

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

Appeal from Sumter County
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-43-01740
Appellate Case No. 2020-001143

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SC Court of Appeals

Andrietta Atkinson and Debra Clyburn-Wilson,
individually and as Personal Representatives
of the Estate of Willie Mae Clyburn,

Respondents,

v.

SSC Sumter East Operating Company, LLC
d/b/a Sumter East Health and Rehabilitation Center
and Paul Granger,

Defendants.

Of whom SSC Sumter East Operating Company, LLC
d/b/a Sumter East Health and Rehabilitation Center is

Appellant.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
)
COUNTY OF SUMTER)
)
Andrietta Atkinson and Debra Clyburn-) C/A No. 2017-CP-43-1740
Wilson, individually and as Personal)
Representatives of the Estate of Willie Mae)
Clyburn,)
)
Plaintiffs,) **ORDER DENYING MOTION TO COMPEL**
) **ARBITRATION**
)
Versus)
)
)
SSC Sumter East Operating Company, LLC)
d/b/a Sumter East Health and Rehabilitation)
Center and Paul Granger,)
)
)
Defendants.)

This matter was before the Court in Sumter County, South Carolina, upon Defendant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center's [Sumter East] Motion to Dismiss and Compel Arbitration. Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

BACKGROUND

Willie Mae Clyburn [Clyburn] was admitted to the Sumter East on October 13, 2016. Sumter East is a skilled nursing facility licensed by the South Carolina Department of Health and Environmental Control. While a resident at Sumter East, Plaintiff contends Clyburn developed pressure sores, resulting in her decline and eventual death. Clyburn died on February 5, 2018. Andrietta Atkinson filed the original action as Power of Attorney for Clyburn on September 20, 2017. After Clyburn's death, Clyburn's daughters, Andrietta Atkinson and Debra Clyburn-Wilson, were appointed as Personal Representatives of her estate, and were substituted as Plaintiffs in this action. Plaintiffs thereafter filed an amended complaint which included causes

of action for Wrongful Death and Survivorship. The parties agreed to conduct limited discovery and mediate this matter without waiver of Sumter East's arbitration rights. Following the parties' inability to resolve this matter at mediation, Sumter East filed this Motion to Dismiss and Compel Arbitration. Plaintiffs contend that the Arbitration Agreement is unenforceable under state law.

STANDARD OF REVIEW

A parties' right to a jury trial in South Carolina is governed by state law. Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978). The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid arbitration agreement. Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement to arbitrate exists in the first place...If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing S.C. Code Ann. § 15-48-20(a)). Whether a valid arbitration agreement exists is a matter for judicial determination. York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 78, 749 S.E.2d 139, 144 (Ct. App. 2013).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999). Arbitration is available only when the parties contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard

to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989).

The present case is very similar to three cases where the South Carolina Court of Appeals and Supreme Court addressed the issue of arbitration agreements in skilled nursing facilities: Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292, 304 (Ct. App. 2018); and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d, 679 (Ct. App. 2016). In all three of these cases, our Courts have found Arbitration Agreements to be unenforceable where a family member signed an Arbitration Agreement near the time of admission to a skilled nursing facility for the Decedent and did not have authority to do the same. In all three cases, the Courts found that neither implied authority nor estoppel applied.

ANALYSIS

THE ARBITRATION AGREEMENT IS NOT ENFORCEABLE BECAUSE WILSON WAS NEVER CLYBURN'S LEGAL GUARDIAN OR ATTORNEY IN FACT AND LACKED ACTUAL OR APPARENT AUTHORITY TO SIGN THE ARBITRATION AGREEMENT FOR CLYBURN.

Wilson executed documents on behalf of Clyburn upon her entry to Sumter East on October 13, 2016, including an Arbitration Agreement titled "Dispute Resolution Program" [hereinafter referred to as "Arbitration Agreement"]. The Arbitration Agreement states:

YOUR PARTICIPATION IN DRP IS VOLUNTARY. BY SIGNING THIS AGREEMENT, YOU AGREE TO PARTICIPATE IN THE DISPUTE RESOLUTION PROGRAM. THIS AGREEMENT MAY BE REVOKED BY SENDING A WRITTEN NOTICE OF REVOCATION WITHIN THIRTY (30) DAYS FROM THE DATE OF ADMISSION OR THE DATE ON WHICH THIS AGREEMENT IS SIGNED, WHICHEVER OCCURS LATER. A DECISION TO REVOKE THIS AGREEMENT WILL IN NO WAY ADVERSELY AFFECT THE RESIDENT'S STATUS AT

THE FACILITY. WE WILL NOT REFUSE TO ADMIT, ATTEMPT TO DISCHARGE THE RESIDENT OR TAKE ANY OTHER ADVERSE ACTION AGAINST THE RESIDENT BASED ON A REVOCATION OF THE OPPORTUNITY TO PARTICIPATE IN A DRP.

The Arbitration Agreement is separately paginated from the Admissions Agreement, and each document contains its own signature lines. At the bottom of the Arbitration Agreement there is a signature line for the resident, another line for the signature of a Representative to sign when a “mentally competent resident is unable to physically execute the Agreement and authorizes a Representative to sign Agreement on the Resident’s behalf.” Both of these lines were left blank. The next signature line states, “If resident is judged incompetent, complete this section. . . I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves Individually.” Wilson signed the Agreement under this section.

A. Wilson lacked the actual authority to bind Clyburn’s estate to an Arbitration Agreement.

Sumter East argues that Wilson’s signature on the Arbitration Agreement binds Clyburn’ estate. The court disagrees. The mere fact that an arbitration agreement exists does not automatically refer any dispute to arbitration. The agreement must be valid, enforceable, and signed by the parties who had the express and legal authority to do so. The legal consequences of an agent’s actions can only be attributed to the principal when the agent has actual or apparent authority. Charleston Registry v. Young Clement, 359 S.C. 635, 598 S.E.2d 717 (Ct. App. 2004). Moreover, it is the duty of one dealing with an agent to use due care to ascertain the scope of the

agent's authority. Frasier v. Palmetto Homes of Florence, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). The evidence shows Wilson was not the legal guardian of Clyburn, nor was she the attorney in fact.

