian, or the personal representative of the estate of a deceased Resident (collectively "Resident Party") shall be made in writing and submitted to CT Corporation System, 75 Beattie Place, Two Insignia Financial Plaza,

Greenville, SC 29601, via certified mail, return receipt requested. Demand for Arbitration by Alterra shall be made in writing and submitted to the Resident or his or her agent, representative, successor or assign and/or Resident's Attorney-in-Fact, and/or Responsible Party via certified mail, return receipt requested.

3. The arbitration proceedings shall take place in the county in which the Residence is located, unless agreed to otherwise by mutual consent of the parties.

4. The arbitration panel shall be composed of one (1) arbitrator. Subject to the requirements of section A.5. herein, the parties shall agree upon an arbitrator that must either be a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience as an attorney. If the parties cannot reach an agreement on an arbitrator within twenty (20) days of receipt of the Demand for Arbitration, then the arbitration shall be submitted to the American Arbitration Association, or other similar organization, but must still be conducted by one (1) arbitrator who is a retired South Carolina circuit or federal court judge or a member of the South Carolina Bar with at least ten (10) years of experience practicing as an attorney. If the arbitrator is selected from the American Arbitration Association, or other similar organization, each party shall have the right to request one (1) substitution within ten (10) days of receiving notice of the identity of the arbitrator. The person requesting of the substitution shall submit a request for substitution in writing to the American Arbitration Association, or other similar organization, and to the other party via U.S. mail.

5. The arbitrator shall be independent of all parties, witnesses, and legal counsel. No past or present officer, director, affiliate, subsidiary, or employee of a party, witness, or legal counsel may serve as an arbitrator in the proceeding.

6. Discovery in the arbitration proceeding shall be governed by the Federal Rules of Civil Procedure. However, discovery shall be modified by the following, unless agreed to otherwise by the party to whom the request is made:

   a. The Resident Party shall provide Alterra with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after Demand for Arbitration is received (and Alterra shall reimburse Resident Party $0.25 per page).

   b. Alterra shall provide the Resident Party with permissible discovery per the Federal Rules of Civil Procedure within twenty (20) days after the Demand for Arbitration is received (and Resident Party, unless proven indigent, shall reimburse Alterra $0.25 per page).

   c. The only depositions allowed shall be of experts. No other individuals may be deposed.

d. Resident Party shall designate any and all expert witnesses within sixty-five (65) days after Demand for Arbitration is submitted.

e. Alterra shall have thirty (30) days after Resident Party's expert designation is received in which to depose such experts.

f. Alterra shall designate any and all experts one hundred and fifteen (115) days after Demand for Arbitration is submitted.

g. Resident Party shall have thirty (30) days after Alterra's expert designation is received in which to depose such experts.

h. Any report or affidavit of an expert, and a list of all records contained in the expert's file, must be exchanged by the parties no later than ten (10) working days before the date of the expert's deposition.

i. The following shall be exchanged no later than fourteen (14) working days before the arbitration hearing:

   1. List of witnesses to be called at the arbitration hearing (full name, title, address and phone number if known) and an outline of each witnesses' intended testimony;

   2. List of documents to be relied upon at the arbitration hearing;

   3. Any sworn recorded statements to be relied upon at the arbitration hearing and included therewith the full name, title, address and phone number of the person making the sworn statement.

j. The arbitration hearing shall be held no later than one hundred and eighty (180) days after Demand for Arbitration is submitted, or within a reasonable time thereafter if a conflict arises with the arbitrator's calendar.

7. The arbitrator shall designate a time and place within the county in which the Residence is located, for the arbitration hearing and shall provide thirty (30) days' notice to the parties of the arbitration hearing.

8. The arbitrator shall apply the Federal Rules of Evidence and Federal Rules of Civil Procedure in the arbitration proceeding except where otherwise stated in this Agreement. Also, the arbitrator shall apply, and the arbitration decision shall be consistent with, Federal law except as otherwise stated in this Arbitration Provision.

9. The arbitration decision should be signed by the arbitrator and delivered to the parties and their counsel within thirty (30) days following the conclusion of the arbitration. The decision shall set forth in detail the arbitrator's findings of fact and conclusions of law.

10. The arbitrator's decision shall be final and binding without the right to appeal.

11. The arbitrator's fees and costs associated with the arbitration shall be divided equally among the parties, unless the Resident Party is proven indigent. The parties shall bear their own attorneys' fees and costs and hereby expressly waive any right to recover attorney fees or costs, actual or statutory.

12. The arbitration proceeding shall remain confidential in all respects, including the Demand for Arbitration, all arbitration filings, deposition transcripts, documents produced or obtained in discovery, or other material provided by and exchanged between the parties and the arbitrator's findings of fact and conclusions of law. Following receipt of the arbitrator's decision, each party agrees to return to the producing party within thirty (30) days the original and all copies of documents exchanged in discovery and at the arbitration hearing, except those documents required to be retained by counsel pursuant to law. Further the parties to the arbitration also agree not to discuss the amount of the arbitration award or any settlement, the names of the parties, or the name/location of the Residence except as required by law.

13. The Limitation of Liability Provision below is incorporated by reference into this Arbitration Provision

14. This Arbitration Provision and the Limitation of Liability Provision below shall survive the death of the Resident.

X _____
(Please initial as having read and understood the provisions of section V., subsection A)

B. LIMITATION OF LIABILITY PROVISION: *Read Carefully Before Signing*

1. The parties to this Agreement understand that the purpose of this "Limitation of Liability Provision" is to limit, in advance, each party's liability in relation to this Agreement.

2. Liability for any claim brought by a party to this Agreement against the other party, including but not limited to a claim by Alterra for unpaid Basic Service or Personal Service charges, or a claim by, or on behalf of, a Resident, Resident Party, or by a Resident's Estate, Agent or Legal Representative, arising out of the care or treatment received by the Resident or the Resident's occupancy or presence at Alterra, including, without limitation, claims for medical negligence, shall be limited as follows:

   a. Net economic damages shall be awardable, including but not limited to, past and future medical expenses, offset by any collateral source payments such as payments made by medical insurance.

b. Noneconomic damages, such as pain and suffering, shall be limited to a maximum of $250,000.00.

c. Interest and/or late fees on unpaid assisted living charges shall not be awarded.

d. Punitive damages shall not be awarded.

3. Should sub-sections a, b, c and/or d, provided above, be deemed invalid, the validity of the remaining sub-sections will not be affected.

X _____
(Please initial as having read and understood the provisions of section V., subsection B.)

C. BENEFITS OF ARBITRATION AND LIMITATION OF LIABILITY PROVISIONS

The parties' decision to select arbitration is supported by the potential cost-effectiveness and time-savings offered by selecting arbitration, which may avoid the expense and delay of judicial resolution in the court system. The parties' decision to select arbitration and to agree to a limitation of liability also are supported by the potential benefit of preserving the availability, viability, and insurability of an assisted living company for the elderly and disabled in South Carolina, by limiting such assisted living company's exposure to liability. With this Agreement, Alterra is better able to offer its services and accommodations at a rate that is more affordable to the Resident. In terms of the time-savings offered by selecting arbitration, the parties recognize that often the Resident is elderly and may have a limited life-expectancy, and therefore selecting a quick method of resolution is potentially to a Resident's advantage.

The Resident, Responsible Party, or his or her legal guardian, or authorized Power of Attorney understands that other assisted living companies' Agreements may not contain an arbitration provision, or limitations of liability provision. The parties agree that the reasons stated above are proper consideration for the acceptance of the Arbitration and Limitation of Liability Provisions. **The undersigned acknowledges that he or she has been encouraged to discuss this Agreement with an attorney.**

The parties to this Agreement further understand that a jury will not decide their case.

X _____
(Please initial as having read and understood the provisions of section V., subsection C.)

VI. MISCELLANEOUS

A. DEFAULT TO ARBITRATION

If it is determined by a court of law that the Arbitration Provision provided in this Agreement is invalid, the parties hereto make clear their express desire to waive a jury trial and resolve their claims against each other in the appropriate court solely before a judge.

B. NON-DISCRIMINATION

Alterra does not discriminate on the basis of race, religion, color, national origin, sex, age, disability, marital status, sexual preference, or source of payment. Alterra respects all religious faiths and does not have any specific religious affiliation.

C. RISK AGREEMENT

You and your Responsible Party are responsible for your personal, financial and health care decisions. In addition, you are responsible for maintaining at all times your own health, personal property, liability, automobile (if applicable), and other insurance coverages in adequate amounts. You agree to obtain insurance with coverage for your personal property and your general liability in the amount of $100,000. You agree to provide proof of such coverage to Alterra. You acknowledge that Alterra is not an insurer of your person or property.

You understand and agree that:

1. Alterra may encourage you to participate in community, leisure, and social activities and to maintain an appropriate level of independence in activities of daily living, as well as your personal and financial affairs;

2. Independent activities, responsibility for personal, financial, and health care decisions, and lifestyle and care preferences may involve risks of personal injury and/or property damage or loss;

3. The standard of services in an assisted living residence does not include one-on-one care, assistance or supervision e.g. one resident assistant for each Resident, or immediate response to non-emergent needs. Consistent with your daily life activities, including but not limited to resting in your apartment or common areas, watching television, listening to music, reading, and sleeping at night, there may be short and long periods of time in which you will be left alone, unsupervised;

4. Alterra makes no representations or guarantees that Alterra staff can prevent Residents from falling. Further, Alterra does not represent or guarantee your health condition will not change or deteriorate throughout your Residency;

5. The services provided by Alterra may not meet all of your personal, social, or health care needs and Alterra will use its best efforts to assist you in arranging for services which you require and which are not included in this Agreement;

6. Many Residents of Alterra suffer from memory impairment, including Alzheimer's disease and dementia. This condition can cause unexpected behavior including, but not limited to, wandering, forgetfulness, agitation towards others and confusion. Alterra makes no representations or guarantees that it can predict the behavior of its Residents. Therefore, Alterra also makes no representations or guarantees that it can always prevent a Resident from wandering or attempting to wander from the Residence, entering into a private area, misplacing or losing items or engaging in physical contact with another Resident;

7. Alterra makes no representations or guarantees that Alterra is secure from theft or any other criminal act perpetrated by any other Resident or person; therefore, Alterra recommends that valuables, including but not limited to, jewelry and large amounts of money, not be brought into the Residence. If you choose to bring in such valuables, you are doing so at your own risk and Alterra will not be responsible for any theft or loss of these items;

8. Due to state regulations and fire code, Alterra is not permitted to lock its exterior doors and, therefore, does not guarantee that its Residents will not wander out of the Residence. In our memory care buildings, the exterior doors are alarmed with a delayed egress feature and our systems are designed to alert our staff to respond and assist a Resident to safety, should they wander from the building.

You understand and agree to assume the risks inherent in this Agreement. You agree to hold Alterra and its employees and agents harmless for any damages or injury or other loss resulting from: (1) reasonable acts or omissions made in good faith; (2) action of any third party, fire, water, theft or the elements; or (3) loss of personal property. Alterra will only be liable for damages, injuries or other losses to you or any third party entering a Suite, or any other part of the residence, if due to willful misconduct or negligence of Alterra.

Alterra reserves the right to recover from you any loss caused by fire, vandalism or any other acts by you or your invitees or guests. Alterra may assign such right to its insurance carrier.

D. RELIANCE

By entering into this Agreement, Alterra is relying upon the truthfulness of the promises and representations made by you and your Responsible Party.

E. NO LIABILITY IF AWAY FROM RESIDENCE

In the event that you knowingly leave the Residence or are temporarily away from the Residence, any and all responsibility of Alterra for your welfare shall terminate during your absence.

F. ASSIGNMENT

This Agreement is not assignable by you or your Responsible Party without prior written consent of Alterra. The rights and obligations of Alterra may be assigned to any person or entity, and such person or entity will be responsible to ensure the obligations of Alterra under this Agreement are satisfied in full from and after the date that you are notified of such assignment. Alterra may engage another person or entity to perform any or all of the services under this Agreement.

