

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

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**SC Court of Appeals**

Appeal from Spartanburg County  
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Case No. 2018-CP-42-03447  
Appellate Case No. 2020-001107

Estate of Barbara Owens,  
by and through her Personal Representative, Mary Jane McCraw,  
Individually and on behalf of Statutory Beneficiaries,

Respondent,

v.

Fundamental Clinical and Operational Services, LLC;  
Fundamental Administrative Services, LLC;  
THI of South Carolina, LLC;  
THI of South Carolina at Spartanburg, LLC  
d/b/a Magnolia Manor-Spartanburg,

Appellants.

**INITIAL BRIEF OF APPELLANTS**

**CLEMENT RIVERS, LLP**  
Stephen L. Brown (SC Bar No. 66468)  
D. Jay Davis, Jr. (SC Bar No. 12084)  
Russell G. Hines (SC Bar No. 72100)  
Kate C. Mettler (SC Bar No. 103762)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488

*Attorneys for Appellants*

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err in denying the Facility’s<sup>1</sup> motion to compel Plaintiff’s<sup>2</sup> claims to arbitration and, in turn, the Other Defendants’<sup>3</sup> corresponding motions for a stay of this lawsuit pending the outcome of the Facility’s motion and any resulting arbitration between Plaintiff and the Facility?<sup>4</sup>**
- A. Did the circuit court err in rejecting the Facility’s merger/equitable estoppel argument? That is, did it err in failing to find (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Owens effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement?**
- B. At a minimum, did the circuit court err in denying the Facility’s alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement’s enforceability?**
- II. Assuming, *arguendo*, it was appropriate under the circumstances for the circuit court to enter a confidentiality order, did the court err in entering the “Subject Confidentiality Order”?<sup>5</sup> That is, should it have entered Appellants’ proposed confidentiality order instead, or at least**

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<sup>1</sup> The “Facility” is Defendant-Appellant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg. It is a skilled nursing facility in Spartanburg County.

<sup>2</sup> “Plaintiff” is Plaintiff-Respondent, Estate of Barbara Owens (“Ms. Owens”), by and through her Personal Representative, Mary Jane McCraw (“Ms. McCraw”), Individually and on behalf of Statutory Beneficiaries.

<sup>3</sup> The “Other Defendants” are Defendants-Appellants Fundamental Clinical and Operational Services, LLC (“FCOS”); Fundamental Administrative Services, LLC (“FAS”); and THI of South Carolina, LLC (“THI”), collectively. “Appellants” refers to the Facility and the Other Defendants, collectively.

<sup>4</sup> Out of an abundance of caution, to be clear, this Issue, and the corresponding Argument, challenges the circuit court’s ruling on both Appellants’ principal motions and their subsequent motion under Rule 59(e), SCRCF.

<sup>5</sup> The “Confidentiality Order” is defined in the Statement of the Case.

**omitted the “Sharing Provision”<sup>6</sup> from the Subject Confidentiality Order?**

### **STATEMENT OF THE CASE**

With the help of Ms. McCraw, her daughter, Ms. Owens was admitted to the Facility on July 23, 2015. (*See* Admission Agmt.; Aff. of Ms. McCraw.) In conjunction with Ms. Owens’s admission to the Facility, Ms. McCraw signed an Admission Agreement<sup>7</sup> and an Arbitration Agreement<sup>8</sup> on Ms. Owens’s behalf. By her signature on the Arbitration Agreement, Ms. McCraw expressly “represent[ed] that . . . she ha[d] the authority to sign on [Ms. Owens’s] behalf so as to bind [Ms. Owens] as well as [herself].” (Arbitration Agmt.)

Plaintiff commenced this wrongful death and survival action on October 4, 2018, in the Court of Common Pleas, Spartanburg County. (*See* Summons; Compl.) Plaintiff’s claims are premised on alleged deficiencies in the care Ms. Owens received during her residency at the Facility, which, according to Plaintiff, caused her decline and eventual death. (*See* Compl.) While acknowledging that the Other Defendants (whom Plaintiff refers to as “Corporate Defendants”) did not

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<sup>6</sup> The “Sharing Provision” is defined in the Statement of the Case.

<sup>7</sup> (Admission Agmt.)

<sup>8</sup> (Arbitration Agmt.) Without question, the Arbitration Agreement is governed by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the “FAA”). The Arbitration Agreement expressly states that the FAA applies. (Arbitration Agmt.) Moreover, our Supreme Court has held that skilled nursing facility admission agreements implicate interstate commerce and, thus, the FAA. *Dean v. Heritage*

provide any direct care or services to Ms. Owens, Plaintiff alleges their control over the Facility directly affected the quality of Ms. Owens's care. (*See* Compl.; *see also* 7/13/20 Order p. 3; Pl.'s Mem. in Opp'n to Facility's MTCA p. 2.) Appellants deny Plaintiff's allegations on all fronts.

Based on the Arbitration Agreement Ms. McCraw signed for Ms. Owens, the Facility moved to compel Plaintiff's claims to arbitration (the "Motion to Compel Arbitration"). (Facility's MTCA; *see also* Facility's Mem. in Supp. of MTCA.)<sup>9</sup> The Other Defendants moved to stay the lawsuit pending the outcome of the Motion to Compel Arbitration and any resulting arbitration between Plaintiff and the Facility (collectively, the "Motions to Stay"). (Other Defendants' Mots. to Stay; *see also* Other Defendants' Mem. in Supp. of Mots. to Stay.)

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*Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381–82, 759 S.E.2d 727, 732–33 (2014).