Wilson also lacked the capacity to bind Clyburn under the South Carolina Adult Health Care Consent Act ("AHCCA"). The AHCCA governs the placement or removal of an individual from a facility that provides intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). Under the AHCCA, a party may consent to health care on behalf of a patient if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8)(emphasis added). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for a patient who is unable to consent and provides an order of priority for who may make those decisions. It reads:

- (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
 - (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
 - (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
 - (3) a person given priority to make health care decision by another statutory provision;
 - (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
 - a. entry of a pendent lite order in a divorce or separate maintenance action;
 - b. formal signing of a written property or marital settlement agreement; or
 - c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
 - (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
 - (6) a parent of the patient;

- (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
- (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
- (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendant has put forth insufficient evidence to demonstrate that Clyburn herself was unable to consent or that two licensed physicians certified her inability to consent, as required by the statute, which would trigger the AHCCA and allow a family member to make health care decisions for her.

Additionally, even if Wilson had actual authority under the AHCCA, her authority under the Act would extend only to health care decisions and would not give her the authority to sign an Arbitration Agreement. The AHCCA only deals with health care related decisions, not legal decisions. Nowhere in the entire AHCCA is the word “legal” or “arbitration” used. Clearly the legislature intended this Act to govern only those decisions related to health care. The South Carolina Supreme Court addressed this issue squarely in Coleman v. Mariner Heath Care, 407 S.C. 346, 755 S.E.2d 450 (2014). In Coleman, a nursing home resident’s sister was authorized to make health care decisions under the AHCCA because her sister was unable to consent within the meaning of the Act and she was an individual with statutory priority to represent her sister. The court held that her authority under the AHCCA did not give her the capacity to bind her sister to a voluntary arbitration agreement. According to the Court, the AHCCA specifically limited the representative’s authority to making health care decisions and associated financial

arrangements. The Court held arbitration is not a health care or related financial decision, and thus the decision to engage in arbitration exceeds the authority granted by the AHCCA. Id. at 351-52, 755, S.E. 2d at 453.

Sumter East argues that the Admissions Agreement and Arbitration Agreement signed by Wilson should be merged into one document, which Wilson had authority to sign. This court disagrees and finds the Admissions Agreement and Arbitration Agreement were not merged and should be treated as two separate documents.

Our South Carolina Supreme Court has ruled that there is a difference between a residency contract and an arbitration agreement, and that just because the two agreements are executed contemporaneously does not make them one and the same. The Supreme Court has ruled:

Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such services. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 354, 755 S.E.2d 450, 454 (2014).

The Court reached similar holdings in Thompson v. Pruitt Corp., 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting

Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

In this case, as in Coleman, the Admission Agreement and Arbitration Agreement were separate documents, each with its own separate pagination and signature lines. Furthermore, in this case the Admissions Agreement contains language indicating that the Admissions Agreement is the “entire agreement and understanding between the parties.” In addition, the Arbitration Agreement could be revoked within thirty days, whereas the Admissions Agreement contained no revocation provision. The Arbitration Agreement states that a resident’s decision to revoke the document has no bearing on whether or not the resident would be admitted to the facility. The language of Sumter East’s own document suggests that even Sumter East treated these as entirely separate agreements.

Sumter East cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit. Therefore, even if Wilson had the actual authority to sign the Admissions Agreement, that authority did not extend to the Arbitration Agreement.

B. Wilson did not have the apparent authority to bind Clyburn’s Estate.

South Carolina law requires that to prove apparent authority, the Defendant must show “(1) that the purported principal consciously or impliedly represented another to be his agent; (2) that there was reliance upon the representation; and (3) that there was a change of position to the relying party’s detriment.” Cowburn v. Leventis, 366 S.C. 39, 619 S.E.2d 448 (Ct. App. 2005). The basis of apparent authority is representations made by the principal to the third party and reliance by the third party on those representations. Young v. S.C. Department of Disabilities and Special

Needs, 374 S.C. 360, 367, 649 S.E.2d 488, 491 (2007). The proper focus in determining a claim of apparent authority is not on the relationship between the principal and the agent, but the relationship between the principal and the third party. Vereen v. Liberty Life Insurance Company, 306 S.C. 423, 412, S.E.2d 425 (Ct. App. 1991). The burden of establishing agency is on the party asserting that a principal agency relationship exists. Id.

Sumter East places much emphasis on the behavior and deposition testimony of Wilson as to her apparent authority to act for Clyburn. The case law, however, suggests that it is Clyburn's actions which dictate whether she held Wilson out as her agent. This Court finds that the present case is nearly identical to Hodge and Thompson. In Hodge, the South Carolina Court of Appeals discussed a Maryland case, Dickerson v. Longoria, 414 Md. 419, 995, A.2d 721, 743 (2010). The Court specifically stated, "'This limited range of acts performed on the [decedent]'s behalf suggest, at most [he] may have conferred on [the personal representative] the authority to make health care and financial decisions on his behalf, but no more than that.'" Hodge at 567. Further, in Thompson, the Court determined that "'The authority conveyed by a principal to an agent to handle finances or make health care decisions does not encompass executing an agreement to resolve legal claims by arbitration, thereby waiving the principal's right of access to the courts and to a jury trial.'" Thompson at 686.

The only evidence that suggests Clyburn held Wilson out as having authority to sign an Arbitration Agreement on Clyburn's behalf is the fact that she remained at the facility for some five months and never repudiated the Arbitration Agreement. However, by its very terms her

residence at Sumter East was not effected by the Arbitration Agreement. Clyburn's silence on the issue is not a sufficient basis from which to infer apparent authority.

**PLAINTIFFS ARE NOT EQUITABLY ESTOPPED FROM DENYING THE
ARBITRATION AGREEMENT**

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

Defendant has not met its burden to establish these elements. There is insufficient evidence Wilson acted in a way amounting to a false representation to Sumter East regarding her authority to act for Clyburn. Additionally, Sumter East cannot meet its burden to show they lacked knowledge or the means of attaining the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have determined the truth of the facts in question. Binkley

v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Sumter East had the capacity to determine whether Wilson had authority to sign the Arbitration Agreement on Clyburn's behalf. Sumter East is – or should be – familiar with the legal concepts of guardianship and powers-of-attorney. Sumter East had the ability to simply ask Wilson whether she was Clyburn's guardian or attorney-in-fact and to request supporting documentation.