G. HEIRS AND SUCCESSORS

This Agreement is for the benefit of and binds the parties and their respective heirs, representatives, successors and assigns.

H. AMENDMENTS

This Agreement and any written amendments constitute the entire agreement between the parties and supercede all prior and contemporaneous discussions, representations, correspondence, and agreements whether oral or written, pertaining to this Agreement. Except for the right of Alterra to modify fees, rates and charges, amend services provided and establish reasonable operating procedures and rules for the general welfare and safety of the residents, this Agreement may be amended only in writing signed by both parties.

I. SEVERANCE

Should any part of this Agreement be invalid, the validity of the other parts of this Agreement will not be affected.

J. RESPONSIBLE PARTY

You have designated a Responsible Party, who has agreed to the terms of the attached Responsible Party Agreement and whose signature appears below.

K. SUBORDINATION

This Agreement and the parties' rights hereunder will be subordinate to any ground lease, mortgage or deed of trust now or hereafter placed upon the residence, but your right to remain in possession of your suite will not be disturbed so long as you comply with all of the provision of this Agreement.

L. NOTICES

Notices will be written and given by personal delivery or mailing by regular mail, postage pre-paid to the following or such other persons or places as the parties may notify each other. Notices shall be deemed given based upon the date personally delivered or upon the date postmarked.

Alterra:
Residence Director at Residence Address (as noted on Exhibit A)

Resident:
(as noted at end of this Agreement)

Responsible Party:
(as noted in Exhibit B)

BY THEIR SIGNATURES, the parties or their representatives have executed this Agreement.

Exec. Director 7-10-06
For Alterra Title Date

Gladys H Brown 7-10-06
Resident Date

Dianne B Sprott 7-10-06
Responsible Party Date

SEND NOTICES AND MONTHLY STATEMENTS TO RESIDENT IN CARE OF:

Name: Dianne B. Sprott
Address: 1319 Doral Drive-Manning SC 29102
Phone No.: 803-473-4770 (cell) 435-1664

OTHER RELATED MATERIALS

1. Resident Bill of Rights
2. Residence Handbook
3. Emergency Evacuation Plan
4. Admissions Package and Special Services Form
5. Medical Records Release
6. Resident Assessment
7. Personalized Service Plan

EXHIBITS INCLUDED:

A. Schedule of Services and Rates
B. Responsible Party Agreement
C. Pet Addendum
D. Additional Resident Fee
E. Pharmacy Services Agreement
F. Acknowledgement of Grievance Procedure and Resident Bill of Rights

EXHIBIT A
SCHEDULE OF SERVICES AND RATES

Resident Gladys Brown

Residence 1 W H Sumter

Address
Sumter, SC 29150

Suite # 105

Move-In Fee (Prior to Move-in) $ 500.00

Basic Services

Basic Service Rate $ 2626.

- Accommodations - You are entitled to the use of the suite described above and to the use of Alterra's personal property located in the suite. You are also entitled to use and enjoy with all other residents the common areas of the residence. You may provide your own furnishings and personal property; however, Alterra reserves the right to limit the number and type of furnishings if Alterra determines that they present a safety hazard or potential safety hazard.

- Daily Meals - Alterra will provide three meals daily. Snacks are available 24-hours a day.

- Utility Service - Alterra will provide gas, electric and water service. Telephone charges are not included in the Basic Service Rate. Basic cable television o is o is not included in the Basic Service Rate.

- Weekly Housekeeping Service - Alterra will clean your suite once a week.

- Weekly Laundry and Linen Service - Alterra will launder your personal items and your bed linens once a week.

- Life Enrichment Program - Alterra will provide planned social, educational and recreational programs.

- Staffing 24 hours a day - Alterra will have staff on duty 24-hours per day, seven days a week.

- Transportation – Alterra will secure or provide transportation for resident when a physician's services are needed. Local transportation for medical reasons will be provided by Alterra at no additional charge. You understand that transportation for purposes other than those described in the preceding sentence will be at your expense.

Alterra will provide thirty (30) days written notice of any change in Basic Services.

Personal Service Plan

Personal Service Plan Rate $ 971.00

Alterra will make available, at an additional cost, a Personal Service Plan. The Personal Service Plan is designed to provide you greater personal services than those provided under the Basic Services. Alterra will use a personal service assessment to determine the personal services you require prior to moving in and periodically throughout your residency. The results of the assessments and the cost of providing the additional personal services will be shared with you and your Responsible Party. All third party providers (including, but not limited to, third party health care and medical providers) who enter residence must sign in with the Residence Director or supervisor on duty and agree to comply with Alterra's policies.

MONTHLY SERVICE RATE $ 3597.00
(Add Basic Service Rate and Personal Service Plan)

Available Amenities and Conveniences

From time to time, Alterra may make amenities and conveniences available to you at your request. When available, such additional services may include guest meals, transportation, transportation escort services, enhanced cable television, special events, or special programs. These additional choices are not included in the Basic Service Rate. Please contact your Residence Director for a current fee schedule.

I agree to the above Schedule of Services and Rates effective 7-10-06, **and I understand and agree that Alterra has a right to change these rates and/or change the services provided in accordance with the provisions of the Residency Agreement.**

Tammy Watts Exec. Director 7-10-06
For Alterra Title Date

Gladys H Brown 7-10-06
Resident Date

Dianne B Spratt 7-10-06
Responsible Party Date

EXHIBIT B
RESPONSIBLE PARTY AGREEMENT

Colodys H. Brown ("Resident"); Dianne B. Sprott ("Responsible Party") and Alterra Healthcare Corporation, a Delaware Corporation (herein after "Alterra"), hereby agree as follows:

WHEREAS, the Resident desires to live in the suite identified in the attached Residency Agreement; and

WHEREAS, Alterra is willing to enter into the Residency Agreement if Resident identifies an individual who is willing to provide certain assistance to or on behalf of Resident in the event that such assistance is necessary, and who is willing to pay Resident's financial obligations to Alterra under the Residency Agreement in the event that Resident does not make payments when due; and

WHEREAS, Responsible Party agrees to provide such assistance and to pay such obligations, if and as necessary.

IN CONSIDERATION of the foregoing, the Parties agree as follows:

I. PERSONAL ASSISTANCE. In the event the condition of the Resident requires such assistance, and upon the request of Alterra, Responsible Party will assist Resident or legally responsible person, as necessary by:

(a) Participating with Alterra staff in evaluating Resident's needs and in planning and implementing an appropriate plan for Resident's care;

(b) Maintaining Resident's welfare and fulfilling Resident's obligations under the Residency Agreement;

(c) Relocating Resident following termination;

(d) Transferring Resident to a hospital, nursing home, or other facility in the event that Resident requires care Alterra does not offer;

(e) Removing Resident's personal property from suite when Resident leaves;

(f) Making necessary arrangements for funeral services and burial in the event of death.

II. FINANCIAL RESPONSIBILITY. If Resident fails to make payments due to Alterra under the Residency Agreement, Responsible Party agrees to pay Alterra such amounts within thirty (30) days of receiving written notice of nonpayment.

III. REVIEW OF RESIDENCY AGREEMENT. Responsible Party acknowledges that he or she has received and has reviewed a copy of the Residency Agreement, and has had an opportunity to ask any questions Responsible Party may have.

BY THEIR SIGNATURES, the parties or their representatives have executed this Agreement to be effective as of July 10, 2006

Tammy Mills Exec. Director 7-10-06
For Alterra Title Date

Gladys H Brown 7-10-06
Resident Date

Deanne B Spratt - 7-10-06
Responsible Party Social Security No. DL No. Date

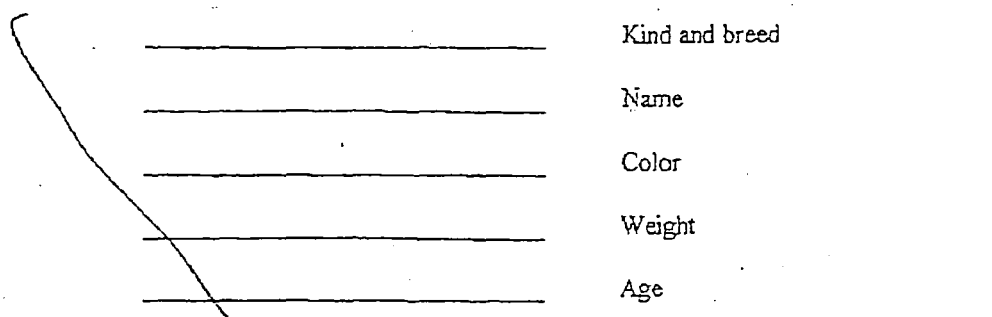
SEND NOTICES TO RESPONSIBLE PARTY AT:

Address: 1319 Doral Drive - Manning SC 29102

Phone No.: 803-473-4770 (cell) - 435-1664

EXHIBIT C
PET ADDENDUM

Alterra consents to the Resident keeping in the suite the household Pet described as follows:



_____ Kind and breed

_____ Name

_____ Color

_____ Weight

_____ Age

I. RESIDENT RESPONSIBILITIES. The Resident will keep the Pet in the suite except when walking the Pet, if applicable, or transporting it to and from the suite. The Resident will not allow the Pet in lobbies or in common residential areas, and will transport the Pet to and from the suite only by side entrances of the building, when available and/or feasible. The Resident will walk and curb the Pet only in areas designated by Alterra and will be responsible for cleaning up after the Pet. When the Pet is not in the suite, the Resident will keep it on a leash no longer than five (5) feet or in a cage or other appropriate closed and ventilated container, and in the control of the Resident. If the Pet is a bird, the Resident will keep it caged both in and out of the suite. If the Pet is a dog or cat, the Resident will ensure that it wears a collar with appropriate identification (including the Resident's telephone number) at all times that it is out of the suite.

The Resident will comply with all vaccination and licensing requirements applicable to the Pet, showing proof of this upon request, and will comply with appropriate standards of care, treatment, and grooming. In all circumstances, the Resident is responsible for the health, welfare, and proper care of the Pet. The Resident will ensure that the Pet does not disturb the right of other residents to the peaceful enjoyment of their suites and of the common areas. The Resident will not leave the Pet unattended when the Pet is not in the suite.

Alterra, in its discretion, may assist the Resident in caring for the Pet as part of the Resident's Personal Service Plan. Charges and payment for such services will be governed by the terms of the Residency Agreement.

The Resident will be liable for any personal injury or property damage caused by the Pet that is suffered by Alterra, its employees or agents, other residents, guests, or invitees. The Resident and/or Responsible Party agree to purchase renter's insurance in the amount of $100,000, which specifically covers any personal injury or property damage caused by the Pet. The Resident shall provide Residence with proof of insurance coverage.

II. TERM & TERMINATION. This Addendum will continue until the Residency Agreement between the Resident and Alterra is terminated, unless either party terminates

this Addendum for any reason by giving fourteen (14) days prior written notice to the other party. Alterra may terminate this Addendum upon twenty-four (24) hours notice in the event the Resident breaches any of the Resident's obligations under this Addendum. In the event that the Pet is left unattended for more than twenty-four (24) hours, or if Alterra determines that the Resident, for any reason, is unable to care for the Pet, Alterra reserves the right to arrange for the Pet to be delivered to:

Sponsor: _____

Address: _____

Phone: _____

Or to such other individual or agency as Alterra determines to be appropriate. The Resident will pay all costs of delivery, feeding, care, treatment, and housing of the Pet. The Resident acknowledges that the Resident has no right to keep a pet, except to the extent expressly permitted by this Addendum. Alterra reserves the right to withdraw its consent to the Resident keeping the Pet at any time by terminating this Addendum, as permitted above.

BY THEIR SIGNATURES, the parties executed the Addendum to be effective _____, _____.