<sup>9</sup> Without question, Plaintiff's claims against the Facility are within the scope of the Arbitration Agreement. (*See* Arbitration Agmt. ("[A]ny controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to [Ms. Owens's] stay at Facility, or to the provisions of care or services to [Ms. Owens], including but not limited to any alleged tort, personal injury, negligence or other claim; or any federal or state statutory or regulatory claim of any kind; or whether or not there has been a violation of any right or rights granted under State law (collectively 'Disputes'), and the parties are unable to resolve such through negotiation, then the parties agree that such Dispute(s) shall be resolved by arbitration . . . .") This plain language clearly embraces the subject matter of Plaintiff's claims against the Facility; but even if there were "any doubts concerning the scope of arbitrable issues[,] [they] should be resolved in favor of arbitration . . . ." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999).

The circuit court heard Appellants’ respective motions on July 25, 2019,<sup>10</sup> the Honorable J. Mark Hayes, II, presiding. The court denied the Motion to Compel Arbitration by formal order filed October 25, 2019. (10/25/19 Order.)<sup>11</sup> Pursuant to Rule 59(e), on November 4, 2019, Appellants timely moved the court to alter, amend, and/or reconsider its decision. (Defs.’ Mot. to Reconsider.) The court heard Appellants’ Rule 59(e) motion on January 6, 2020,<sup>12</sup> and by formal order filed July 13, 2020,<sup>13</sup> denied it in all but two (modest) particulars. (7/13/20 Order.)<sup>14</sup>

Also on July 13, 2020, on Plaintiff’s motion,<sup>15</sup> and over Appellants’ objections,<sup>16</sup> the circuit court entered Plaintiff’s proposed confidentiality order (the

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<sup>10</sup> (Tr. of 7/25/19 Hr’g.)

<sup>11</sup> By Form 4 order filed August 23, 2019, the court had stated its decision to deny the Motion to Compel Arbitration and directed Plaintiff’s counsel to submit a proposed formal order to that effect. (8/23/19 Form 4 Order.)

<sup>12</sup> (Tr. of 1/6/20 Hr’g.)

<sup>13</sup> By Form 4 order filed June 25, 2020, the court had stated its decision to deny Appellants’ Rule 59(e) motion (in all but the two particulars explained in **footnote 14**, *infra*) and directed Plaintiff’s counsel to submit a proposed formal order to that effect. (6/25/19 Form 4 Order.)

<sup>14</sup> In its prior order, filed October 25, 2019, the court had mistakenly referred to “*Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings*” (“HVH”) as a named defendant and had not expressly addressed the Motions to Stay. (*See* 10/25/19 Order.) The court granted Appellants’ Rule 59(e) motion only insofar as it (1) removed and vacated the reference to HVH in its prior order and (2) confirmed that, in consequence of its denial of the Motion to Compel Arbitration, the Motions to Stay were denied as moot. (7/13/20 Order pp. 1–2.)

<sup>15</sup> (Pl.’s Mot. for Confidentiality; Pl.’s Proposed Confidentiality Order.)

“Subject Confidentiality Order”). (Subject Confidentiality Order.) Among Appellants’ objections to the Subject Confidentiality Order (all of which are addressed in Argument II below) the strongest by far is that it does not restrict the use of their confidential documents to *this* lawsuit, but instead, in terms collectively referred to herein as the “Sharing Provision,” not only allows Plaintiff’s counsel to keep their confidential documents but also to share them with “other attorneys involved in similar litigation against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by this Order.” (Subject Confidentiality Order p. 3; *see also id.* at pp. 6–7.)

To be clear, assuming, *arguendo*, it was appropriate under the circumstances for the circuit court to enter a confidentiality order when it did—given that, as evidenced by this appeal, the question of whether Plaintiff’s claims against the Facility should proceed in circuit court or in arbitration (and, in turn, the question raised by the Motions to Stay) was yet to be answered with finality at the time the Subject Confidentiality Order was entered—Appellants had no objection to the entry of a reasonable confidentiality order. (*See, e.g.*, Defs.’ Memo in Opp’n to Pl.’s Proposed Confidentiality Order p. 1.) Indeed, Appellants submitted a

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<sup>16</sup> (*See* Tr. of 7/25/19 Hr’g pp. 40:17–42:3; Tr. of 1/6/20 Hr’g pp. 51:5–60:2; Email from Pl.’s counsel to Presiding Judge’s law clerk dated July 8, 2020; Email from Defs.’ counsel to Presiding Judge’s law clerk dated July 8, 2020; Defs.’ Mem. in Opp’n to Pl.’s Proposed Confidentiality Order; Defs.’ Proposed Confidentiality Order; Email from Presiding Judge’s law clerk dated July 9, 2020.)

proposed confidentiality order modeled on the standard federal confidentiality order (the “Standard Federal Order”),<sup>17</sup> the terms of which the circuit court itself had previously indicated to be in accord with the confidentiality orders it was accustomed to entering. (Tr. of 1/6/20 Hr’g pp. 57–59:5.) Nor did Appellants seek to prevent Plaintiff from making full and fair use of their confidential documents in *this* case. (Defs.’ Memo in Opp’n to Pl.’s Proposed Confidentiality Order p. 3 n.1.)

By notice served August 12, 2020, this appeal—from the circuit court’s denial of the Motion to Compel Arbitration and the Motions to Stay and the Subject Confidentiality Order—timely follows. (*See* Notice of Appeal/Proof of Service/NEF.)