Sumter East also fails to show any direct benefit Clyburn received by virtue of the Arbitration Agreement. As stated above, the Admissions Agreement and Arbitration Agreement were separate documents, and Clyburn's admission to Sumter East was never conditioned upon her signing the Arbitration Agreements. Sumter East cannot point to any other "direct benefit" Clyburn received from entering into the Arbitration Agreement which would support its claim that she be equitably estopped from denying the Agreement. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission agreements and the [arbitration agreements] merged"); Thompson, 416 S.C. at 59-60, 784 S.E.2d at 688 (any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract).

Further, so long as the admission and arbitration contracts are separate documents, any alleged misrepresentations made by a resident's family member when signing the contracts would not equitably estop the resident's attorney-in-fact from challenging the family member's authority to bind the resident to arbitration. A family member who signs an arbitration contract

without legal authority to bind the resident acts in their individual capacity and their misrepresentations, if any, would have no bearing on claims against the nursing home by the resident even if the misrepresenting family member is also the attorney in-fact for the resident. Thompson, 416 S.C. 43, 62, 784 S.E.2d 679 (Ct. App. 2016) (finding nursing home “may not hold [resident’s] estate responsible for any possible misrepresentations Son or Daughter may have made in their individual capacities”). Since the agreements were not merged, Defendant’s equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

THE ARBITRATION AGREEMENT WAS NOT RATIFIED BY WILLIE MAE CLYBURN.

Clyburn's continued residency Sumter East did not act as a ratification of the Arbitration Agreement. To establish a ratification of the Arbitration Agreement Sumter East must show (1) acceptance by the principal of the benefits of the agent's acts, (2) the principal's full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal's intent to accept the unauthorized arrangement. Lincoln v. Aetna Gas. & Sur. Co., 300 S.C 188, 191, 386 S.E.2d 801, 803 (Ct. App. 1989).

Clyburn’s presence at the facility alone cannot constitute an affirmative representation. See Hodge (rejecting the notion that a nursing home resident represents his/her family member has authority to enter an arbitration agreement on the resident’s behalf simply by failing to object to the family member’s signature).

Sumter East argues Clyburn accepted the benefits of the Arbitration Agreement and relies

on this as proof of ratification. However, the only alleged benefit Sumter East can cite is admission to the facility, which the terms of the Arbitration Agreement show were not impacted by the signing or refusing of the Agreement. The Court of Appeals' ruling in Thompson speaks directly on this point, stating, "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688. As there is no clear benefit that Willie Mae Clyburn derived from the Arbitration Agreement, and her presence alone does not constitute an affirmative representation to accept the Arbitration Agreement, this Court finds that the Arbitration Agreement was not ratified.

CONCLUSION

For the foregoing reasons the Defendant's Motion to Dismiss and Compel Arbitration is DENIED.

IT IS SO ORDERED.

Kristi Curtis, Circuit Court Judge

June __, 2020
Sumter, South Carolina



Sumter Common Pleas

Case Caption: Andrietta Atkinson , plaintiff, et al VS Ssc Sumter East Operating Company, Llc , defendant, et al

Case Number: 2017CP4301740

Type: Order/Other

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2020-06-24 14:36:40 page 14 of 14

STATE OF SOUTH CAROLINA
COUNTY OF Sumter
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP4301740

Andrietta Atkinson et al
PLAINTIFF(S)

Ssc Sumter East Operating Company, Llc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion to Alter, Amend, and/or reconsider the Court's Order filed June 25th, 2020, denying Defendant's Motion to Compel Arbitration is hereby denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/14/2020 .

Power Of Attorney For Willie Mae Clyburn
Paul Granger

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Sumter Common Pleas

Case Caption: Andrietta Atkinson , plaintiff, et al VS Ssc Sumter East Operating Company, Llc , defendant, et al

Case Number: 2017CP4301740

Type: Order/Electronic Form 4

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2020-07-14 14:44:51 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Andrietta Atkinson as Power of Attorney for	)	C/A No. 2017-CP
Willie Mae Clyburn,	)	
	)	
	)	SUMMONS
Plaintiff,	)	(Jury Trial Demanded)
	)	
Versus	)	
	)	
SSC Sumter East Operating Company, LLC d/b/a	)	
Sumter East Health and Rehabilitation Center and	)	
Paul Granger,	)	
	)	
Defendants.	)	

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your Answer to the said Complaint to said Plaintiff's attorneys D. Nathan Hughey, A. Stuart Hudson and Bradley H. Banyas, at their office located at 1311 Chuck Dawley Blvd, Suite 201, Post Office Box 348, Mt. Pleasant, South Carolina 29465-0348, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Complaint.

s/ A. Stuart Hudson
 D. Nathan Hughey (SC Bar #68409)
 A. Stuart Hudson (SC Bar #71691)
 Bradley H. Banyas (SC Bar #101668)
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September 20, 2017
 Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
	)	
Andrietta Atkinson as Power of Attorney for	)	C/A No. 2017-CP
Willie Mae Clyburn,	)	
	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Jury Trial Demanded)
Versus	)	
	)	
	)	
SSC Sumter East Operating Company, LLC d/b/a	)	
Sumter East Health and Rehabilitation Center and	)	
Paul Granger,	)	
	)	
	)	
Defendants.	)	

The Plaintiff, Andrietta Atkinson as Power of Attorney for Willie Mae Clyburn, complaining of the Defendants, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center and Paul Granger (“Defendants”), alleges as follows:

1. The Plaintiff is a citizen and resident of Spartanburg County, South Carolina.
2. Upon information and belief, the Defendant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center, is a business corporation organized and existing pursuant to the laws of the State of Delaware which conducts business in Sumter County, South Carolina at 880 Carolina Avenue, Sumter, South Carolina.
3. Upon information and belief, the Defendant, Paul Granger, is a citizen and resident of Sumter County, South Carolina and is the administrator of Sumter East Health and Rehabilitation Center.
4. The Defendants had the right and/or power to direct and control its employees and/or agents in the business of delivering care for a fee through skilled nursing facilities and they are personally, jointly and severally liable for the acts and omissions committed.
5. The Defendants delivered care for a fee and had authority, express or implied, to control the means and agents employed to execute care at the Defendants' facilities at all times during the residency of Willie Mae Clyburn.