For Alterra	Title	Date
Resident		Date
Responsible Party		Date

EXHIBIT D
ADDITIONAL RESIDENT FEE

When two residents occupy a single occupancy suite, Alterra charges a single occupancy Basic Service Rate plus an additional resident fee. Each resident in the suite is responsible for paying one-half of the total of the single occupancy Basic Service Rate plus the additional resident fee, entitling each resident to receive the Basic Services described in Section 1 of the Residency Agreement. Each resident will also be responsible for the cost of his or her Personal Service Plan.

In the event that the Agreement of one resident is terminated for any reason, effective upon such termination, the remaining resident's Basic Service Rate will automatically be adjusted to reflect the Basic Service Rate for a single occupancy suite for the remainder of the month in which the adjustment is made and for each month thereafter.

Single Occupancy Basic Service Rate $_____

Additional Resident Fee $_____

Total Charge for Suite $_____

BASIC SERVICE RATE FOR EACH RESIDENT $_____
(1/2 of the total charge for suite)

_____

Resident Date

_____

Responsible Party Date

EXHIBIT E
PHARMACY SERVICES AGREEMENT

Alterra has Medication Management policies and programs. Alterra works closely with pharmacy providers to make certain that the needs of our residents are met. Preferred pharmacy providers are chosen based upon their ability to provide services to our residents to enhance their health and wellness. Important services include:

- Screening for possible negative drug interactions
- Assessments for potential allergic reactions of medications
- Recommending therapeutic substitutions when appropriate
- Providing competitive pricing for comparable packaging and offering generic substitutions when appropriate
- Alerting staff and physicians when there is a duplication of prescriptions
- Individual wellness recommendations
- Regular scheduled review and monitoring of medications
- Routine or emergency delivery 24-hours a day, 365 days a year
- Medication packaging that meets Alterra's standards for safety

Our "preferred provider" for pharmacy services at Alterra Stately House is Prescott Care Pharmacy. Our staff works closely with this pharmacy to meet the needs of our residents. They will review all current medications before your move-in and the consultant pharmacist will be in the residence on a regular schedule to meet with you individually, if needed.

If you decide to use another pharmacy provider other than Alterra's "preferred provider", they will be required to meet Alterra's standards regarding medication management.

If you have chosen NOT to use Alterra's preferred pharmacy provider, please review and sign the following statement acknowledging you understand the residence's expectations regarding the provision of medications.

I understand that I will be required to provide medications that are packaged in a unit of use packaging system, unless I have been granted an exemption to the packaging requirement by the Regional Director of Operations. I understand there is a service fee, as described in Exhibit X Concierge Services List, that is associated with a packaging exemption due to the additional administrative oversight required.

If at any time I am not able or no longer willing to provide this type of packaging system and I do not have an exemption, I understand that I need to find alternative housing.

X _____

(Please initial as having read and understood the above provision.)

I also understand that I will have the responsibility for reordering medications but in the event the medications are not delivered within two days prior to the depletion of my medication stock, the residence will reorder my medications with the 'Preferred Pharmacy' to insure no disruption takes place. I agree to pay for the medications and any associated service charges.

The fees associated with reordering medications from the "Preferred Pharmacy" are determined by the "Preferred Pharmacy", and are in addition to the service fee described above.

MY SIGNATURE BELOW INDICATES THAT I HAVE READ, UNDERSTAND AND AGREE TO ABIDE BY THE TERMS OF THIS ALTERRA PHARMACY SERVICES AGREEMENT.

Woodys H Brown — 7-10-06

Resident Signature — Date

Dianne B Lynch — 7-10-06

Legal Representative Signature — Date

EXHIBIT F

ACKNOWLEDGEMENT OF GRIEVANCE PROCEDURE AND RESIDENT BILL OF RIGHTS

I, Dianne B Scott, acknowledge that I have received written copies of Alterra's Grievance Procedure and South Carolina's Resident Bill of Rights and that I understand the policy for filing a grievance and the Resident Bill of Rights.

Gladys H Brown — 7-10-06
Resident — Date

Dianne B Scott — 7-10-06
Responsible Party — Date

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	OF THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER)	
)	C.A.No.: 2010-CP-43-1495
Dianne B. Sprott as Conservator and)	
Attorney in fact for Gladys Hanna Brown,)	
)	**MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION, OR ALTERNATIVELY, TO STAY THE PENDING ARBITRATION**
Plaintiff,)	
)	
vs.)	
)	
)	
Brookdale Senior Living, Inc.;)	
FEBC-ALT Investors, LLC;)	
FEBC-ALT Holdings, Inc.; and,)	
Brookdale Senior Living Communities, Inc.)	
d/b/a Sterling House of Sumter,)	
)	
Defendants.)	
)	

Plaintiff submits this Memorandum in Opposition to Defendants' Motion to Dismiss and to Compel Arbitration.

FACTS

Gladys Hanna Brown was admitted to Sterling House of Sumter, SC on July 11, 2006. (Compl. ¶ 20). One day before moving in, Dianne Sprott signed a contract as Ms. Brown's "responsible party" with Defendants entitled "Alterra Residency Agreement" ("Agreement"). (See Exhibit 1, Attached). The Agreement includes an arbitration provision and a limitation of liability provision. These provisions begin on page 12 and end on page 16 of the 31-page document and include the following items: (1) arbitration requirement for all claims pursued by Plaintiff but no such requirement for potential eviction claims by Defendant against Plaintiff; (2) forum selection clause; (3) limitations on discovery including prohibition on depositions of fact

witnesses (4) attorney fee and cost recovery prohibition; (5) punitive damage prohibition; and (6) $250,000 noneconomic damages cap.

On May 29, 2009, Ms. Brown fell and suffered a subdural hematoma as well as a fractured hip during a fire drill at Sterling House. (Compl. ¶ 22). As a result of the fall, Ms. Brown was hospitalized, has been forced to undergo numerous medical procedures, and has suffered permanent mental and physical injuries. (Comp. ¶ 25-31). On July 25, 2010, Plaintiff filed suit against Defendants relating to the May 29, 2009 fall. By motion dated September 27, 2010, Defendants seek to dismiss Plaintiff's claims and compel arbitration.

ARGUMENT

1. **This court should decide the arbitration provision's validity rather than an arbitrator.**

Plaintiff asserts that the Agreement's arbitration and limitation of liability provisions are unconscionable, against South Carolina public policy, and therefore invalid. In essence, Plaintiff claims that there is no binding arbitration agreement between the parties. The court must determine as an initial matter whether the arbitrability issue is itself subject to arbitration. South Carolina law clearly says that the trial court decides whether there is a valid arbitration agreement between the parties. In Zabinski v. Bright Acres Associates, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001), the court found that whether a valid arbitration agreement exists "is an issue for judicial determination, unless the parties provide otherwise." In other words, in the absence of clear evidence to the contrary, "courts assume that the parties intended courts, not arbitrators, to decide...certain gateway matters, such as whether the parties have a valid arbitration agreement at all." Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 335, 588 S.E.2d 617, 621 (Ct. App. 2003)(quoting Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003)).

This principle is true under South Carolina's Uniform Arbitration Act and contracts subject to the Federal Arbitration Act. See S.C. Code Ann. § 15-48-20(a)("if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue"). The U.S. Supreme Court has held that courts are to decide the issue when the party opposing arbitration raises a contract defense (fraud in the inducement, unconscionability, etc.) related to the arbitration provision itself. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967). However, if the challenge goes to the validity of the contract as a whole rather than the arbitration provision, then an arbitrator must decide. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445 (2006). The Court has also noted that this rule only applies if the arbitration agreement clearly and convincingly subjects the threshold validity issue to arbitration. Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 2777 n. 1(2010).

In this case, the Agreement purports to submit to arbitration "all claims or controversies arising out of or in any way relating to this Agreement...including disputes regarding interpretation of this Agreement." There is no specific reference to the validity issue. Interpreting very similar language, the South Carolina Supreme Court held that the agreement's validity was not subject to arbitration. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24, 344 S.E.2d 663, 668 (2007). Additionally, the Simpson court found no clear and unmistakable evidence that the parties intended to arbitrate the gateway issue since one party to the agreement challenged the entire arbitration clause's validity. Id. Since the Agreement does not specifically reference arbitration of the validity issue and since Plaintiff disputes the arbitration provision's validity, this court is the proper forum for determining the provision's validity.

2. **The Agreement's arbitration and limitation of liability provisions are unconscionable and therefore invalid.**

South Carolina law presumes the validity of an arbitration agreement. Towles v. United Healthcare Corp., 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 2003). However, arbitration agreements as contracts are governed by general contract principles including the contract defenses of fraud, duress, and unconscionability. Simpson, 373 S.C. at 24, 644 S.E.2d at 668. Under South Carolina law, 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." Id. at 25, 344 S.E.2d at 668. If a contract provision is unconscionable, it may be invalidated or its application limited so as to prevent an unconscionable result. Id.

The "Alterra Residency Agreement" is an adhesion contract. An adhesion contract is one that is on a standardized form, presented on a take-it-or-leave-it basis, and whose terms are not subject to input by the party with less bargaining power. Herron v. Century BMW, 387 S.C. 525, 531-32, 693 S.E.2d 394, 397 (2010). Based on cases from other jurisdictions, the arbitration and limitation of liability provisions in the Agreement Plaintiff signed is identical to the language in Alterra contracts used at facilities around the country. As the responsible party for a resident entering an assisted living facility, Plaintiff was in no position to aid in drafting the Agreement. The Agreement was presented on a pre-printed form and Plaintiff was forced to take-it-or-leave-it, i.e. sign the Agreement as printed or Ms. Brown would not be admitted to the facility. While adhesion contracts are not per se unconscionable and finding a contract to be an adhesion contract is "merely the beginning point of the [unconscionability] analysis", courts look at adhesion contracts between consumers and commercial entities with "considerable skepticism."

Lackey v. Green Tree Fin. Corp., 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998); Simpson, 373 S.C. at 27, 644 S.E.2d at 669.

Several factors bear on whether a party lacked a meaningful choice in assenting to a contract. These factors include (1) disparity in bargaining power between the parties (2) parties' relative sophistication (3) whether the party seeking to avoid the contract is a "substantial business concern" (4) whether there is an element of surprise in the offending provision's inclusion; and (5) conspicuousness of the offending provision. Herron, 387 S.C. at 532, 693 S.E.2d at 398; Simpson, 373 S.C. at 25, 644 S.E.2d at 669. Stated more broadly, this prong of the unconscionability analysis speaks to the fundamental fairness of the bargaining process. Simpson, 373 S.C. at 25, 644 S.E.2d at 669. In sum, this prong "depends upon all the facts and circumstances of a particular case." Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005).

This case involves a contract between a consumer and commercial entity. Unequal bargaining power is "inherent" in such cases. Herron, 387 S.C. at 533, 693 S.E.2d at 398. Plaintiff was in an especially vulnerable bargaining position as Ms. Brown was in need of immediate care at the time the Agreement was signed. There was also a marked disparity between the sophistication of the parties. Defendants include a national health care corporation with extensive experience in this area and copious legal resources. Ms. Brown was a vulnerable adult with diagnosed senile dementia, and needed immediate assisted living placement. Plaintiff lacked the business judgment to understand the full implications of an arbitration agreement including the practical and legal implications of altered discovery procedures that essentially deny Plaintiff the opportunity to speak with critical fact witnesses. Defendants made no effort to explain these procedures. In fact, Mrs. Sprott states that no one explained the arbitration

provision to her at all, only that she was told that she was signing documents necessary to have her mother admitted to Sterling House of Sumter.