## **STANDARD OF REVIEW**

### **Re: Issue/Argument I**

A circuit court’s determination of whether a claim is subject to arbitration is reviewed de novo on appeal. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). This includes de novo review of the determination of whether an arbitration agreement is enforceable against a nonsignatory. *Wilson v. Willis*, 426 S.C. 326, 334, 827 S.E.2d 167, 172 (2019). “Under de novo review, a circuit

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<sup>17</sup> (Email from Defs.’ counsel to Presiding Judge’s law clerk dated July 8, 2020; Defs.’ Proposed Confidentiality Order.)

court's factual findings will not be reversed on appeal if any evidence reasonably supports those findings." *Id.*

### **Re: Issue/Argument II**

Under Rule 26(c), SCRCF, the circuit court may make orders regulating discovery, including confidentiality orders. A circuit court's rulings on discovery matters will not be disturbed on appeal absent a clear abuse of discretion. *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734 (1989). The burden is upon the party appealing the order to demonstrate the court abused its discretion. *Karppi v. Greenville Terrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). An abuse of discretion occurs when the circuit court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000); *see also Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990) ("An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law.").<sup>18</sup>

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<sup>18</sup> The above being said, while the Subject Confidentiality Order is perhaps technically a "discovery" order, "Sharing Provision" has literally nothing to do with the discovery needs of *this* case. Although embedded within a motion made in this case in Plaintiff's name, as a practical matter, the request for the "Sharing Provision" was the separate and independent request of a non-party,

## Re: Both Issues/Arguments I and II

Issues of law, however, are reviewed without any particular deference to the lower court. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 782 S.E.2d 590 (2016). Even where a ruling is on a matter within trial court's discretion, if the ruling is based on a misunderstanding of the law, rather than upon

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Plaintiff's counsel, made for their own sake, as well as on behalf of other vaguely identified non-parties (generic litigants from parts unknown who may at some point meet Plaintiff's counsel's definition of "similarly positioned"), for relief that (a) is not aimed at protecting Plaintiff's confidential information but rather disclosing Appellants' and (b) is wholly disconnected from any actual need in *this* case, the grant of which affects Appellants' substantial rights. The nature and effect of the relief granted via the "Sharing Provision" is such that it is or is akin to a judgment on the merits of an action or quasi-action/cause of action/claim unto itself in the nature of a request for a declaratory judgment or special remedy. *See Blakely & Copeland v. Frazier*, 11 S.C. 122, 134 (1878) ("The term 'merits' is not very clearly defined. *It certainly embraces more than the questions of law and fact, constituting the cause of action or defen[s]e.*") (emphasis added); Rule 2, SCRCP, Official Note ("This Rule . . . abolishes the mostly cosmetic differences between 'actions' and 'special proceedings'. A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc."). And Appellants' opposition thereto amounts to a countervailing request for a form of injunctive relief to protect them from the prospect of irreparable harm, if not permanently, at least on such a temporary basis as may be necessary to ensure that Appellants were afforded a meaningful opportunity to pursue any/all available legal avenues (to include, without limitation, any/all rights to appeal) to try to protect their property, rights, and/or interests. *Cf. Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001) (the sole purpose of a temporary injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation.); Jean Hofer Toal et al. *Appellate Practice in South Carolina* p. 154 (3d ed. 2016) ("If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity.").

the exercise of discretion, the question presented on appeal is one of law. *See Bain v. Self Mem'l Hosp.*, 281 S.C. 138, 152, 314 S.E.2d 603, 611 (Ct. App. 1984).

## ARGUMENT

### **I. The circuit court erred in denying the Motion to Compel Arbitration and, in turn, the Motions to Stay.**

The relationship between the Motion to Compel Arbitration and the Motions to Stay is such that, insofar as the circuit court was concerned, the denial of the former mooted the latter. The fates of these motions (or, more precisely, the fates of the appeals taken from the circuit court's rulings thereon) are likewise intertwined in this Court: whether the Motions to Stay are properly viewed as moot depends on whether the Motion to Compel Arbitration was properly denied—which, most respectfully, it was not.

Accordingly, in showing that the circuit court erred in denying the Motion to Compel Arbitration, the argument below also shows the court's error in denying the Motions to Stay, which are not properly viewed as moot and should have been (or, alternatively, on remand should be) granted. *See* 9 U.S.C. § 3 (“If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, *shall* on application of one of the parties *stay the trial of the action until such arbitration*

*has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.”)* (emphasis added); *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002) (“[The] FAA clearly requires a court stay ‘any suit or proceeding’ pending the arbitration of ‘any issue referable to arbitration under an agreement in writing for such arbitration’ upon the application of one of the parties.”); *see also Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 641, 239 S.E.2d 647, 652 (1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement. However, the Circuit Court included in its order the requirement that all parties be included in one arbitration proceeding. Federal has signed no arbitration agreement and cannot be forced into compulsory arbitration. We feel it was erroneous to condition the relief to which respondents are plainly entitled upon the voluntary submission of Federal to arbitration proceedings. This provision has been deleted from the foregoing Order of the lower court.”).

- A. The circuit court erred in rejecting the Facility’s merger/equitable estoppel argument, i.e., it erred in failing to find (1) that the Admission Agreement and the Arbitration Agreement merged and (2) that, because Ms. Owens effectively embraced and directly benefitted from the Admission Agreement, Plaintiff should be estopped to deny the enforceability of the Arbitration Agreement.**

First off, to be clear, the Facility’s merger/equitable estoppel argument is not an argument *for the enforceability* of the Arbitration Agreement but rather an argument *for Plaintiff to be estopped to deny the enforceability* of the Arbitration Agreement. In short, the idea is that the Admission Agreement and the Arbitration Agreement merged, and Ms. Owens having effectively embraced and directly benefitted from the Admission Agreement, Plaintiff is estopped to deny the enforceability of the Arbitration Agreement with is merged therewith. Accordingly, any analysis by the circuit court or counterargument by Plaintiff aimed at denying the Arbitration Agreement’s enforceability, e.g., that, under the common law of agency (to include not only true agency but also agency by estoppel, as well as ratification) and/or under the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80, and/or because Ms. McCraw did not hold power of attorney over Ms. Owens, Ms. McCraw lacked authority to sign the Arbitration Agreement on behalf of Ms. Owens, is beside the point and unavailing.