6. Attached as Exhibit A is an expert affidavit specifying at least one negligent act.

7. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

8. The Plaintiff is informed and believes that at all times material to this Complaint the Defendants' employees and/or agents were acting on behalf of or, in place of the Defendants in making decisions regarding the care of Willie Mae Clyburn. Additionally, the Plaintiff is informed and believes that at all times material to this Complaint that all of the employees of the Defendants were acting within the course and scope of their employment in regard to their care and treatment of Willie Mae Clyburn.

9. On the application for the license in effect at the time of Willie Mae Clyburn's injury, Sumter East Health and Rehabilitation Center, being sworn under oath, acknowledged that it was required to comply with the standards set forth in South Carolina Regulation 61-17 and further that understood in order to maintain a license to operate, it was required to comply with applicable State, Federal, and local laws, codes, and regulations applicable to the facility prior to Willie Mae Clyburn's injury.

10. The State of South Carolina required that Sumter East Health and Rehabilitation Center have policies and procedures that accurately reflected actual practice regarding care, treatment, procedures, and services - including nursing services, the operation of the facility, and how Sumter East Health and Rehabilitation Center was going to meet the specialized needs of the residents with Alzheimer's disease and/or related dementia such as Willie Mae Clyburn - and the State of South Carolina required that Sumter East Health and Rehabilitation Center make the policies and procedures available be accessible to staff. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

11. The State of South Carolina required that Sumter East Health and Rehabilitation Center

have a documented regimen of appropriate care, treatment, services or written action plan prepared by the facility for Willie Mae Clyburn, based on assessment data, e.g., social services, which was to be implemented for the benefit of Willie Mae Clyburn as well as other residents. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

12. The State of South Carolina required that Sumter East Health and Rehabilitation Center keep a record of each incident involving residents or staff members or volunteers, occurring in the facility or on the facility grounds, and directed that it was required to be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

13. Willie Mae Clyburn's injuries constituted reportable incidents.

14. The State of South Carolina required that Sumter East Health and Rehabilitation Center keep a legible and complete medical record, to include and any all incidents involving Willie Mae Clyburn as well as other residents. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

15. The State of South Carolina required Sumter East Health and Rehabilitation Center to describe in its care plan for Willie Mae Clyburn as well as other residents the services that Sumter East Health and Rehabilitation Center was going to furnish to her, *i.e.*, what assistance Sumter East Health and Rehabilitation Center was going to provide to her, how much assistance Sumter East Health and Rehabilitation Center was going to provide to her, who at Sumter East Health and Rehabilitation Center was going to provide the assistance, how often, and when. Sumter East Health and Rehabilitation Center

acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

16. The State of South Carolina required that Sumter East Health and Rehabilitation Center to administer treatment and services to Willie Mae Clyburn as well as other residents in a caring and humane manner, *effectively* and *safely*, and staff were required to respond to a signal system call from a resident to provide care or assistance in a prompt manner. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

17. The State of South Carolina required Sumter East Health and Rehabilitation Center to assure that Willie Mae Clyburn did not develop pressure-related wounds unless the resident's clinical condition demonstrates that they were unavoidable and to address treatment of existing pressure-related wounds. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

18. The State of South Carolina required Sumter East Health and Rehabilitation Center to take an interdisciplinary approach to decrease the risk of pressure-related wounds, and institute measures to prevent and treat wounds that are consistent with each resident's clinical condition, risk factors, and goals. Such actions were required to include but not be limited to: body position of bed or chair bound residents changed in accordance with the ICP; proper skin care provided for bony prominences and weight bearing parts to prevent discomfort and the development of pressure areas, unless contraindicated by physician's orders; and soiled or wet bed linen replaced promptly with clean, dry linen and clothing after being soiled. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via

signing its application for the same under oath subject to penalty of perjury.

19. The State of South Carolina required Sumter East Health and Rehabilitation Center to provide appropriate staff members in numbers and training to perform those duties that result in compliance with 61-17, to suit the needs and condition of the residents, and to meet the demands of effective emergency on-site action that might arise, and to provide training and qualifications for the tasks performed in compliance with all State, Federal, and local laws, and current professional organizational standards. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

20. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure that staff members Direct care staff members, in addition to meal service staff have at least the following qualifications: ability to render care and services to residents in an understanding and gentle manner; sufficient education to be able to perform their duties and have a working knowledge of regulations applicable to their scope of work. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

21. The State of South Carolina required Sumter East Health and Rehabilitation Center to have direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs and that direct care staff be assigned only duties for which they are trained. Further, the State of South Carolina required Sumter East Health and Rehabilitation Center to have licensed nurse staff members currently and continuously licensed to practice nursing in South Carolina during the period they are staff members, and that only individuals appropriately licensed may perform duties requiring a registered or licensed practical nurse.

Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

22. The State of South Carolina required Sumter East Health and Rehabilitation Center to have an adequate number of licensed nurses be on duty to meet the total nursing needs of residents. Licensed nursing staff were required to be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

23. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure staff members were provided the necessary training to perform the duties for which they were responsible and that, before performing any duties, all newly-hired staff members were to be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members were to be instructed in the provisions of S.C. Code Ann. Section 43-35-5 *et seq.* (1976, as amended), "Omnibus Adult Protection Act" and S.C. Code Ann. Section 44-81-10 *et seq.* (1976, as amended), "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in 61-17. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

24. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure all staff were provided inservice training programs that identify training needs related to problems, needs, care of residents and infection control and were sufficient to assure staff's continuing competency. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a

condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

25. The State of South Carolina required Sumter East Health and Rehabilitation Center to acknowledge its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

26. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure all entries in the resident record were legible and complete, and separately authenticated and dated promptly by the individual, identified by name and discipline, responsible for providing or evaluating the service or care furnished. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

27. The State of South Carolina required Sumter East Health and Rehabilitation Center to admit only individuals identified as appropriate for the level of care, services, or assistance offered. The facility was required to establish admission criteria that are consistently applied and comply with State, Federal, and local laws and regulations, and permitted to admit and retain only those individuals whose needs could be met by the accommodations and services for which the facility is licensed. Anyone who had a need for medical care for acute illness or injury that was beyond the scope of the facility to provide, and where hospitalization was consistent with the individual's condition was not permitted to be retained as a resident. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