The third factor for determining whether there was an absence of meaningful choice, determining whether Plaintiff was a "substantial business concern," is not defined in Herron or Simpson. In other cases, a "substantial business concern" has been found where the parties negotiated at arm's length, the plaintiff was a sophisticated party, and the plaintiff was represented by counsel during negotiations. Laidlaw Envtl. Serv., Inc. v. Honeywell, Inc., 966 F. Supp. 1401 (D.S.C. 1996); see also Hooters of America, Inc. v. Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998)(discussing "substantial business concern" with reference to "marked disparity in parties' bargaining power). As discussed above, Plaintiff was at a significant disadvantage in bargaining power and was less sophisticated in legal matters than Defendants.

Finally, the arbitration and limitation of liability provisions were not conspicuous within the Agreement. The Agreement's "Arbitration and Limitation of Liability of Provision" section is located in section five out of six and on pages 12-16 of a 31-page document. Except for two phrases, the five-page section is not bolded, underlined, or otherwise distinguished in font from the Agreement's other provisions. While the Agreement expressly indicates in bold that disputes between the parties will not be decided by a jury, the discovery limitations[1] and damage caps/exclusions[2] are not distinguished from the surrounding block of text in any way. Viewed as a whole, these factors indicate Plaintiff faced a lack of meaningful choice when signing the Agreement.

The Agreement also includes oppressively one-sided terms. South Carolina courts have found contracts to be unconscionable where the contract included limitations or prohibitions on

[1] §V(A)(6)(c) on p. 13
[2] §V(B)(2)(a)-(d) on p. 15-16

statutory and punitive damages, a lack of mutuality in the rights of the parties, and terms aimed at curtailing claims rather than finding a more efficient or efficacious resolution of disputes. See Simpson, 373 S.C. at 29, 644 S.E.2d at 670. The arbitration and limitation of liability provisions contain several patently unfair provisions. Punitive damages, attorney's fees, and costs are declared non-recoverable and noneconomic damages are limited to $250,000. None of these terms apply to a traditional negligence claim by a nursing home or assisted living resident. There is simply no benefit to Plaintiff in accepting these terms.[3] As such, the arbitration and limitation of liability provisions are so oppressive that a reasonable person would not make them and a fair person would not accept them.

The Agreement's terms also demonstrate a lack of mutuality of rights and obligations. For example, Defendants are permitted fifty more days than Plaintiff to designate expert witnesses. Also, while nearly all claims between the parties are subjected to arbitration, Defendants do carve out an exception for "any action for eviction." These are two instances where Defendants, drafter of an adhesion contract with grossly superior bargaining power, have given themselves rights that Plaintiff does not enjoy. Finally, the Agreement's discovery limitation evinces intent to thwart Plaintiff's search for the truth. By barring non-expert witness depositions, Defendants prevent Plaintiff from speaking with Defendants' employees, the most critical fact witnesses in a nursing home negligence case.

[3] Section five, subsection C of the Agreement purports to articulate the "Benefits of Arbitration and Limitation of Liability Provisions." The supposed benefits include (1) time and money savings in resolving disputes (2) ensuring the viability of nursing homes (3) lower monetary rates for nursing care. As with all other of the Agreement's provisions, Plaintiff had no part in drafting this subsection. Instead, Plaintiff was presented with a preprinted adhesion contract and asked to sign. Thus, the assertion that arbitration and damage recovery limitations benefit Plaintiff depends on Defendants' ability to ascertain and articulate what will benefit Plaintiff without consulting Plaintiff on the matter. Additionally, the lower rates for nursing care cited as a benefit is little solace to a resident who is injured or killed by Defendants' negligence and, because of the Agreement's discovery and damage limitations, left without resource to fully investigate and recover for their loss.

In the past, South Carolina courts have approached the unconscionability issue by looking to decisions in other states interpreting similar contracts. See Simpson, 373 S.C. at 26, 644 S.E.2d at 669 (citing several Ohio cases with similar arbitration clauses). There are multiple cases from other jurisdictions that have found this exact Alterra contract's arbitration and limitation of liability provisions unconscionable. While the precise test for unconscionability varies from state to state, these opinions demonstrate that the Alterra Residency Agreement's terms are one-sided and oppressive. In Ostroff v. Alterra Healthcare Corp., 433 F. Supp. 2d 538, 544 (E.D. Pa. 2006), the district court found the Agreement unconscionable based on the grossly unfair terms. The Ostroff court interpreted the exact same contract Plaintiff signed in this case, a 31-page contract entitled "Alterra Residency Agreement" with an arbitration provision in section five.

Discussing the fact witness deposition ban, the court first noted that a discovery restriction in an arbitration agreement does not render the agreement unconscionable unless the restriction denies the plaintiff "a fair opportunity to present their claims." Id. at 545 (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)). The deposition ban denied the plaintiff a fair opportunity because it denied access to two of the most vital sources of information. Alterra employees and the nursing home's other residents. While the plaintiff's attorney may have been able to convince some of the residents to speak voluntarily, the ban took away any means of compelling their testimony. As for Alterra employees, the plaintiff's lawyer was prevented from speaking with them by legal ethics rules. Ostroff, 433 F. Supp. 2d at 545; see also Rule 4.2, RPC, Rule 407, SCACR ("a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer"). The deposition ban put the

plaintiff at a sizable disadvantage in the arbitration because the plaintiff will have "only limited information as to how the accident in question occurred." Ostroff, 433 F. Supp. 2d at 545.

The Ostroff court also pointed to the lack of mutuality evident from the arbitration agreement. This provision subjects every claim between Alterra and the resident to arbitration except for "any action for eviction." This provision demonstrated that Alterra "crafted an arbitration procedure that favored it over residents." 433 F. Supp. 2d at 547. The lack of mutuality combined with the grossly unfair discovery restriction rendered the contract unconscionable. Id.

Earlier this year, a New Jersey appellate court found the Alterra Residency Agreement's arbitration and limitation of liability provisions to be unconscionable. Estate of Ruszala v. Brookdale Living Communities, Inc., 1 A.3d 806 (N.J. Super. Ct. App. Div. 2010). The Ruszala court called the fact witness deposition ban "palpably egregious" and "clearly intended to thwart plaintiff's ability to prosecute a case" against the nursing home. 1 A.3d at 821. Also, the noneconomic damages cap had the "insidious effect of permitting nursing home operators to budget potential liability as a mere cost of doing business" and prevented plaintiffs from full recovery for their losses. Id. Additionally, by prohibiting punitive damages, the contract took away the public vindication and deterrent benefit justifying punitive damages as a measure of judicial relief. Ruszala, 1 A.3d at 821-22. As a whole, the contract "form[ed] an unconscionable wall of protection for nursing home operators seeking to escape the full measure of accountability for tortious conduct that imperils a discrete group of vulnerable consumers." Id. at 822. Based on the preceding South Carolina authority and persuasive authority from other states, the Agreement's arbitration and limitation of liability provisions are unconscionable and invalid.

3. **The Agreement's arbitration and limitation of liability provisions are void as against South Carolina public policy.**

South Carolina courts will not enforce a contract whose terms are illegal or contrary to South Carolina public policy. Carolina Care Plan v. United HealthCare Serv., Inc., 361 S.C. 544, 556 606 S.E.2d 752, 758 (2004). In other words, a court will not "lend its assistance" to carry out the terms of a contract that violates public policy. Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010). A state's public policy can be "uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of a people." Grant v. Butt, 198 S.C. 298, 17 S.E.2d 689, 693 (1941). South Carolina public policy is "derived or derivable by clear implication from the established law of the state as found in its Constitution, statutes, and judicial decisions." Id.

South Carolina law establishes a clear public policy favoring preservation of "the dignity and personal integrity of residents of long-term care facilities." S.C. Code Ann. § 44-81-20. In furtherance of this policy, South Carolina has a "Bill of Rights for Residents of Long-Term Care Facilities." S.C. Code Ann. § 44-81-40. South Carolina law relating to long-term care facility residents is based on the premise that "[e]very vulnerable adult is entitled to live in safety and in health." S.C. Code Ann. § 44-35-510(1). When there is an unexpected negative result involving a resident in a long term care facility, including assisted living facilities and nursing homes, South Carolina policy provides for a full investigation of the incident. The investigative process is important in ascertaining the negative result's cause, discovering methods for preventing the result in the future, and "identifying gaps in services to vulnerable adults and families." S.C. Code Ann. § 43-35-510(6). South Carolina's "Omnibus Adult Protection Act" establishes an injury investigative system for long term care facilities whose goals include identifying a failure "to exercise reasonable care in hiring, training, or supervising facility personnel or in staffing or

operating a facility and this failure results in the commission of abuse, neglect, exploitation, or any other crime against a vulnerable adult in a facility." S.C. Code Ann. § 43-35-80.

The Agreement's arbitration and limitation of liability provisions are totally incompatible with this public policy. As discussed above, the Agreement's discovery restriction acts as an information shielding device preventing nursing home residents and their families from obtaining the truth about the cause of the resident's injury. Additionally, with civil claims against Defendants severely weakened by the discovery restriction, one of the mechanisms for ensuring the quality of long term residential care is removed. South Carolina's express policy of ensuring residents' safety and investigating instances of injuries in long term care is thwarted by the Agreement's arbitration provision. Additionally, by limiting noneconomic damages and barring punitive damages, the Agreement severely decreases Defendants' financial exposure. Preventing a plaintiff from recover the full amount of his/her actual damages and barring recovery of punitive damages is incongruent with state policy that espouses investigation of nursing home incidents to "identify[] gaps in services" and prevent future negative results. Punitive damages are designed as "a warning and an example to deter the wrongdoer and others from committing like offenses in the future." Gamble v. Stevenson, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991). If the Agreement's arbitration and limitation of liability provisions are enforced as written, these policies will not be served.

4. **The invalid portions of the Agreement's arbitration and limitation of liability provisions are so pervasive that the provisions should be invalidated in full.**

South Carolina law generally favors arbitration of disputes. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009). However, severability is not always proper for an unconscionable provision in an arbitration clause. Simpson, 373 S.C. at 34, 673 S.E.2d at 673. The parties' intent is the primary factor in determining whether the offending

provision is severable. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002). If the offending provision "pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts," then severance looks more like rewriting the contract than effectuating the parties' intent. Simpson, 373 S.C. at 34, 673 S.E.2d at 673 (quoting Booker v. Robert Half Int'l Inc., 413 F.3d 77, 84-85 (D.C. Cir. 2005)); see also Alexander v. Anthony Intern., L.P., 341 F.3d 256, 271 (3rd Cir. 2003)(concluding court "cannot give effect to an agreement to arbitrate afflicted by so much fundamental and pervasive unfairness"). Recognizing South Carolina's policy favoring arbitration, the Simpson court refused to sever an arbitration agreement's offending provisions and instead invalidated the entire agreement because it contained multiple unconscionable provisions that denied statutory rights and violated established public policy. 373 S.C. at 35, 644 S.E.2d at 674 n. 9.

The previous sections of this memo discuss several items within the Agreement's arbitration and limitation of liability provisions that are unconscionable and inconsistent with South Carolina public policy. The Agreement contains multiple severability provisions but Simpson shows that severability clauses are ineffective if unconscionable provisions permeate the overall arbitration provision. This case is similar to Simpson and the court should refuse to enforce the entire arbitration provision rather than attempting to excise the multiple unconscionable items within the provision. Like Simpson, the arbitration provision contains multiple unconscionable items including the discovery restriction and damages cap. Like Simpson, the Agreement's unconscionable provisions are inconsistent with the state's clear public policy related to nursing home care. Therefore, the arbitration clause should be invalidated in full.

CONCLUSION

Based on the foregoing discussion, Plaintiff requests that the court deny Defendants' Motion to Dismiss and Compel Arbitration.

Respectfully submitted.