### **Re: Merger**

South Carolina recognizes numerous potentially viable theories under which a nonsignatory can be bound to an arbitration agreement. *Wilson*, 426 S.C. at 338,

827 S.E.2d at 174 (“South Carolina has recognized several theories that could bind nonsignatories to arbitration agreements under general principles of contract and agency law, including (1) incorporation by reference, (2) assumption, (3) agency, (4) veil piercing/alter ego, and (5) estoppel.”). And in *Coleman v. Mariner Health Care, Inc.*, even though our Supreme Court found against merger on the *particular facts* before it, the Court nonetheless confirmed the validity of the general proposition of *law* on which the *Coleman* appellants based their merger/equitable estoppel argument:

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

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

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

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

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

407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added).

Here, the circuit court failed to recognize material distinctions between the facts of the instant case and those that controlled (or were simply not addressed in) *Coleman* and its progeny, *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), and *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

The merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”<sup>19</sup> as indeed the Admission Agreement and the Arbitration Agreement were here,<sup>20</sup> there is evidence to upset the *presumption in favor of merger*, i.e., the presumption that the contracting parties intended the instruments to be construed together as effectively one contract. This is a question of the parties’ intention. *Id.* at 355, 755 S.E.2d at 455 (“in the absence of anything

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<sup>19</sup> *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455.

<sup>20</sup> As the *Coleman* Court expressly observes regarding the admission and arbitration agreements before it (which in *this* respect—but not in respect of the material facts bearing on the question of whether the presumption of merger is rebutted—are no different from the instant agreements), “the documents were [indeed] executed at *the same time, by the same parties, for the same purposes, and*

indicating a contrary *intention* . . .”) (emphasis added). “[I]n attempting to ascertain th[e] [parties’] intention,” the Court “endeavor[s] to determine the situation of the parties, as well as their purposes, at the time the contract was entered into.” *Klutts*, 268 S.C. at 89, 232 S.E.2d at 25.

For the merger presumption to mean anything in practice, it cannot be upset based on mere conjecture, but only on actual evidence that—notwithstanding the concurrence of all the particular circumstances necessary for the presumption to even arise in the first place (same time, parties, purpose, and transaction)—can nonetheless support a reasonable, non-speculative inference that the parties’ intention was contrary to merger. *Cf. The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) (“[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation.”). No such inference can be drawn here. Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement not to merge.

Unlike the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson*, all of which provided that they could be disclaimed or revoked within 30 days of their signing (while the corresponding admission agreements contained no such provision), the instant Arbitration Agreement has no such disclaimer/revocation provision. (*See* Arbitration Agreement.) Moreover, it is

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*in the course of the same transaction.*” 407 S.C. at 355, 755 S.E.2d at 455

simply incorrect to say, as the circuit court does, that “[t]he [instant] Admission Agreement’s ‘Entire Agreement’ provision shows that one contract constituted ‘the entire agreement and understanding between the parties’ concerning admission to the Facility and prohibited merging the [Admission Agreement and the Arbitration Agreement].” (7/13/20 Order p. 9.) While the instant Admission Agreement does contain an “Entire Agreement” clause, it does not reference the Arbitration Agreement as a separate contract. (Admission Agmt. p. 12.) Indeed, directly contradicting the idea of the instant Admission Agreement’s supposed “separatedness” (in the parlance of the *Coleman* Court<sup>21</sup>), the “Entire Agreement” clause in the instant Admission Agreement expressly states that “other Admissions materials” are part of the Admission Agreement, thereby expressly contemplating the lack of its own supposed “separatedness.” (Admission Agmt. p. 12.) And without question, the Arbitration Agreement is among these other materials.

As the circuit court points out, the Arbitration Agreement was optional, i.e., “The signing of the Arbitration Agreement was not a condition of admission.” (7/13/20 Order p. 3.) But all this means is that it did not have to be agreed to for Ms. Owens to be admitted to the Facility, i.e., the Arbitration Agreement did not

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(emphasis added).

<sup>21</sup> 407 S.C. at 356, 755 S.E.2d at 455 (explaining how, in *Coleman*—unlike the instant case—the “Entire Agreement” clause expressly referred to a separate arbitration agreement and, thus, “recognize[d] the ‘*separatedness*’ of the

have to be executed at all. It does not mean that the Arbitration Agreement did not become a part of the admissions materials once it was in fact agreed to. Indeed, the fact that the Arbitration Agreement was not required for admission underscores its *connectedness* to the Admission Agreement. The two go together hand in glove. Without the hand (the Admission Agreement), there is no reason for the glove (the Arbitration Agreement).

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true: the Admission Agreement is necessary to the Arbitration Agreement. That is, the Admission Agreement *could* have stood on its own, i.e., without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with. But that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the particular circumstances that give rise to the presumption of merger—same time,<sup>22</sup> parties, purpose, and transaction—but

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[arbitration agreement] and the admission agreement, not a merger of the two contracts.”) (emphasis added).

<sup>22</sup> As the circuit court expressly acknowledged, the Admission Agreement and the Arbitration Agreement were signed on the same day, July 23, 2015. (7/13/20 Order p. 3 (“Ms. Owens was admitted to the Facility on July 23, 2015 under the terms of the Admission Agreement governing the care Ms. Owens would receive at the Facility as well as Ms. Owens’ financial obligation to pay for those services. . . . [Ms. McCraw] signed a contract entitled ‘Arbitration Agreement’ on July 23, 2015 . . . .”)) The court erroneously asserts that the Arbitration Agreement was signed “after Ms. Owens was already admitted to the [F]acility.” (*Id.*) Besides the absence of any evidence in the record to support this

unlike the Admission Agreement, which is capable of making sense either standing alone or together with the Arbitration Agreement, *the Arbitration Agreement only makes sense together with the Admission Agreement*, which is its (the Arbitration Agreement's) sole reason for being. (*See* Arbitration Agreement (providing for arbitration of “any controversy or dispute between the parties arising out of or relating to Facility’s Admission Agreement, or breach thereof, or relating in any way to Resident’s stay at Facility, or to the provisions of care or services to Resident . . . .”); *id.* (“This [Arbitration] Agreement shall remain in effect for all care rendered at Facility . . . .”).)