28. The State of South Carolina required Sumter East Health and Rehabilitation Center to have practices that promote conditions that prevent the spread of infectious, contagious, or communicable diseases and provide for the proper disposal of toxic and hazardous substances. These preventive measures

and practices were required to be in compliance with applicable regulations and guidelines of the Occupational Safety and Health Administration, *e.g.*, the Bloodborne Pathogens Standard; the Centers for Disease Control and Prevention, *e.g.*, Immunization of Health-Care Workers: Recommendations of the Advisory Committee on Immunization Practices and the Hospital Infection Control Practices Advisory Committee; the Department's South Carolina Guidelines For Prevention and Control of Antibiotic Resistant Organisms in Health Care Settings, and R.61-105; and other applicable State, Federal and local laws and regulations. The State of South Carolina required Sumter East Health and Rehabilitation Center to have an infection control/QI committee that meets at least annually to address infection control issues consisting of the medical director and representatives from at least administration, nursing, dietary, and housekeeping staff to assure compliance with 61-17 regarding infection control. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

29. The State of South Carolina required Sumter East Health and Rehabilitation Center to have a written, implemented quality improvement program that provided effective self-assessment and implementation of changes designed to improve the care, treatment and services provided by the facility. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

30. Willie Mae Clyburn was admitted to the Defendants' facility, Sumter East Health and Rehabilitation Center, for long term residency on or about October 13, 2016.

31. While at the facility, the Defendants allowed Ms. Clyburn to develop preventable injuries which the Defendants had a duty to prevent, caused by a breach of that duty, including but not limited to pressure sores, and suffer horrific, painful, disfiguring, permanent and life threatening injuries which caused great pain and suffering.

32. Upon information and belief, the Defendants were licensed under the laws of the State of South Carolina and were required to provide reasonable and prudent nursing home care to Willie Mae Clyburn.

33. The Defendants had an obligation to employ nursing assistants, nurses and orderlies who were qualified to render reasonable care to a patient in the condition of Willie Mae Clyburn and in accordance with federal and state regulations as well as the representations made by the Defendants.

34. Additionally, pursuant to South Carolina law, the Defendants had a duty to ensure that care/services were rendered effectively and safely and precautions taken for residents with special conditions, e.g., Alzheimer's disease and/or related dementia, etc. and to provide appropriate assistance in activities of daily living were required to be provided to residents, as needed.

35. Furthermore, without limitation, the Defendants had a duty to comply with all current federal, state, and local laws and regulations concerning resident care, resident rights and protections, and privacy and disclosure requirements, e.g., Section 44-81-10, et seq., of the S.C. Code of Laws, 1976, as amended, Resident's Bill of Rights, Alzheimer's Special Care Disclosure Act, and the Omnibus Adult Protection Act notice, Section 43-35-5, et seq. as well as all local, state, and federal laws and current professional organizational standards.

36. Upon information and belief, the Defendants failed to assign sufficient and qualified staff to ensure that all necessary care was delivered to Willie Mae Clyburn.

37. Upon information and belief, the Defendants failed to ensure that the proper treatment and standard of care was delivered to Willie Mae Clyburn.

38. Upon information and belief, the Defendants failed to properly train, monitor and supervise the staff necessary to provide a reasonably prudent standard of care to Willie Mae Clyburn.

39. In particular, while at the Defendants' facility, the Defendant acquired a stage IV wound.

FOR A FIRST CAUSE OF ACTION
(Negligence)

40. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph and in their entirety.

41. The Defendants undertook the duty to render nursing home care to Willie Mae Clyburn in accordance with the prevailing and acceptable professional standards of care for nursing homes and their employees and agents in the national community and as further required by the state and federal laws applicable to the same.

42. Notwithstanding undertaking that duty and while Willie Mae Clyburn was under the care of the Defendants, the Defendants departed from prevailing and acceptable professional standards of care and treatment of Willie Mae Clyburn and were thereby negligent, careless, grossly negligent, reckless and in violation of the duties owed to Willie Mae Clyburn, and they are liable for one or more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care:

- a. In failing to comply with those provisions of 61-17 recited above and to which the Defendants' swore under oath subject to penalty of perjury that they would comply;
- b. In failing to properly monitor the resident's physical well-being while residing at the Defendants' facility;
- c. In failing to properly supervise the personnel and staff and employees at the Defendants' facility with regard to Willie Mae Clyburn's care;
- d. In failing to properly revise and modify plans of care for Willie Mae Clyburn in response to Willie Mae Clyburn's needs;
- e. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;
- f. In violating state and/or federal regulations requiring actions to protect the safety and health of Willie Mae Clyburn, so as to constitute negligence per se;
- g. In failing to ensure that the Defendants' personnel and employees had sufficient, adequate and current training, credentials and skills to properly prevent Willie Mae Clyburn from suffering from injury and pain;
- h. In failing to have in place proper and adequate policies, procedures, protocols, rules and regulations for the care and treatment of nutritional and infection control issues and fall prevention issues at the Defendants' facility, or if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;

- i. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and pressure ulcer prevention procedures;
- j. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and pressure ulcer prevention procedures were available to agents, servants and employees of the Defendants;
- k. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent skill and judgment;
- l. In failing to ensure that Willie Mae Clyburn had proper care;
- m. In failing to properly document significant clinical findings;
- n. In failing to properly document the medical records of Willie Mae Clyburn;
- o. In failing to follow and ensure that its employees follow the South Carolina Residence Bill of Rights for Long Term Care Facilities, South Carolina Department of Health and Environmental Control Regulation 61-84;
- p. In failure to provide sufficient number of personnel to meet the needs of residents;
- q. In failure to ensure that a resident maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical conditions demonstrates that this is not possible;
- r. In failing to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source are reported immediately to the administrator of the facility and to other officials in accordance with State Law through established procedures (including to the State survey and certification agency);
- s. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- t. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- u. In failing to notify family members or authorities after incidents;
- v. In failing to transfer Willie Mae Clyburn to a higher level of care as needed, and
- w. In such other particulars as may be ascertained through discovery or shown at trial.

43. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendants and their agents, servants and/or employees, Willie Mae Clyburn suffered from severe debilitating injuries which resulted in permanent decline, as a result of which Willie Mae Clyburn has suffered severe and extreme emotional distress, anxiety, physical injuries, medical bills, the likes of which no person should endure, for which Willie Mae Clyburn is entitled to recover in an amount to be determined by a jury at the trial of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence per se)

44. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in their entirety.