Lara Pettiss Harrill, Esquire
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Rock Hill, South Carolina
February 25, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Dianne B. Sprott as Conservator and Attorney in Fact for Gladys Hanna Brown,	)	MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND TO COMPEL ARBITRATION, OR ALTERNATIVELY, TO STAY THE ACTION PENDING ARBITRATION
Plaintiffs,	)	
v.	)	
Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter,	)	C.A. No. 2010-CP-43-1495
Defendants.	)	

Defendants, Brookdale Senior Living Inc., FEBC-ALT Investors, LLC, FEBC-ALT Holdings, Inc., Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter ("Defendants" or Brookdale"), have made a Motion to Dismiss and Compel Arbitration, or Alternatively, to Stay the Action Pending Arbitration in this case and this Memorandum is submitted in support of that Motion.

FACTS

Gladys Hanna Brown ("Brown") was admitted to Sterling House of Sumter ("Sterling House") on July 10, 2006 and resided there until May 29, 2009. Alterra Healthcare Corporation ("Alterra") is a Delaware corporation, which became a wholly owed subsidiary of FEBC-ALT Holdings, Inc., which is a wholly owned subsidiary of FEBC-ALT Investors, LLC, which is a wholly owed subsidiary of Brookdale Senior Living Inc. on September 30, 2005. *See* Amended Affidavit of Timothy J. Cesar, Exh. 1 to Defendants' Memorandum ("Cesar Am. Aff."), at ¶¶ 3, 6. Alterra was the lessee, manager, and license holder of Sterling House when Brown was

admitted to Sterling House. *Id.* at ¶¶ 3, 4. Alterra formally changed its name to Brookdale Senior Living Communities, Inc. on February 17, 2009. *Id.* at ¶ 3.

Upon admission to Sterling House, Brown and Plaintiff in this action, Diane B. Sprott ("Sprott"), entered into a residency agreement ("the Agreement") with Alterra.[1] *See* Att. A to Cesar Am. Aff. The first page of the Agreement provides, in all capital letters and underlined, that it is subject to arbitration. *Id.* at 9040001. Section V. of the Agreement is titled "Arbitration and Limitation of Liability Provision" and provides "[a]ny and all claims or controversies arising out of or in any way relating to [the residency agreement] or the Resident's stay . . . shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law." *Id.* at 9040012. The claims covered by the Agreement include claims for "statutory, compensatory or punitive damages and whether sounding in breach of contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted." *Id.*

On July 15, 2010, Sprott, as Conservator and Attorney in Fact for Brown, filed an action against Defendants alleging, among other things, that Defendants were negligent in the care and treatment of Brown. Sprott did not submit her claims to arbitration as required by the Agreement for claims arising out of or any way connected to Brown's residency at Sterling House. Because the Agreement governs all claims asserted by Sprott in this action, Defendants filed the Motion seeking to compel arbitration of Sprott's claims.

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[1] Alterra was the lessee, manager, and license holder of Sterling House when Brown was admitted to Sterling House. Therefore, the Residency Agreement is between Brown, Sprott and Alterra. As explained above, Alterra formerly changed its name to Brookdale Senior Living Communities, Inc. in February 2009, a defendant in this action. Therefore, we will refer to the Agreement as entered into between Brown, Sprott, and Brookdale.

ARGUMENT

A. Sprott is bound to arbitrate the dispute under the Agreement and this Court should enforce her obligation to do so.

1. There is a longstanding philosophy in South Carolina of liberally favoring arbitration.

The South Carolina Supreme Court has followed the lead of the United States Supreme Court and Congress in adopting the philosophy that arbitration provisions should be liberally construed. Since the decision of the District of South Carolina in 1968, *Corbin v. Washington Fire & Marine Ins. Co.*, 278 F. Supp. 393, 396-97 (D.S.C. 1968), South Carolina courts have stated that arbitration of controversies is favored by the law. While South Carolina courts were, at first, hesitant to embrace all the implications of such a liberal policy toward arbitration – e.g., admitting that South Carolina law is preempted by the Federal Arbitration Act – the South Carolina Supreme Court has now embraced the following concept:

> Beginning in the mid-1980's, the United States Supreme Court, interpreting the FAA, essentially "federalized" the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause. The federal policy favoring arbitration, as expressed in the FAA, is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements. The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements.

Zabinski v. Bright Acres Assocs., 553 S.E.2d 110, 115 (S.C. 2001) (internal citations omitted).

Since *Episcopal Housing Corp. v. Federal Ins. Co.*, 239 S.E.2d 647, 649-50 (S.C. 1977), the South Carolina Supreme Court has, in increasingly stronger language, embraced the role arbitration plays in our jurisprudence and has erased any hesitation that may have previously existed regarding the arbitration of all types of claims. Beginning in 1993 with *Osteen v. T.E. Cutino Construction Co.*, 434 S.E.2d 281 (S.C. 1993), South Carolina courts have gone to great lengths to ensure that the intent of the parties to arbitrate, as evidenced by their agreement, is

upheld. *See Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360, 364 (S.C. 2001) ("[W]e are guided by the same liberal policy favoring arbitration."); *Zabinski*, 553 S.E.2d at 116 ("While the parties may agree to enforce arbitration agreements under state rules rather than FAA rules, the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate."); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 89-90 (2000) ("We have ... rejected generalized attacks on arbitration that rests on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law of would-be complainants.'") (internal citations omitted).

The South Carolina Court of Appeals summarized the strong legal and policy bias in favor of arbitration in *Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 588 S.E.2d 136, 138 (S.C. Ct. App. 2003) as follows:

> In South Carolina, the test for determining whether a particular issue is subject to arbitration is articulated in Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). "The policy of the United States and South Carolina is to favor arbitration of disputes." Id. at 596, 553 S.E.2d at 118. "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." Id. at 596-97, 553 S.E.2d at 118. "Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." Id. at 597, 553 S.E.2d 118. To decide whether an arbitration agreement covers a particular dispute, the court must determine whether the factual allegations underlying the claim fall within the scope of the agreement, irrespective of the label given to the cause of action. Id. When interpreting arbitration agreements within the scope of the FAA, DUE REGARD MUST be given to the federal policy in favor of arbitration, and any ambiguity in the scope of the arbitration clause must be resolved in favor of arbitration. Stokes, 351 S.C. at 612, 571 S.E.2d at 714. "Unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." Zabinski, 346 S.C. at 597, 553 S.E.2d at 118. See also Towles v. United HealthCare Corp., 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999) (stating a motion to compel

> arbitration should be denied only where the arbitration clause is not susceptible of any interpretation and would cover the asserted claim).

Further, South Carolina courts have consistently upheld the parties' intent to arbitrate claims under the Federal Arbitration Act even if their agreements fail to conform to the rigid requirements of the South Carolina Uniform Arbitration Act. *See, e.g., Episcopal Housing Corp. v. Federal Ins. Co.*, 239 S.E.2d 647 (S.C. 1977), *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 476 S.E.2d 149, 151 (S.C. 1996), and *Munoz*, 542 S.E.2d at 364. The South Carolina Court of Appeals has held that "[b]oth federal and state policy favor arbitrating disputes." *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 842 (S.C. Ct. App. 1999). The *Towles* court further stated that "[t]his preference for arbitration has manifested itself in legislation and judicial decisions supporting expeditious appeal of decisions denying an application to compel arbitration." *Id.* The above authority is proof of the longstanding philosophy in South Carolina of liberally favoring arbitration when there is clear evidence of the intent to arbitrate.

2. **The Agreement between the parties clearly reflects their intent to arbitrate.**

This court should enforce the clear intent of the parties to arbitrate their dispute. As stated above, the Agreement provides that "[a]ny and all claims or controversies arising out of or in any way relating to [Brown's residency] . . . shall be submitted to binding arbitration . . . and shall not be filed in a court of law. **The parties to that Agreement further understand that a jury will not decide their case.**" *See* Att. A to Cesar Am. Aff. at 9040012 (emphasis in original). This provision is contained within Section V., subsection A. "ARBITRATION PROVISION." Immediately following this subsection, Sprott initialed that she read and understood the provisions contained within Section V., subsection A. *Id.* at 9040015. In fact, Sprott initialed by the statement "Please initial as having read and understood the provisions of

section V." after each subsection within Section V. ARBITRATION AND LIMITATION OF LIABILTY PROVISION, a total of three times. *Id.* at 9040015-16. Further, it should be noted that Sprott initialed immediately after this statement: "**The parties to this Agreement further understand that a jury will not decide their case.**" *Id.* at 9040016 (emphasis in original). This was the second time this statement was contained within Section V. in bold type and the second time Sprott initialed that she understood it. Additionally, both Sprott and Brown signed at the end of the Agreement indicating that it was their intention to enter into this legally binding contract. *Id.* at 9040031. Finally, neither Sprott nor Brown indicated on the Agreement that they did not agree to arbitrate any claims that may thereafter arise. *Id.* at 9040001-31.

It is clear that the intent of the Agreement is to resolve allegations of negligence and personal injury through arbitration. Further, it is the clear intent of Sprott and Brown to enter into this Agreement with Brookdale. As a result, Sprott's claims in this case are governed by the Agreement and this Court should enforce such unambiguous intent of the Agreement. *See Lacke v. Lacke*, 608 S.E.2d 147, 151 (S.C. Ct. App. 2005) (citing references omitted) (stating that where an agreement is clear and capable of legal interpretation, the Court's only function is to interpret its lawful meaning).

Further, South Carolina law is clear that a person that enters into a contact has a duty to read the contract. *Maw v. McAlister*, 166 S.E.2d 203, 205 (S.C. 1969). If a person is capable of reading and understanding, that person is bound by the terms of the contract even if that person failed to read it. *Sims v. Tyler*, 281 S.E.2d 229, 230 (S.C. 1981). Our Courts do not treat agreements to arbitrate differently and have held that a plaintiff's failure to read an arbitration provision does not render it unconscionable. *Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360, 365 (S.C. 2001). Therefore, even if Sprott or Brown now assert that they did understand

that by signing the Agreement they were giving up their rights to a jury trial, that fact does not render the Agreement unenforceable in the face of their clear intent to arbitrate.

Finally, the Agreement is anything but unconscionable. The ARBITRATION AND LIMITATION OF LIABILITY PROVISION Section is five pages out of the 21 page agreement; clearly not hidden within the Agreement. Further, on the front page of the Agreement there is notice to the parties, in all caps and underlined, that the Agreement is subject to Arbitration. Again, conspicuous notice. Additionally, as stated above, the statement that the parties understand that any claims would not go to a jury is stated twice and in bold letters. Finally, the agreement, also in bold type, recommends and encourages the parties to discuss the Agreement with an attorney. In fact, Sprott initialed that she had been encouraged by Brookdale to consult with an attorney on three separate occasions in the document. This arbitration provision is far from unconscionable.

3. **Sprott must be estopped from denying the enforceability of the Agreement.**

As stated above, the arbitration provision is contained within the Residency Agreement, which governs the relationship between Sprott, Brown, and Brookdale with respect to the services and accommodations provided to Brown by Brookdale, payment for those services and accommodations, as well as certain responsibilities and representations of and to the parties. *See* Att. A to Cesar Am. Aff. at 9040001-31. Sprott's claims against Defendants in this action are for negligence, corporate negligence, and gross negligence related to alleged improper care and treatment of Brown at Sterling House. Therefore, Sprott's claims are based upon the terms and conditions of the Agreement as they relate to services, or the alleged lack thereof, provided to Brown by Brookdale as well as Brookdale's responsibilities and representations made to Brown.

The Fourth Circuit has stated 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). Since Plaintiff is relying on the relationship between her, Brown, and Defendants, which is governed by the Agreement, to bring her claims in this action, she should be equitably estopped from asserting that the arbitration provision contained within the Agreement is not enforceable.