Even though the Arbitration Agreement was not a *condition* of admission, it was agreed to in *conjunction* with admission; whereupon, it was intended to be considered and construed together with the Admission Agreement, such that the two were effectively one instrument governing various interrelated aspects of Ms. Owens’s relationship with the Facility: the Admission Agreement setting forth the terms of her admission, the Arbitration Agreement providing for arbitration of disputes arising out of her admission. (*Compare* Admission Agmt. (setting forth

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assertion, the only evidence that is in the record is that both the Admission Agreement and the Arbitration Agreement were signed at the same time (*see* Admission Agmt.; Arbitration Agmt.; Aff. of Ms. McCraw), again, as indeed reflected in the circuit court’s recognition of July 23, 2015, as the date Ms. Owens’s was admitted to the Facility and the date the Arbitration Agreement was signed. Indeed, Plaintiff herself admits that the Admission Agreement and the

the terms of Ms. Owens's admission to the Facility) *with* Arbitration Agmt. (providing for arbitration of disputes arising out of Ms. Owens's admission in the Facility).)

Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agmt. p. 10 (providing "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agmt. (providing that, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").) Essentially, both instruments provide that South Carolina law applies except where displaced by federal law. This provides no reasonable inference of an intent contrary to merger.

Similarly, the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and are separately signed provides no reasonable inference of an intent contrary to merger.

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Arbitration Agreement were "signed during the admission process." (Pl.'s Mem.

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

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that *merger is the default position*, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all these align—same time, same parties, same purpose, same transaction—our courts will consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a

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in Opp’n to Facility’s MTCA.)

contrary intention.” 407 S.C. at 355, 755 S.E.2d at 455. To allow the merger presumption to be upset based on evidence that is merely ambiguous—i.e., that does not even go so far as to clearly indicate a contrary intention, but at most might (or might not) reflect a contrary intention—is to allow the exception to devour the rule.

Respectfully, the circuit court’s finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent. *Cf. Huffines*, 365 S.C. at 188, 617 S.E.2d at 130. It should have found that the Arbitration Agreement merged with the Admission Agreement. The instruments were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Owens’s admission to the Facility and would not have been done at all but for her admission to the Facility. Any finding against merger improperly relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties’ intent.

### **Re: Equitable Estoppel**

The circuit court’s analysis of equitable estoppel misapprehends or overlooks South Carolina’s favorable view of the applicability of the direct benefits test for equitable estoppel in arbitration cases.

The circuit court relies on the “traditional” six-factor test for equitable estoppel employed in *non*-arbitration cases, while casting aside the direct benefits test as a federal standard that “look[s] past South Carolina contract law.” (7/13/20 Order pp. 10–11.) South Carolina law, however, undeniably recognizes the potential for equitable estoppel to be successfully invoked to enforce an arbitration agreement against a nonsignatory under the direct benefits test. *See Wilson*, 426 S.C. at 338, 827 S.E.2d at 174 (observing that South Carolina has recognized a number of theories that could bind nonsignatories to arbitration agreements, including estoppel); *id.* at 340–345, 827 S.E.2d at 175–177 (favorably discussing the framework of the so-called direct benefits test—which was the test that the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, following its (the Court of Appeals’) prior decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which test the Facility contends Plaintiff is estopped from refusing to comply with the Arbitration Agreement here, where Ms. Owens received direct benefits (in the form of her admission and care/treatment at the Facility, to include, without limitation, room and board) from the Admission Agreement with which the Arbitration Agreement was merged); *id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson*

Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). In other words, contrary to the circuit court’s analysis, *Wilson*—as well as logic itself—supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this.

Properly viewing the Admission Agreement the Arbitration Agreement as merged, Ms. Owens (who was, according to Plaintiff herself, competent and possessed contractual capacity at all relevant times<sup>23</sup>) received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. To deny her receipt of such benefits is illogical. It would require wholly discounting every single aspect of her residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility). Not even Plaintiff alleges this. (*See Compl.*)

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement Ms. McCraw signed for Ms. Owens and that Ms. Owens’s estate is estopped to deny the Arbitration Agreement’s enforceability, Ms. Owens having effectively embraced the contract with the Facility for the purpose of her admission only to later, via her estate, attempt to

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<sup>23</sup> (Tr. of 7/25/19 Hr’g p. 15:17–20.)

repudiate the Arbitration Agreement with which her Admission Agreement merged.<sup>24</sup>

Lastly, out of an abundance of caution, to the extent it may be relevant in regard to the circuit court's treatment of the Facility's equitable estoppel argument, the court's analysis relies on the incorrect assertion that Ms. McCraw did not represent to the Facility that she was authorized to sign the Arbitration Agreement on behalf of her mother and the improper imposition of an investigatory burden on the Facility to determine Ms. McCraw's authority. (*See* 7/13/20 Order p. 11.)