45. The Defendants are a long term health care providers who have a duty to abide by certain federal and state regulations in the care and treatment of their residents.

46. The federal and state regulations combine to form minimum standards of care which the Defendants must meet and exceed in order to ensure proper treatment of patients, including, specifically, Willie Mae Clyburn.

47. The Defendants failed to abide by the standards, rule and regulations promulgated by the United States Government and the State of South Carolina in their treatment and care of Willie Mae Clyburn.

48. The standards, rule and regulations promulgated by the United States Government and the State of South Carolina were specifically enacted for the benefit of the class of persons for which Willie Mae Clyburn was a member.

49. As a direct and proximate result of the Defendants' negligence, recklessness, willfulness and wantonness in failing to abide by the standards of care, rules and regulations standards, rule and regulations promulgated by the United States Government and the State of South Carolina, Willie Mae Clyburn suffered severe injuries as described above, constituting negligence per se.

FOR A THIRD CAUSE OF ACTION
(Fraud and Misrepresentation)

50. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

51. The Defendants, through deception, artifice, and circumvention, successfully defrauded Plaintiff, who trustingly submitted to care at the Defendants' facilities on the basis of explicit and implicit representations:

- a. That the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure the Plaintiff received safe and adequate care;
- b. That the Defendants would adequately staff the skilled nursing facility and he would enjoy confident and adequately trained employees;
- c. That the Defendants would provide high quality professional care and would accurately and truthfully document the condition of the Plaintiff and the care rendered to her;
- d. Such other misrepresentations as may be set forth above in this Complaint or as may later be set forth;

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

53. The Defendants purposefully disseminated such representations and promotions in order to induce the Plaintiff, her family, and others like them into placing themselves or their relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.

54. The Defendants fraudulently concealed its inability to care for the Plaintiff according to acceptable standards required by law and represented by the Defendants, and the representations made were false.

55. The representations made and concealments done by the Defendants were material to the Plaintiff and her family.

56. At the time the Defendants made such representations, they knew such affirmative claims of service were false.

57. The Plaintiff and her family were unaware of the falsity of the representations made by the Defendants.

58. The Plaintiff and her family had a right to rely on the representations and concealments made by the Defendants.

59. As a result of the Defendants' fraud, misrepresentations and concealments, the Plaintiff subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

60. As a proximate cause of the Defendants' fraud and misrepresentation, the Plaintiff suffered physical injuries, pain and suffering as previously alleged.

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

61. The Plaintiff realleges and reiterates all previous paragraphs as fully as if set forth in this paragraph in its entirety.

62. The Plaintiff and Defendants are "persons" within the meaning of Section 39-5-10(a), Code of Laws of South Carolina, 1976, as amended.

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

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

- a. Representing to the general public and to the Plaintiff and her family: that the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure the Plaintiff received safe and adequate care; that the Defendants would adequately staff the skilled nursing facility and she would enjoy confident and adequately trained employees; that they would provide high quality professional care and would accurately and truthfully document the condition of the Plaintiff and the care rendered to her; and such other particulars as are set forth above in this Complaint or may be shown through discovery or trial;

- b. Further, at the time of the Plaintiff's admission to care, the Defendants promoted and disseminated the above representations and information which would lead the Plaintiff, her family, and other similarly situated consumers to believe the above representations were true. The Defendants purposefully disseminated such representations and promotions in order to induce the Plaintiff, his family, and others like them into placing himself or his relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.
- c. The Defendants fraudulently concealed their inability to care for the Plaintiff according to acceptable standards required by law and represented by the Defendants, and the representations made were false.
- d. The representations made and concealments done by the Defendants were material to the Plaintiff and her family.
- e. At the time the Defendants made such representations, they knew such affirmative claims of service were false.
- f. The Plaintiff and her family were unaware of the falsity of the representations made by the Defendants.
- g. The Plaintiff and her family had a right to rely on the representations and concealments made by the Defendants.
- h. As a result of the Defendants' fraud, misrepresentations and concealments and deceptive and unfair representations, the Plaintiff subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

65. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated with other residents.

66. The Defendants' conduct adversely affects the public interest of South Carolina.

67. The Defendants knew or reasonably should have known their conduct violated the Unfair Trade Practices Act.

68. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive practices, the Plaintiff have suffered an ascertainable loss of money, physical injuries, pain and suffering as previously alleged.

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

WHEREFORE, the Plaintiff respectfully prays for judgment against the Defendants 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 action, and for such other and further relief as this Court deems proper.

s/ A. Stuart Hudson
D. Nathan Hughey (SC Bar #68409)
A. Stuart Hudson (SC Bar #71691)
Bradley H. Banyas (SC Bar #101668)
HUGHEY LAW FIRM, LLC
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Attorneys for the Plaintiff

September 20, 2017
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Andrietta Akinson as Power of Attorney for	)	C/A No. 2017-CP-
Willie Mae Clyburn,	)	
	)	
	)	AFFIDAVIT OF TRACEY
Plaintiff,	)	POURMOGHADAM, RN
	)	
Versus	)	
	)	
SSC Sumter East Operating Company, LLC	)	
d/b/a Sumter East Health and Rehabilitation	)	
Center and Paul Granger,	)	
	)	
Defendants.	)	

1. My name is Tracey Pourmoghadam, RN and I am over the age of eighteen, of sound mind and otherwise competent to make this Affidavit, which I make based upon my background, education, training, and experience. This affidavit is also based upon my own personal knowledge.

2. I am a Registered Nurse, licensed in the State of South Carolina. My further qualifications and background are set forth in the attached CV (Exhibit "A"), which is incorporated by reference.

3. I have actual professional knowledge and experience in my area of practice, Registered Nursing, including my specialty within this area, which is nursing home and long term care. In addition to the above, I have been in the active practice of the area of my specialty, in the profession of Registered Nursing in the State of South Carolina for at least three of the last five years preceding this opinion.

4. I am familiar with the standard of care applicable to the Defendants during the time of Willie Mae Clyburn's admittance in the Defendants' facility, commonly known as Sumter East Health and Rehabilitation Center, and the standard of care and skill exercised by reasonably prudent skilled nursing facilities, management companies, operating companies, and other healthcare providers under similar conditions as those involving Willie Mae Clyburn.