B. **The Agreement involves interstate commerce, therefore, the Federal Arbitration Act preempts state law to the extent that state law raises exception to compelling arbitration.**

Even if the Agreement is not valid under the South Carolina Uniform Arbitration Act, S.C. Code Ann. §15-48-10, *et seq.*, it is still valid under the Federal Arbitration Act. As stated in *Zabinski v. Bright Acres Assocs.*, "[a]lthough [a] arbitration provision does not meet the technical requirements of section 15-48-10(a), the inquiry does not end there." 553 S.E.2d 110, 115 (S.C. 2001). Therefore, this Court must consider the applicability of the Federal Arbitration Act. Under South Carolina law, if the contract involves interstate commerce, the Federal Arbitration Act preempts South Carolina law to the extent that the latter invalidates the arbitrability of the claims. *See id.* at 115-16. South Carolina case law has recognized the enforceability of arbitration agreements under the Federal Arbitration Act. *Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360, 363-64 (S.C. 2001) (finding an arbitration agreement that provided it should be governed by the FAA was enforceable in accordance with its terms).

The Federal Arbitration Act provides that "[a] written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2 (2003). For

the last twenty years, federal courts have "essentially 'federalized' the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause." *Zabinski*, 553 S.E.2d at 115. "The basic purpose of the FAA is to overcome state courts' refusal to enforce arbitration agreements." *Id.* (citing *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265 (1995)) (emphasis added).

South Carolina courts have unanimously and consistently stated that even if the contract does not comply with the requirements set forth in the South Carolina Uniform Arbitration Act, the dispute may nonetheless be subject to arbitration under the Federal Arbitration Act if the contract involves interstate commerce. For example, in *Munoz v. Green Tree Financial Corp.*, the South Carolina Supreme Court held that an arbitration provision that did not comply with the notice requirements under the South Carolina Arbitration Act was nevertheless valid and binding because it involved interstate commerce and thus, was subject to the Federal Arbitration Act. 542 S.E.2d at 363-64. Further, in a footnote, the *Munoz* court expressed its view that even if the parties agreed that the state Arbitration Act would apply, the failure of the arbitration provisions of the contract to strictly adhere to the state requirements would not prohibit the court from finding the arbitration provisions nonetheless enforceable under the Federal Arbitration Act, especially if the only alternative is not abiding by the parties' clear intent to arbitrate their claims. *Id.* at n.2.

1. **The Agreement to provide services to Brown involves interstate commerce.**

The South Carolina Supreme Court recognized that the United States Supreme Court has interpreted "involving commerce" broadly and expansively. *Zabinski v. Bright Acres Assocs*, 553 S.E.2d 110, 115 (S.C. 2001). Our courts abide by "Congress' intent to exercise its commerce power in full." *Id.* (citing *Allied Bruce Terminix Co.*, 513 U.S. at 274). To determine

whether a transaction "involves commerce," this court must examine the Agreement, the complaint, and the surrounding facts. *Zabinski*, 553 S.E.2d at 117.

The Agreement involves interstate commerce. First, during Brown's residency at Sterling House, employees 1) attended conferences and training sessions outside the state of South Carolina, 2) were paid out of Wisconsin, and 3) communicated with existing and prospective residents and/or their families who were living outside the state of South Carolina. *See* Cesar Am. Aff. at ¶¶ 9-11; *Towles v. United Healthcare Corp.*, 524 S.E.2d 839, 843 (S.C. Ct. App. 1999) (holding that attending out-of-state conferences, participating in telephone conferences with corporate staff in a different state, and reviewing proposals from out-of-state medical and ancillary service providers constitutes sufficient evidence of interstate commerce). Second, during Brown' residency at Sterling House, it accepted residents from outside the state of South Carolina. *See* Cesar Am. Aff. at ¶ 12.

Third, Sterling House used a variety of goods and services in connection with the care and treatment of Brown during her residency, which were purchased and shipped from states other than South Carolina. *See* Cesar Am. Aff. at ¶¶ 14-15. These purchases of goods and services through interstate commerce meet the requirements for application of the Federal Arbitration Act. *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 476 S.E.2d 149, 152-53 (S.C. 1996) (finding the interstate commerce requirement met because the contract involved transport of materials out of state); *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 118 (S.C. 2001) (finding interstate commerce in a partnership developed property because the partnership used "out-of-state materials, contractors, and investors"); *Munoz*, 542 S.E.2d at 364 (finding interstate commerce in an installment contract case where the builder was domiciled in South Carolina but assigned rights to a Delaware Creditor, agreement was prepared in Minnesota, and

proceeds were disbursed from Minnesota); *Episcopal Hous. Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647, 650-51 (S.C. 1977) (holding construction contract involved interstate commerce where materials, equipment, and suppliers were produced and manufactured out-of-state); *Circle S. Enterprises Inc. v. Stanley Smith & Sons*, 343 S.E.2d 45, 47 (S.C. Ct. App. 1986) (finding construction contract involved interstate commerce where equipment, materials, and subcontractors were furnished from out-of-state). The above discussion is evidence that the Agreement involves interstate commerce and, therefore, the Federal Arbitration Act is applicable in this matter.

2. **The Federal Arbitration Act preempts limitations on the types of claims which may be subject to arbitration.**

The United States Supreme Court has rejected state acts that limit that applicability of arbitration claims. *See Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). *Southland Corp.* provides that any state limitation on the types of claims that may or may not be subject to arbitration is preempted by (and invalidated by) the Federal Arbitration Act and its policy of favoring arbitration of all claims. *Id.* (holding invalid a California statute which sought to limit the arbitrability of certain types of claims).

The Fourth Circuit has also adopted the notion that state laws cannot "immunize" certain types of claims from arbitration. For example, in *Saturn Distribution Corp. v. Williams*, 905 F.2d 719, 722 (4th Cir. 1990) the court rejected an attempt by the Virginia legislature to prohibit the arbitration of claims between automobile dealers and automobile manufacturers. The court stated that such a statute conflicts with the Federal Arbitration Act and is further preempted by the Supremacy Clause. *Id.* Other federal courts have upheld jurisdiction under the Federal Arbitration Act despite arguments that the applicable state law does not favor arbitration of personal injury claims. *See Miller v. Public Storage Management, Inc.*, 121 F.3d 216 (5th Cir.

1997); *OPE Intern. LP v. Chet Morrison Contractors Inc.*, 258 F.3d 443 (5th Cir. 2001). As the United States Supreme Court and Fourth Circuit have held, a state may not qualify those types of claims which may or may not be arbitratable. Therefore, any argument that the above captioned case is "different" because it involves claims for personal injuries is of no merit as that argument has been rejected by numerous courts. South Carolina courts have suggested that it would be against the general policy favoring arbitration provisions to inquire into the fairness of compelling the parties to arbitrate. *See Swentor v. Swentor*, 520 S.E.2d 330, 336 (S.C. Ct. App. 1999) ("an inquiry into the substantive fairness of an [arbitration] agreement, however, would be inconsistent with the Arbitration Act").

Therefore, to the extent that Plaintiff makes an argument that this Court cannot compel arbitration under South Carolina law, the FAA applies as the Agreement involves interstate commerce and this Court should compel arbitration pursuant to it.

CONCLUSION

For the reasons set forth above, this Court should grant the Defendants' Motion and should dismiss this case and compel arbitration between the Plaintiff and Defendants.

Respectfully submitted,

Mary A. Giorgi

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Greenville, SC
March 2, 2011

State of South Carolina)
)
County of Sumter)

Dianne B. Sprott as Conservator
and Attorney in fact for Gladys Hanna Brown,
Plaintiffs

vs.

Motions Hearing
2010-CP-43-01495

Brookdale Senior Living, Inc. et.al.,
Defendants

BEFORE THE HONORABLE W. Jeffrey Young, Judge.

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

Ms. Lara Pettiss Harrill,
Attorney for Plaintiffs

Mr. Jordan C. Calloway,
Attorney for Plaintiffs

Ms. Luanne L. Runge,
Attorney for Defendants

Margaret T. Sullivan,
Court Reporter

THE COURT: The next one is Dianne B. Sprott versus Brookdale Senior Living. Okay. Ms. Harrill and Ms. Runge. This is case of Dianne B. Sprott, as conservator for Gladys Hanna Brown versus Brookdale Senior Living, Incorporated. FEDC ALC, Investments LLC FEDC- Holding Incorporated and Brookdale Senior Living, Incorporated; doing business as Sterling House in Sumter. This is under Docket No. 2010-CP-43-1495. This is, as I understand, a Motion to Compel; is that correct, Ms. Harrill?

MS. HARRILL: Yes, Your Honor.

MS. RUNGE: Your Honor, it's a Motion to Compel the Corporation.

THE COURT: You may, proceed.

MS. RUNGE: Thank you, Your Honor. Luanne Runge, for the Defendants. Your Honor, we have moved in response to the complaint to compel arbitration in this case. We submitted a brief. And we hope that Your Honor has a copy.

THE COURT: I do.

MS. RUNGE: And I probably have an extra copy for you.

THE COURT: You are, Ms. Runge?

MR. RUNGE: Yes, Your Honor. These

arguments and brief, Judge, I just want to quickly go over what our arguments are in this case. This is a case filed by the representative of a former resident of Sterling House of Sumter. It involves a claim of negligence regarding her care while she was a resident there.

When she entered the facility, an Admission Agreement was signed; which is attached to the memorandum.

THE COURT: I've got it; yes.

MS. RUNGE: And here today, Judge, we are here to argue that this case should be dismissed and arbitration should be compelled. Because it is clear of the intent of the parties based upon this agreement, that they intended for a dispute such as this to be submitted to finding and arbitration. Ms. Brown who is a resident, came to Sterling House in Sumter in July of 2006, and she stayed there until May of 2009.

She signed this agreement as did her daughter, Dianne Sprott, on July 10th 2006. If you look at the Arbitration Agreement, Judge, there are a number of provisions which are key. The first one on Page 12, which is Section 5, Paragraph A. Which says any and all claims or

controversies arising out of or in any way related to this agreement or the resident's stay found in contract or tort, shall be submitted to binding arbitration.

About midway down that in bold letters, it says: Parties to this agreement further understand that the jury will not decide their case. That's on Page 12.

THE COURT: I see that.

MS. RUNGE: This is the Arbitration Agreement for you to go on through Page 15, where you will see in the middle of Page 15, there are initials DVS. And that's the Plaintiff, Ms. Sprott, indicating that she has initialed that, and read and understood those provisions.

And then if you turn to Page 16, Subsection C, of then such arbitration, and at the bottom of that page, there is another signature DBS of the Plaintiff, Ms. Sprott, indicating that she understands the jury will not deny this case; understands the provisions of that agreement; as well as, that she acknowledges that she has been encouraged to discuss this agreement with an attorney.

And of course, the entire agreement itself

was signed by Ms. Sprott on Page 20 of the agreement. In addition, Judge, on the first page of the agreement at the bottom, as to the language: "This agreement is subject to arbitration," in all caps and underlined.

THE COURT: Well there is a statute which says what you must do.

MS. RUNGE: Correct.

THE COURT: Is it your position that this document conforms to that statute?

MS. RUNGE: Yes, sir, Your Honor. And if the provisions of -- if there is some technicality in the South Carolina Uniform Arbitration Act, which is not that we contend that the FAA applies here. We submitted the affidavit of Tim Cesar of Brookdale, who in his affidavit, goes through the basis for interstate commerce. And that's applying the Federal Arbitration Agreement.

So, Judge, if, you know, if you look at this agreement in the multi-pages, we have gotten here; 5 pages out of a 20 page agreement, covering arbitration, we think that it's clear the parties intended to submit this matter to arbitration.

THE COURT: Yes, sir.

MR. CALLOWAY: Your Honor, Jordan Calloway

on behalf of the Plaintiff here with Ms. Harrill. Our wish is that this agreement is unconscionable, and therefore, should be unenforceable. Under South Carolina law for a contract to unconscionable there has to be indications that, excuse me, that there is absence of any choice and it's oppressive or one sided terms. And we think that if you look at the look at the agreement under the circumstances in which it was entered into, and the terms of the agreement here itself---

THE COURT: How is the terms oppressive?