There is, of course, an implied covenant of good faith and fair dealing in every contract. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995). Moreover, "one who has signed a contract is presumed to have read, understood, and assented to its terms." *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019). And, again, when she signed the Arbitration Agreement, Ms. McCraw expressly represented that she had authority to sign on Ms. Owens's behalf. The circuit court wrongfully overlooked all this, unjustly punishing the Facility both for Ms. McCraw's false representations and for supposedly failing to meet some unspecified duty to investigate them. No such duty is in fact recognized under South Carolina law—and, indeed, no legal

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<sup>24</sup> Although the dispute here is about the Arbitration Agreement, as opposed to the Admission Agreement, to the extent there were any question about

authority is cited by the circuit court. Moreover, because the Arbitration Agreement is covered by the FAA, it “must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]” *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011). By holding the Facility to an elevated standard of determining Ms. McCraw’s authority to contract, the circuit court fails to place the Arbitration Agreement on equal footing with other contracts and, thus, violates the FAA.

**B. At a minimum, the circuit court erred in denying the Facility’s alternative request for limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement’s enforceability.**

The Arbitration Agreement is valid on its face, containing Ms. McCraw’s express representation of her authority to bind her mother, Ms. Owens. (*See* Arbitration Agmt.) The only evidence that Ms. McCraw lacked authority to bind Ms. Owens is her own affidavit (filed July 23, 2019, just two days before the hearing on the Motion to Compel Arbitration (*See* Aff. of Ms. McCraw)) contradicting her prior representation that she had authority to sign the Arbitration Agreement on her mother’s behalf. Without this affidavit, Plaintiff would have no evidence to upset the facial validity of the Arbitration Agreement. In other words, the testimony presented via this affidavit constitutes the only evidentiary basis for

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the enforceability of the Admission Agreement, the Facility’s equitable estoppel argument applies with equal force to the Admission Agreement.

the trial court's denial of the Facility's motion to compel arbitration, and the Facility has thus far been forced to take it at face value, without any opportunity to examine the affiant.

Assuming, *arguendo*, the circuit court did not err in denying the primary request for relief (as argued above in Argument I.A.), the interests of justice required that it allow the Facility to conduct targeted discovery on the Arbitration Agreement's enforceability based on agency or related concepts. Otherwise, the Facility is left in the impossible Catch-22 of, on the one hand, being vulnerable to Plaintiff's argument that it has not presented sufficient evidence to prove the Arbitration Agreement is enforceable (whether by true agency,<sup>25</sup> estoppel,<sup>26</sup> or

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<sup>25</sup> A true agency relationship may be established by evidence of actual or apparent authority. *R & G Const., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000). "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control." *Froneberger v. Smith*, 406 S.C. 37, 49, 748 S.E.2d 625, 631 (Ct. App. 2013) (quoting Restatement (Third) of Agency § 1.01 (2006)). "An agreement may result in the creation of an agency relationship although the parties did not call it an agency and did not intend the consequences of the relationship to follow. Agency may be proved by circumstantial evidence showing a course of dealing between the two parties." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145–46, 425 S.E.2d 764, 773 (Ct. App. 1992). The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

<sup>26</sup> "When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular

ratification,<sup>27</sup> each a fact-intensive inquiry), while, on the other hand, being vulnerable to Plaintiff's argument that it waived its arbitration rights by making use of the tools of litigation (i.e., discovery) to prove them.

It is manifestly unfair and unjust for the circuit court to rely on Ms. McCraw's unchecked affidavit without allowing the Facility any opportunity to question her about it or otherwise follow pertinent evidentiary leads. It cannot be the case that the proponent of arbitration (who, it must be remembered, may well be attempting to vindicate a valid right to arbitrate that the arbitration opponent has wrongfully denied) has the burden to establish that right in a fact-based judicial proceeding in which it is disallowed use of the fact-finding tools (discovery procedures) available in other judicial proceedings. Obviously, if this were an

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purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." *R & G Const.*, 343 S.C. at 433, 540 S.E.2d at 118 (Ct. App. 2000).

<sup>27</sup> Authority can be supplied to an agent retroactively by express or implied ratification. See *Brazell Bros. Contractors v. Hill*, 245 S. C. 69, 74, 138 S.E.2d 835, 837 (1964) ("Ratification, as the term implies, is the adoption by one person of an act done or bargain made for him by another under such circumstances that he would not have been bound but for his subsequent assent."). "Ratification, as it relates to the law of agency, may be defined as the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S. C. 75, 89, 124 S.E.2d 602, 608 (1962). It is not necessary for a principal to be present at the time of the commission of his agent's act in order for him to ratify that act. See *State v. Waldrop*, 73 S. C. 60, 52 S.E. 793, 795 (1905) ("The presiding judge ruled that he

action to determine the validity of a contract other than an arbitration agreement there would be no question about the Facility's ability to conduct discovery relevant to the facts/circumstances bearing on the contract's validity. To force the Facility into a situation where its arbitration rights are at the mercy of an unchecked affidavit (filed by an affiant directly contradicting her own prior representations) and where it cannot otherwise conduct relevant discovery to vindicate those rights without risking waiving them at the same time as it proves them is not only patently unjust but also a violation of the FAA's requirement that arbitration agreements must be placed on equal footing with other contracts. *See Concepcion*, 563 U.S. at 339.

**II. Assuming, *arguendo*, it was appropriate under the circumstances for the circuit court to enter a confidentiality order, the court erred in entering the Subject Confidentiality Order. It should have entered Appellants' proposed confidentiality order instead, or at least omitted the Sharing Provision from the Subject Confidentiality Order.**

Through discovery, Plaintiff seeks access to sensitive business and financial information, ultimately from all Appellants and has served extensive requests for financial documentation/information including operating budgets, financial statements, subleases, loan agreements, business communications, staffing methods and analytical data, policies and procedures, employee rosters, personnel files, and commercial contracts with non-parties ("Confidential Materials"). The

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could ratify the act of the agent, whether he was present or not, and in this we see

Confidential Materials contain private, financially sensitive, personally sensitive, health-related or proprietary commercial information. Assuming, *arguendo*, it was appropriate under the circumstances for the circuit court to enter a confidentiality order, the court erred in entering the Subject Confidentiality Order. It should have entered Appellants' proposed confidentiality order instead, or at least omitted the Sharing Provision from the Subject Confidentiality Order.