5. I have reviewed records and / or documents relating to Willie Mae Clyburn from the skilled nursing facilities, as well as hospitals where Willie Mae Clyburn was treated. Based on my review of these records, I find that there is at least one deviation from the standard of care on behalf of the Defendants during her residency at Sumter East Health and Rehabilitation Center.

6. Without limitation, my review of records and/or documents relating to Ms. Clyburn show the following:

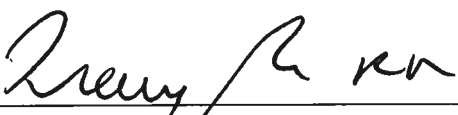
- Ms. Clyburn was admitted to Sumter East Health and Rehabilitation Center on or about October 13, 2016.
- During Ms. Clyburn's residency, she suffered from pressure sores.

7. In my professional opinion, the Defendants deviated from the standard of care and skill exercised by nurses generally and under similar conditions and like surrounding circumstances as those presented by Willie Mae Clyburn. In particular, in my opinion, without limitation, they deviated from the standard of care in the following particulars:

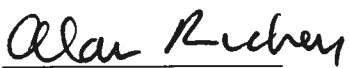
- Failing to appropriately care plan for Willie Mae Clyburn.
- Failing to prevent pressure ulcers.
- Failing to monitor for skin breakdown and promote healing.
- Failing to turn and reposition Willie Mae Clyburn.
- Failing to develop and maintain an appropriate interim care plan.
- Failing to recognize treat and heal pressure ulcers.
- Failing to meet the standard care of reasonably prudent skilled nursing facilities, management companies, nurses, owners and operators.

8. Additionally, it is my opinion that Willie Mae Clyburn's injuries were proximately caused by the Defendants' deviations.

9. This is not a complete list of all deviations from the standard of care which I have found in reviewing these records. As a result, I reserve the right to modify, change or supplement these opinions in the future.


Tracey Pourmoghadam, RN

Sworn to me this 18th day of May, 2017.


Notary Public for South Carolina
My commission expires: 1-15-2019

Tracey Pourmoghadam, RN

TPourmoghadam@aol.com • Charleston, SC • 843-303-1363

Objectives

To utilize my professional knowledge, nursing skills and leadership experience to enhance the outcomes of patient centered care.

Education

Anne Arundel Community College

Associates Degree in Nursing - December 2007

Salisbury State University

Bachelors Degree of Social Work - May 1996

Experience

Piedmont Hospice, Wando, SC

Clinical Director *August 2010 – present*

- Be responsible for the overall direction of clinical services.
- Establish, implement and evaluate goals and objectives for hospice services that meet and promote company standards of quality and contribute to the total organization and philosophy.
- Interview, hire, train, orient, supervise and evaluate qualified Hospice interdisciplinary team personnel.
- Provide daily direction to the team, including all scheduling, care planning, documentation, productivity and all other patient care operations.
- Manage all patient care expenditures including but not limited to labor, pharmacy, DME, medical supplies and patient care mileage.
- Assure regulatory compliance including achieving and maintaining Hospice Medicare certification.

Mount Pleasant Manor, Mount Pleasant, SC

Weekend Nursing Manager *March 2008 – December 2010*

- Assesses and evaluates the systems which facilitate the delivery of quality resident care.
- Facilitates the resolution of issues and concerns associated with resident / patient care including family issues.

• • •

- Implements and evaluates all nursing procedures and systems relative to unit programming.
- Makes nursing diagnoses that serve as the basis for the delivery of care.
- Performs nursing assessments regarding the health status of the resident / patient.
- Develops a plan of care and implements nursing care based on assessment.
- Provides health education to patients and their families.
- Participates in quality assurance activities.
- Completes required forms and documents in accordance with company policy and state and/or federal regulations.

Skills

- Strong Analytical and problem solving skills
- Proven leadership skills
- QAPI programs
- Compliance audits in skilled nursing care, assisted living care and home health care
- Excellent communication skills

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
ANDRIETTA ATKINSON AS POWER	)	CASE NO. 2017-CP-43-01740
OF ATTORNEY FOR WILLIE MAE	)	
CLYBURN ,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	ANSWER TO PLAINTIFF'S COMPLAINT
	)	ON BEHALF OF DEFENDANT SSC
SSC SUMTER EAST OPERATING	)	SUMTER EAST OPERATING COMPANY,
COMPANY, LLC D/B/A SUMTER	)	LLC D/B/A SUMTER EAST HEALTH AND
EAST HEALTH AND	)	REHABILITATION CENTER
REHABILITATION CENTER AND	)	
PAUL GRANGER,	)	
	)	
DEFENDANTS.	)	
	)	

TO: D. NATHAN HUGHEY, A. STUART HUDSON, AND BRADLEY H. BANYAS,
ATTORNEYS FOR THE PLAINTIFF:

The Defendant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center (hereinafter referred to as "this Defendant" or the "Facility"), by *and through its undersigned counsel and subject to and without waiving its right to compel this matter to arbitration*, hereby responds and answers the Plaintiff's Complaint as follows:

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

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

3. This Defendant admits the allegations set forth in Paragraph 2 of Plaintiff's Complaint.

4. Responding to the allegations set forth in Paragraph 3 of Plaintiff's Complaint, this Defendant admits that Paul Granger was the administrator employed by this Defendant during all or part of Plaintiff's residency. The remaining allegations set forth in the above Paragraph are directed at parties other than this Defendant and therefore no response is required.

5. The allegations contained in Paragraph 4 of Plaintiff's Complaint call for legal conclusions, and therefore no response is required. To the extent a response is required, these allegations are denied.

6. This Defendant denies the allegations contained in Paragraph 5 of the Complaint, as stated. Without waiving said denial, This Defendant admits Mr. Clyburn was a resident of the Facility and a fee was paid on his behalf for services related thereto. Any and all allegations inconsistent with this response or intended to allege liability or damage against this Defendant are denied.

7. The allegations in Paragraph 6 of the Complaint are not directed at this Defendant and therefore require no response. To the extent the allegations in Paragraph 6 are intended to allege liability or damage against this Defendant, they are denied and strict proof is demanded thereof. Further responding, this Defendant admits there is a photocopy of an affidavit attached as Exhibit A to Plaintiff's Complaint.