MR. CALLOWAY: The terms, Your Honor, are material---

THE COURT: There are several places she could have gone. Why did she sign this agreement?

MS. SPROTT: Just because I am---

THE COURT: I am asking him the question.

MS. SPROTT: Yes, sir.

MR. CALLOWAY: She was thinking here, you know, she was at home with a sitter. She needed nursing care. She went to the place she thought she could get care immediately. Because she needed skilled nursing care immediately, at that time.

THE COURT: There are several places in Sumter to go. There is other places. Why is this agreement as laid out, oppressive?

MR. CALLOWAY: Your Honor, this agreement sets out discovery limitations. It prevents the Plaintiff deposing anyone other than expert witnesses. We couldn't depose the employees of the Plaintiff's facility. We can't depose other residents of the facility. We couldn't find the truth as to exactly what happened here. So and we can't talk to them about their position, because under in Rule 4.2 of Rules of Professional Conduct, we can't speak to them without their permission. So we can't depose them. We can't get to the truth of exactly what happened here.

There is also a limitation on damages; non-economic damages that's $250,000 which is below the South Carolina Non-economic Damages Act. And there is also a complete bar on punitive damages. Your Honor, this is also a reservation of all this agreement purports to cover all claims between the parties. There is a reservation on the rights of the Defendants to maintain a claim for eviction in Court against the Plaintiffs. There is a lack of mutuality there as well.

Your Honor, this agreement, this precise agreement, has been determined to be unconscionable in two other states; in Pennsylvania, and also in Court in New Jersey just last year.

THE COURT: Have you got any law from South Carolina on it?

MR. CALLOWAY: I'm sorry?

THE COURT: Do you Have you got any law from South Carolina?

MR. CALLOWAY: As far as unconscionability on this precise agreement; no. But I just made that point so that other courts looked at this, and said, these terms are one sided and oppressive. And as in our memorandum, Your Honor, we cited both those cases and we also cited some law from South Carolina on unconscionability. And oppressive or one sided terms.

THE COURT: Okay. That as a good answer. You are capable. That was a good answer, go ahead. I knew he could do it. You tried to interrupt him. I just let him do it.

MR. CALLOWAY: Your Honor, also another thing keep in mind on the unconscionability argument, this is an Adhesion contract; a consumer

contract, with a woman who diagnosed senile dementia; who was need of better care at this time. This consumer contract, Adhesion Contracts are looked at with skepticism by the board.

THE COURT: But she was -- the person who was impaired although she signed it, she wasn't the responsible party.

MR. CALLOWAY: I am sorry, Your Honor. I didn't mean cut you off, but that's actually was signed by her daughter for court purposes.

THE COURT: That's okay. But I mean, she was not the responsible party; it was her daughter that had all of her faculties and everything like that; correct?

MR. CALLOWAY: Yes. The crux of our argument goes to the circumstance under which this contract was entered and the terms of the contract itself; rather than anything about agency or that part.

THE COURT: Okay. Go ahead.

MR. CALLOWAY: Your Honor, that would be the crux of our argument; that based on the status of South Carolina law, I mean, it was mentioned, the FAA was mentioned. The FAA does come with the circumstance. The FAA does allow for, excuse me.

FAA does not require arbitration in instances where the contract is unconscionable, regardless of the law on the Supreme Court level all the way down. The state law in regards to unconscionability can knock out an arbitration agreement. Just because the FAA comes, doesn't mean it's automatically sent to arbitration.

THE COURT: You're right, if they entered into this agreement they rescind appropriately. Yes, Ms. Runge.

MS. RUNGE: Just a few things in reply, Your Honor. There is no evidence that there is Adhesion Contract here. And as you know Adhesion Contracts are not per se unconscionable in the Perin case.

Also, the Supreme Court in the Perin case, looked at the issue of a meaningful choice here. And I would argue that this case is at least as meaningful in the Arbitration Agreement in that case; if not more so. In that one the Arbitration Agreement was a separate one page document. Here was have got 5 pages. In that case, both Plaintiffs signed the agreement. Here, Ms. Brown and Mr. Sprotts signed this agreement. It is clearly labeled to be an Arbitration Agreement in

bold capital letters underlined in both cases. As well here there are multiple times where a signature was indicated understanding the Arbitration Agreement.

The important terms are in the body and again above the signature line, in both cases. And it is not the most ambiguous. It's a very good contract. We talked about before.

In response to the claims about other courts looking at this agreement, they were looking at the limitations of liability provisions; which if this court finds a problem here, can certainly be severed. Under the severability clause is for this. But we believe those cases are distinguishable as well. And finally, that there's no reason that the parties should not arbitrate this matter. Thank you.

THE COURT: So you all have both provided me with memorandum.

MR. CALLOWAY: Yes, Your Honor.

MS. RUNGE: Yes, Your Honor.

THE COURT: Let me have an opportunity to read over them, and then I will give you my ruling once I had opportunity to do that.

--End of Requested Transcript of Record---

C-E-R-T-I-F-I-C-A-T-E

I, Margaret T. Sullivan, Court Reporter, for the Third Judicial Circuit of the State of South Carolina, do hereby Certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the Court of Common Pleas/nonjury on July 6th 2011, Sumter County, Sumter, South Carolina.

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

12/9/11
DATE

Margaret T. Sullivan
COURT REPORTER
My Commission expires: 9/7/2021

Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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Attorneys for Appellant

August 7, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-43-1495

Dianne B. Sprott as Personal Representative
of the Estate of Gladys Hanna Brown, ... Appellant,

v.

Brookdale Senior Living, Inc.; FEBC-ALT
Investors, LLC; FEBC-ALT Holdings, Inc.;
and Brookdale Senior Living Communities, Inc.,
d/b/a Sterling House of Sumter, ... Respondents.

SUPPLEMENTAL RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Dianne B. Sprott as Conservator and Attorney in Fact for Gladys Hanna Brown,	)	
Plaintiff,	)	MOTION TO STAY DISCOVERY AND FOR PROTECTIVE ORDER
v.	)	
	)	C.A. No. 2010-CP-43-1495
Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter,	)	
Defendants.	)	

TO: DIANNE B. SPROTT AS CONSERVATOR AND ATTORNEY IN FACT FOR GLADYS HANNA BROWN AND HER ATTORNEY, LARA PETTIS HARRILL OF MCGOWAN HOOD & FELDER, LLC

PLEASE TAKE NOTICE that Defendants, Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter ("Defendants" or "Brookdale"), by and through their undersigned counsel, will move the Court for a protective order pursuant to Rule 26(c) of the South Carolina Rules of Civil Procedure, as soon as counsel can be heard, providing that Defendants are not required to respond to Plaintiff's First Interrogatories to All Defendants or Plaintiff's First Requests for Production to All Defendants, copies of which are attached hereto as Exhibits A and B, and staying any further discovery in this action as to Defendants until after the hearing and disposition of Defendants' pending Motion to Dismiss and to Compel Arbitration, or Alternatively, to Stay the Action Pending Arbitration. Defendants make this motion on the ground that the requested discovery is not likely to produce facts necessary to defeat Defendants' pending Motion to Dismiss and to Compel Arbitration, or Alternatively, to Stay the Action

Pending Arbitration and on the ground that responding to this discovery will require a substantial amount of time and cause Defendants to incur significant expense. Further, if Defendants motion is granted, discovery may be narrowed or limited, which is good cause for staying discovery in the case to protect Defendants from undue burden and expense.

This motion is based upon the pleadings in this matter, Defendants' pending Motion to Dismiss and to Compel Arbitration, or Alternatively, to Stay the Action Pending Arbitration, the South Carolina Rules of Civil Procedure, and upon applicable common and statutory law.

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Attorneys for Defendants

Greenville, S.C.
October 26, 2010

EXHIBIT A

Interrogatory No. 16:
Identify each person and their position or former position who received any type of warning, disciplinary action, or other type of reprimand (written or oral) from Sterling House of Sumter as a result of the physical condition, care, and/or treatment of Gladys Hanna Brown during her residency.

Interrogatory No. 17:
Please state whether your right, license, certificate or other authority to operate a residential care facility were, or have been suspended or revoked by any state in the past 5 years.

Interrogatory No. 18:
Please state the complete name, address, and telephone number of each person whom you will or may call as a witness to the trial of this case.

Interrogatory No. 19:
Please identify each expert witness whose opinion is to be offered in support of any aspect of Defendant's proof at trial, including each expert's educational background, specialty training, and a listing or his or her membership and position in professional organizations. Also, state for each expert individually:

a. The subject matter of his or her testimony;
b. The facts upon which he or she relies;
c. Each opinion that he or she will express;
d. The medical and/or scientific literature, authority, and or basis for the opinion(s); and
e. The grounds for each opinion to which he or she will testify.

Interrogatory No. 20:
Please state the complete name, address, title, and official capacity of each person who contributed in any way to the gathering of the information upon which your answers to these Interrogatories are based.

Respectfully submitted,

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Rock Hill, South Carolina
September 22, 2010

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	
	)	C.A.No.: 2010-CP-43-1495
Dianne B. Sprott as Conservator and Attorney in fact for Gladys Hanna Brown,	)	
	)	**PLAINTIFF'S FIRST REQUESTS FOR PRODUCTION TO ALL DEFENDANTS**
Plaintiff,	)	
	)	
vs.	)	
	)	
Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and, Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter,	)	
	)	
Defendants.	)	

TO: LUANN RUNGE, ATTORNEY FOR THE ABOVE NAMED DEFENDANTS:

Pursuant to Rule 34 of the SOUTH CAROLINA RULES OF CIVIL PROCEDURE, Plaintiff hereby propounds and serves the following requests for production of documents upon Defendants Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and, Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter, each to be answered separately, in writing and under oath, within **thirty (30) days** from the date of the service hereof:

DEFINITIONS AND INSTRUCTIONS

As used in Plaintiff's interrogatories, supplemental interrogatories, requests for production of documents, or requests for admissions in this case, the following shall be the meaning and sense in which each term is used:

1. As used herein, the terms "you," "your," "Defendant," and "this Defendant" means and includes Brookdale Senior Living, Inc.; FEBC-ALT Investors. LLC; FEBC-ALT Holdings, Inc.; and, Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter, its agents, affiliates, employees, its attorneys, and anyone else acting on your behalf.

2. As used herein, the term "person" includes a natural person, firm, association, organization, partnership, business trust, corporation, or public entity.

3. As used herein, "writing and recording" shall be defined pursuant to Rule 1001(1), SCRCP.

4. As used herein, the term "photograph" shall be defined pursuant to Rule 1001(2), SC.

5. As used herein, the term "claim" as used herein shall mean and include any claims or allegations set forth in any complaint or counterclaim filed or to be filed in this action.

6. As used herein, the term "person" shall mean any individual, firm, partnership, corporation, proprietorship, association, governmental body, or any other organization or entity.

7. As used herein, the term "date" or any other word relating to a date shall mean the exact date, month and year if ascertainable or if not, the best available approximation.

8. As used herein, the terms "identify" or "Identity," when used in reference to:

   a. An individual shall mean to state: his or her full name, age, sex, present address or last known address, telephone number, job title, physician or professional or business affiliation, social security number and name of employer.

   b. A firm, partnership, corporation or other entity, shall mean to state: its full

name and last known address, telephone number and the legal form of such entity or corporation.

c. A writing or recording, shall mean to give a brief description of the document either by its title, or if it has no title, its content, to give the date of preparation as shown on the document and to give the name, address and position of the custodian thereof. Each of these definitions and instructions is hereby incorporated into each of the requests or interrogatory to which it pertains.

9. In responding to requests for production of documents, you are requested to furnish all documents known or available to you regardless of whether these documents are possessed directly by you or your agents, employees, representatives, investigators, or by your attorneys or their agents, employees, representatives or investigators.

10. In responding to requests for production of documents, if you are unable to produce all of the requested documents, produce to the extent possible and specify the reasons for your inability to produce the remainder.