**A. The Subject Confidentiality Order versus the Standard Federal Order**

While Plaintiff's counsel utilized the Standard Federal Order as the "base" of the Subject Confidentiality Order, the Subject Confidentiality Order does *not* actually protect the Confidential Materials from disclosure, indeed, very much the opposite.

The Subject Confidentiality Order deviates from the Standard Federal Order in a number of ways that (1) undermine any meaningful notion of confidentiality, (2) prejudice Appellants in multiple ways, and (3) do not benefit Plaintiff in the prosecution of *this* case.

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no error.”).

**(1) The Subject Confidentiality Order severely limits the protections of the Standard Federal Order.**

**(a) The Subject Confidentiality Order is unduly limited in its scope.**

The Standard Federal Order by its express terms applies to “all documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery.” (See Ex. A – to Def.’s Mem. in Opp’n, ¶1). Further, the Standard Federal Order permits a party to designate documents as “Confidential” if an attorney has reviewed and determined that such documents “contain information protected from disclosure by statute, trade secrets or confidential research, development or commercial information.” (See Ex. A – to Def.’s Mem. in Opp’n, ¶3).<sup>28</sup>

Conversely, the Subject Confidentiality Order, by its express terms, applies only to “confidential documents produced in the course of discovery,” omitting the language in the Standard Federal Order covering “all responses to discovery requests and all deposition testimony and exhibits, and any other materials which may be subject to discovery” and thereby leaving these materials outside its scope

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<sup>28</sup> This language in the Standard Federal Order tracks both Federal Rule 26(c)(1)(G) and Rule 26(c)(7), SCRCF, which are identical to each other.

and unprotected. (Confidentiality Order ¶1.) The circuit court should have rejected this undue limitation of the Subject Confidentiality Order.

**(b) The Subject Confidentiality Order unduly adds a requirement of showing economic harm to label a document “Confidential”.**

The Subject Confidentiality Order forces Appellants to prove “economic harm” in conjunction with a “Confidential” designation by adding that only such documents that “contain information protected from disclosure by statute, trade secrets, or confidential research, development, or commercial information *that will cause economic harm if made public*” would be able to be designated “Confidential”. (Subject Confidentiality Order, ¶3) (emphasis added). Of course, economic harm from the improper dissemination of these documents is what the Appellants are trying to avoid and requiring proof of harm prior to disclosure would be unwieldly and further complicate the litigation. This “economic harm” element is inconsistent with the Standard Federal Order and the express language Rule 26(c)(7), which does not contain that additional, and arbitrary, “economic harm” qualifier.

But as it, with its limited scope unwieldly “economic harm” requirement, the Subject Confidentiality Order permits Plaintiff and Plaintiff’s counsel to disclose Appellants’ private, proprietary, and sensitive information if it is either: (a) discovered in this case by means other than through document production

(deposition exhibits, discovery responses, etc.) or (b) not be able to be tied to “economic harm” from its disclosure (e.g., personnel files, private information of other individual persons, tax returns, staffing information, employee rosters, financial statements, business communications, etc.).<sup>29</sup> This is prejudicial error.

**(c) The Standard Federal Court has no “Sharing Provision”.**

The Standard Federal Order prohibits Confidential Materials from being used or disclosed by the parties or their counsel for any purposes other than preparing for and conducting the subject lawsuit. (See Ex. A – Standard Federal Order, ¶6(b)). In addition, the Standard Federal Order permits very limited third party disclosures to: (1) counsel and employees of counsel who have responsibility for the preparation and trial of the lawsuit; (2) parties and employees of a party to the order, upon certification that such person’s assistance is necessary to the subject lawsuit; (3) court reporters and persons engaged for the limited purpose of photocopying; (4) consultants, investigators, or experts employed to assist the parties in the preparation and trial of the subject lawsuit; and (5) other persons only upon consent of the producing party or upon order of the court. (See Ex. A – Standard Federal Order, ¶6(b)).

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<sup>29</sup> Appellants strongly believe strongly that disclosure of such information beyond this lawsuit would indeed cause “economic harm.” The point here, however, is that there is private, proprietary and sensitive information that is

The Subject Confidentiality Order permits third-party disclosures to the same persons listed in Paragraph 6(b) of the Standard Federal Order *plus* “other attorneys involved in *similar litigation* which is undefined against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by the Court’s jurisdiction and this Order.” (Subject Confidentiality Order, ¶5(b)(5) (emphasis added)). “Similar litigation” is not a defined term. Also, where the Confidential Materials go is apparently left up to the sole discretion of Plaintiff’s counsel. Additionally, a component of the Sharing Provision is a “non-return” provision that allows Plaintiff’s counsel, and those with whom the Subject Confidentiality Order Confidential Materials to be shared, to simply keep the Confidential Materials. This is prejudicial error.

**B. The Subject Confidentiality Order should not have been entered because Plaintiff failed to satisfy her burden to prove the “Sharing Provision” was warranted.**

The Subject Confidentiality Order should not have been entered because it expressly permits the disclosure of Appellants’ Confidential Materials (1) *beyond this lawsuit* (2) *to unknown parties* and (3) *in other jurisdictions* in violation of the Appellants’ rights to protect commercially sensitive or otherwise confidential/proprietary information. Moreover, omission of the “Sharing Provision” from the Subject Confidentiality Order would have caused Plaintiff no

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worthy of protection regardless of express/readily calculable economic harm (e.g.,

prejudice or other harm whatsoever, while the only benefit of its inclusion is that conferred on Plaintiff's counsel and those with whom they decide to "share."