11. In responding to requests for production of documents, produce every copy of a responsive writing or record where the original is not in the possession, custody or control of the Defendant and every copy of such writing or record where such copy is not an identical copy of the original, or where such copy contains any commentary or notation whatsoever which does not appear on the original.

12. In responding to requests for production of documents, you are requested to furnish all documents known or available to you regardless of whether these documents are possessed directly by you or your agents, employees, representatives, investigators, or by your attorneys or their agents, employees, representatives or investigators.

13. In responding to requests for production of documents, if any of these documents cannot be produced in full, produce to the extent possible, specifying your reasons for your inability to produce the remainder and stating whatever information, knowledge or belief you do have concerning the unproduced portion.

14. In responding to requests for production of documents, if any documents or things requested were at one time in existence, but are no longer in existence, please so state, specifying for each document or thing:

a. The type of document or thing;

b. The types of information contained thereon;

c. The date upon which it ceased to exist;

d. The circumstances under which it ceased to exist;

e. The identity of all persons having knowledge of the circumstances under which it ceased to exist; and

f. The identity of all persons having knowledge or who had knowledge of the contents thereof.

15. In responding to requests for production of documents, if any documents covered by this request are withheld by reason of a claim of privilege, a list shall be furnished, as part of your required response to this request, identifying each document for which a privilege is claimed together with the following information with respect to each document withheld: date, sender, recipient, the identity of any person to whom copies were furnished, general subject matter, basis on which the privilege is claimed and the paragraph of the request to which such document relates.

16. This request is a continuing one. If, after producing documents or responding to an interrogatory, you obtain or become aware of any further documents or other information responsive to the request, you are required to produce or disclose to Plaintiffs such additional documents and/or information.

ny documents are withheld from production by providing the name and title of the nor, the recipients of the documents, the date of creation and to an alleged privilege, unity or other objection, identify fully any such documents, give a general description he contents thereof, and state the basis upon which the objection is based. See Rule)(5).

NOTE. These requests shall be deemed continuing so as to require supplemental production *uant to Rule 26(e) of the South Carolina Rules of Civil Procedure.*

REQUESTS FOR PRODUCTION

Request for Production No. 1:
Please produce copies of all the Organizational Directories and Charts for the above named Defendants, including but not limited to, charts showing corporate structure, charts/directories which contain the various organizational divisions, as well as the names of the Board of Directors and/or Trustees, Corporate Consultants, Chief Executive Officer(s), Chief Financial Officer(s), Regional Vice President(s), Regional Director(s) of Operations, and the Department Heads.

Request for Production No. 2:
Please produce all insurance agreements and/or policies, in their entirety, which afford protection to Defendant or its employees and agents for the acts and omissions set forth by Plaintiff in the above-referenced action including but not limited to, primary, umbrella, and excess policies, as well as any riders to those policies, which may obligate any respective insurance company to satisfy part or all of a judgment which may be rendered in this action against Defendant. Please provide copies of the complete policies (instead of just the Declarations page only).

Request for Production No. 3:
Any and all records, including invoices, which would identify the amount which was spent on staff development and training during the years 2007 and 2008.

Request for Production No. 4:
A complete copy of any and all contracts between Defendants and any management companies, outside consultants, medical directors and executive directors for 2009.

Request for Production No. 5:
Please produce any and all consultant reports, audits, and "scorecards" created for any and all departments of Sterling House of Sumter for 2009.

Request for Production No. 6:
Please produce any and all contracts, agreements, or any other type of document relating to ownership and management of Defendant(s), management agreements, sales agreements, leases, and/or contracts, relating to parties, owners of the facility, real estate, building or nursing home license, managers of Defendant(s), employers of any and all staff, providers of any training, supervision or oversight of any type of staff of Defendant, providers of therapy of any kind, dietary consultation, pharmacy and drug services in effect during the time period of Plaintiff's residency.

Request for Production No. 7:
Please produce a copy of all electronic communications and attachments including but not limited to emails produced by any employee of Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and/or Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter concerning Gladys Hanna Brown and her residency and/or care.

Request for Production No. 8:
Please produce all Management Agreements (including interim management agreements) including all exhibits, schedules, or attachments thereto between Sterling House of Sumter and its subsidiaries or affiliates. Please note that this request is for the year 2009.

Request for Production No. 9:
Please produce a copy of the job description for:

(a) those individuals who charted the plaintiff's medical records;
(b) Certified nursing assistants/aides;
(d) Social worker;
(e) Administrator and/or Executive Director;
(f) Director of Nursing;
(g) Registered Nurse;and,
(h) Licensed Practiced nurse.

Request for Production No. 10:
Please produce color copies of all work schedules, staffing sheets, employee sign-in sheets, and timecards, and/or times sheets showing the identity, number (quantity), and classification (e.g. LPN, RN, CNA, Social worker, Certified Dietary Manager, etc.) of any personnel who worked on May 29, 2009 at Sterling House of Sumter.

Request for Production No. 11:
Please produce a complete copy of the entire financial file, and/or business office file of Gladys Hanna Brown. This request is including but not limited to the billing records, account charges and payment for services, of Gladys Hanna Brown during her residence at Sterling House at Sumter.

Request for Production No. 12:
Please produce any and all documents that relate to the intake or admission of Gladys Hanna Brown as a resident of Defendants' facility. This request is including, but not limited to the intake form, the transfer form, the admissions contract.

Request for Production No. 13:
All notes of any kind that mention or refer to Gladys Hanna Brown, by Defendants personnel during her residency and six months after, including, but not limited to, spiral notebooks, telephone messages, e-mails, computer files, in-house forms, report sheets, logs, pass-down logs, books, change of shift reports, assessment reports, and/or other such documents or communications.

Request for Production No. 14:
All quality assurance reports, documents, studies, complaints or incident investigation documents, which in any way refer to or concern Gladys Hanna Brown. This would include any risk assessment, risk management or risk audits performed by any insurance agency contemplating coverage for the Defendants.

Request for Production No. 15:
Please produce a color copy of the entire original medical chart for Gladys Hanna Brown during the nursing home residency, including all documents relating to the care, treatment or services provided to Gladys Hanna Brown at Defendant Sterling House of Sumter. This request includes but is not limited to incident and/or accident reports that apply to the resident and any and all other written documents whatsoever whether they be maintained by the records custodian or on the floor or anywhere else in your custody and control.
This request includes, but is not limited to, **all** documents which are required to be created and maintained by you in accordance with all federal and state regulations. Further, any document created by you concerning Gladys Hanna Brown, whether or not such record is normally maintained as part of the "nursing home chart" is requested.

Plaintiff's counsel will arrange for the copying of the requested documents if necessary.

Request for Production No. 16:
Any writing or recording which these Defendants contend are relevant or which it may introduce at the trial of this action.

Request for Production No. 17:
Any and all statements of possible witnesses, whether written, recorded, summarized or otherwise preserved in any manner concerning the facts or issues in this action.

Request for Production No. 18:
Please produce all employment and personnel records in their entirety for all the individuals who provided care to Gladys Hanna Brown, or in any way monitored, assisted or supervised her care. This request includes any kind of written, typed, written, printed or recorded material whatsoever, including, but not limited to, resumes, applications for employment, verifications of credentials or qualifications, education and/or in-service documentation, background checks, criminal record checks, research investigation, references, current telephone numbers and addresses, forwarding addresses, agreements concerning employment, contracts of employment or engagement, acknowledgment of liability, evaluations, reprimands, disciplinary warning notices, time cards, time sheets, schedules, notes, transcription of notes, memorandums, letters from any person, including the employee or agent, who is the subject of the file, telegrams, publications, pictures, recordings, log books, individual payroll period reports, and business records which are collected and maintained for the above identified employees in any file or computer database. This request also includes the personnel file for the Executive Director of Sterling House of Sumter during Mrs. Brown's residency.
Plaintiff agrees to keep this information confidential.
In lieu of producing entire files, Plaintiff agrees to review these files and indicate which documents should be copied.

Request for Production No. 19:
Please produce an index of each and every Policy and Procedure Manual and/or Quality Improvement Manual which was in effect at Sterling House of Sumter during the Plaintiff's residency.

Request for Production No. 20:
Please produce an index of every orientation manual which was in effect at the nursing home during the Plaintiff's residency.

Request for Production No. 21:
If an in-house investigation was conducted by or on behalf of Brookdale Senior Living, Inc.; FEBC-ALT Investors, LLC; FEBC-ALT Holdings, Inc.; and/or Brookdale Senior Living Communities, Inc. d/b/a Sterling House of Sumter in the ordinary course of business, subsequent to Gladys Hanna Brown's injuries on or about May 29, 2009 and before Defendant received formal notice of this lawsuit, please provide any and all documentation relating to such investigations, including but not limited to:

(a) All documents, drawings, films, models or other items generated or obtained by or on behalf of Defendant, which are relevant or contain information relevant to the cause of the occurrence in question, the injuries allegedly sustained by the Plaintiff, and/or Defendant's affirmative defenses to Plaintiff's causes of action;
(b) All statements obtained by or on behalf of the Defendant;
(c) All physical and/or tangible items and/or potentially usable evidence obtained by or on behalf of the Defendant from the scene of the occurrence in question;
(d) Any quality assurance report, study, complaint or incident investigation, or investigation of the alleged substandard care or abuse which in any way refers to or concerns Gladys Hanna Brown.

Request for Production No. 22:
All incident reports submitted by any employee or agent of Defendants in regard to Gladys Hanna Brown

Request for Production No. 23:
All reports of all experts; with a current Curriculum Vitae; data and other information considered by the expert in forming opinions; all correspondence between this expert and the Defendant and/or Defendant's attorney and/or representatives; all exhibits to be used as a summary of or support for the opinions; and all treatises, texts or authorities upon which the expert especially relied.

Request for Production No. 24:
For Defendant's expert, any and all reports, statements of opinions, opinion summaries, and all drafts of such reports, statements, and summaries, issued, written, and/or approved by the expert in this case.

Request for Production No. 25:
For Defendant's expert, the data and other information considered by the expert in forming the opinions, to include the methodology.

Request for Production No. 26:
For Defendant's expert, copies of all of the expert's prior depositions and/or Court testimony in any cases in which the expert has testified.

Request for Production No. 27:
For Defendant's expert, any and all publications, articles, papers and postgraduate papers and/or transcripts which the expert has authored, prepared or presented.

Request for Production No. 28:
For Defendant's expert, any and all brochures, advertisements, newsletters, seminar materials, expert listings, expert directories, and promotional materials which in any manner have promoted or offered the expert's services, which have been used, published, or disseminated at any time in the past five years.

Request for Production No. 29:
For Defendant's expert, any and all correspondence, memos, furnished to the expert by the Defendant and its attorneys or representatives in this case.

Request for Production No. 30:
For Defendant's expert, copies of all opinion reports, opinion statements, and opinion summaries prepared by the expert in any prior litigation in which the expert has rendered opinions.

Request for Production No. 31:
Any and all correspondence, reports, charts, photographs, drawings, diagrams, videotapes, brochures, manuals, treatises, measurements, notes or other documents, materials or physical evidence of any kind relied upon by any expert witness in forming an opinion in this case whom Defendant expects to call as a witness at trial.

Request for Production No. 32:
Please produce a privilege log with author, recipients, subject matter, date, and privilege asserted for each document on which privilege is claimed.

Request for Production No. 33:
Please provide complete copies of any and all documents obtained by the Defendant or defense counsel pursuant to any Freedom on Information request or subpoena from any source in connection with this action.

Request for Production No. 34:
Please produce a graphic representation such as a blueprint, layout, floorplan, drawing or illustration which accurately represents the floor plan of Defendant facility during Plaintiff's residency, and which also correctly identifies the room numbers in the facility.

Respectfully submitted,

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Rock Hill, South Carolina
September 22, 2010

Certificate of Counsel

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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August 23, 2012