- (1) **Plaintiff did not, and could not, show that the Standard Federal Order would prevent her from securing "relevant and necessary" information for this lawsuit.**

Plaintiff did not, and could not, show that she needed, or would even be benefited by, the inclusion of the Sharing Provision in the Subject Confidentiality Order in respect of her prosecution of *this* case. (See Subject Confidentiality Order, ¶¶ 5(a), 5(b)(5) and 9). Plaintiff will have access to confidential documents regardless of whether she can share them with other lawyers. See *Biazari v. DB Industries, LLC*, 2017 WL 1498122 at \*3 (W.D. W.Va. April 26, 2017); see also *Steede v. Gen. Motors, LLC*, 2012 WL 2089761 at \*4 (W.D. Tenn. June 8, 2012) ("For her part Plaintiff has not shown how entry of a 'non-sharing' protective order results in hardship for her case," as this restriction did not "prejudice[] her ability to obtain discovery in support of her own claims.").

Plaintiff had to show that that *her* case would be harmed Appellants' Confidential Materials were not discoverable as she proposed. *Biazari, supra*, at \*1 (citing *In re Deutsche Bank Tr. Co. Ams.*, 605 F.3d 1373 (Fed. Cir. 2010); *Pfizer, Inc. v. Apotex, Inc.*, 744 F. Supp. 2d 758, 762 (N.D. Ill. 2010)). Plaintiff's case will not be harmed because the provisions in dispute issue concern solely the competitive disadvantage).

ability to use and share Confidential Materials discovered in *this* lawsuit *beyond this* lawsuit. Accordingly, Plaintiff did not, and could not, demonstrate that the inclusion of the disputed provisions would benefit her in this lawsuit or, alternatively, that their omission would harm her in this lawsuit.

**(2) “Sharing Provisions” as to confidential documents are disfavored and should have been rejected here in the absence of a legitimate public interest.**

In the absence of a *consent* order by the parties agreeing to a sharing provision, many courts disallow the unrestricted sharing of discovery documents with lawyers from other jurisdictions. *See, e.g., In Re Remington Co.*, 952 F.2d 1029, 1033 (8th Cir. 1991) (“use of discovered information should be limited to the *particular lawsuit* in which it has shown to be both relevant and necessary to the prosecution of the action.”) (emphasis added); *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) (“although Plaintiff’s claim harm from the inability to share and compare information with other litigants in other cases, no prejudice has been shown”); *Williams v. Taser Int’l, Inc.*, 2006 WL 1835437 (N.D. Ga. 2006) (“the Court declines to allow Plaintiffs to either retain confidential documents upon the conclusion of this litigation, or to share confidential documents with other attorneys or experts involved in litigation against [Defendants]”); *Blanchard & Co. v. Barrick Gold Corp.*, 2004 WL 737485 (E.D. La. Apr. 5, 2004) (rejecting discovery sharing given “challenges driven by attorneys not involved in this

case”); *see also Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297 (N.D. Ill. 1993); *Massachusetts v. Mylan Labs, Inc.*, 246 F.R.D. 87, 90–91 (D. Mass. 2007); *Biazari, supra*, at \*1.

Some courts have approved sharing provisions in specific, limited circumstances relative to *non-confidential* information, but this typically occurs when the same product is at issue in products liability litigation. Importantly, these opinions are easily distinguishable as they are referring to *non-confidential* information and NOT the issue here: sharing of *confidential* information. *See Culinary Foods, Inc.*, 151 F.R.D. at 306 (“We agree that case law encourages sharing of non-confidential information with other litigants, *but this does not apply to the sharing of confidential information* under a protective order that limits access to certain identified individuals.”) (emphasis added).

**C. The Subject Confidentiality Order violate Appellants’ due process rights to protect the dissemination of confidential information beyond this lawsuit.**

Plaintiff has necessarily conceded that there is “good cause” for a confidentiality order in this case to protect Appellants’ rights in their confidential/commercially sensitive/propriety material from disclosure to the public. Allowing Plaintiff’s counsel to decide how to use and and/or share Appellants’ Confidential Materials *beyond this lawsuit* and in *currently unknown but “similar” future litigation* would undoubtedly eviscerate the Appellants’

procedural and substantive due process rights as the documents will be shared as determined by Plaintiff's counsel with unknown lawyers, unknown experts, unknown consultants, in unknown cases, about unknown residents with absolutely no chance afforded to Appellants to object. And it is "a matter of simple probability, the risk of such disclosure (whether intentional or inadvertent) increases as more individuals gain access to this material." *Biazari, supra*, at \*4.

### **CONCLUSION**

For the foregoing reasons, Appellants ask this Honorable Court to reverse the circuit court—as to its rulings on the Motion to Compel Arbitration, the Motions to Stay, and the Confidentiality Order—and to stay this lawsuit in favor of arbitration (or remand the case to the trial court with instructions for it to do so) or, alternatively, remand the case to the trial court for it to engage in or allow any such other proceedings (including, without limitation, discovery) as may be necessary to properly determine and/or enforce the Facility's rights under the Arbitration Agreement (and the Other Appellants' Motions to Stay) and reverse the circuit court's entry of the Subject Confidentiality Order, or at least its inclusion of the Sharing Provision in the Subject Confidentiality Order.

Respectfully submitted,  
CLEMENT RIVERS, LLP

By: s/Russell G. Hines  
Stephen L. Brown (SC Bar No. 66468)  
D. Jay Davis, Jr. (SC Bar No. 12084)  
Russell G. Hines (SC Bar No. 72100)  
Kate C. Mettler (SC Bar No. 103762)  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401  
P.O. Box 993 (29402)  
(843) 720-5488  
*Attorneys for Appellants*

Charleston, South Carolina

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