8. The allegations contained in Paragraph 7 of Plaintiff's Complaint call for legal conclusions, and therefore no response is required by this Defendant. To the extent a response is required, these allegations are denied. This Defendant would further assert that Plaintiff's claims are subject to a binding arbitration agreement.

9. In responding to the allegations in Paragraph 8 of the Complaint, this Defendant admits that Mr. Clyburn was a resident of the Facility at times relevant to this action. Further responding, this Defendant affirmatively asserts that at all times its employees and staff provided care to Mr. Clyburn in compliance with the appropriate standard of care. To the extent that the allegations in Paragraph 8 call for legal conclusions, no response is required. To the extent the allegations in Paragraph 8 are intended to allege liability or damage against this Defendant, they are denied and strict proof is demanded thereof.

10. In responding to the allegations in Paragraph 9 of the Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively states that at all times care was provided to Mr. Clyburn within the appropriate standard of care. To the extent that the allegations in Paragraph 9 of Plaintiff's Complaint call for a legal conclusion, no response is required. Any allegation in Paragraph 9 inconsistent with this response or intended to allege liability or damage against this Defendant is denied.

11. This Defendant denies the allegations set forth in Paragraph 10 of Plaintiff's Complaint as written. Without waiving such objections, this Defendant admits that the Facility's employees had a duty to comply with the standard of care applicable to Mr. Clyburn and would further assert that it did comply with the applicable standard of care. To the extent the allegations contained in Paragraphs 10 of the Complaint call for legal conclusions, no response is required. This Defendant affirmatively states that at all times care was provided to Mr. Clyburn within the appropriate standard of care. Any allegations in Paragraph 10 inconsistent with this response or intended to allege liability or damage against this Defendant are denied.

12. This Defendant denies the allegations set forth in Paragraph 11 of Plaintiff's Complaint as written. Without waiving this objection, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the applicable standard of care. This Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable as to Mr. Clyburn. The allegations contained in Paragraph 11 of the Complaint, in part, call for legal conclusions, and therefore no response is required by this Defendant. This Defendant affirmatively states that at all times care was provided to Mr. Clyburn within the appropriate standard of care and that an appropriate care plan was in place. Any allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

13. This Defendant denies the allegations of Paragraph 12 of Plaintiff's Complaint as written. In further responding, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable as to Mr. Clyburn. The allegations contained in Paragraph 12 of the Complaint, in part, call for legal conclusions, and therefore no response is required by this Defendant. This Defendant affirmatively states that at all times care was provided to Mr. Clyburn within the appropriate standard of care and that incidents were documented appropriately. Any allegations in Paragraph 12 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

14. The allegations contained in Paragraph 13 of the Complaint call for legal conclusions, and therefore no response is required by this Defendant. To the extent a response is required, this Defendant would crave reference to the skilled nursing chart and records to establish the existence, nature, and condition of any of Mr. Clyburn's alleged injuries.

15. This Defendant denies the allegations set forth in Paragraph 14 of Plaintiff's Complaint as written. Without waiving this objection, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable as to Mr. Clyburn. The allegations contained in Paragraph 14 of the Complaint, in part, call for pure legal conclusions, and therefore no response is required by this Defendant. This Defendant affirmatively state that at all times care was provided to Ms. Clyburn within the appropriate standard of care and that it kept a legible and complete record. Any allegations in Paragraph 14 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

16. This Defendant denies the allegations set forth in Paragraph 15 of Plaintiff's Complaint as written. Without waiving this objection, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable to Ms. Clyburn. The allegations contained in Paragraph 15 of the Complaint, in part, call for pure legal conclusions, and therefore no response is required by this Defendant. This Defendant affirmatively states that at all times care was provided to Mr.

Clyburn within the appropriate standard of care including the care plan implemented for her. Any allegations in Paragraph 15 inconsistent with this response or intended to allege liability or damages against Defendant are denied.

17. This Defendant denies the allegations set forth in Paragraph 16 of Plaintiff's Complaint as written. Without waiving this objection, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable to Ms. Clyburn. The allegations contained in Paragraph 16 of the Complaint call, in part, for pure legal conclusions, and therefore no response is required by this Defendant. This Defendant affirmatively states that at all times care was provided to Ms. Clyburn within the appropriate standard of care. Any allegations in Paragraph 16 inconsistent with this response or intended to allege liability or damages against Defendant are denied.

18. This Defendant denies the allegations set forth in Paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of Plaintiff's Complaint as written. Subject to these objections, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable as to Mr. Clyburn. To the extent the allegations contained in these Paragraphs call for pure legal conclusions, they do not require a response. This Defendant affirmatively states that at all times relevant, care was provided to Mr. Clyburn within the appropriate standard of care. Any allegations set forth in the

above referenced Paragraphs which are inconsistent with this response or intended to allege liability or damages against these this Defendant are denied.

19. In responding to the allegations set forth in Paragraph 30 of Plaintiff's Complaint, this Defendant admits that Mr. Clyburn was admitted to its skilled nursing facility on October 13, 2016 but would crave reference to the skilled nursing chart of Mr. Clyburn in regards to the care and treatment planned for and provided to Mr. Clyburn during his admission. This Defendant denies any allegations set forth in the above Paragraph which are inconsistent with said chart.

20. This Defendant denies the allegations set forth in Paragraph 31 of Plaintiff's Complaint and demands strict proof thereof. Subject to this objection, this Defendant does not deny that Mr. Clyburn may have developed certain injuries and/or conditions while a resident at the Facility, however, this Defendant denies that such injuries or conditions were the result of deficient care. Conversely, this Defendant would affirmatively assert that its care and treatment of Mr. Clyburn was at all times in compliance with the applicable standard of care.

21. This Defendant admits the allegations set forth in Paragraph 32 of Plaintiff's Complaint insofar as it is alleged that the Facility was a licensed skilled nursing facility and was required to provide care to Mr. Clyburn in accordance with the applicable standard of care. Any allegation inconsistent with the above response or intended to allege liability or damages as to this Defendant is hereby denied.

22. In response to the allegations set forth in Paragraphs 33, 34, and 35 of Plaintiff's Complaint, the Defendant admits that the Facility was required to provide appropriate care to its residents in compliance with the governing standard of care. To the extent the allegations

contained in the above Paragraphs call for legal conclusions, they do not warrant a response. Any allegation inconsistent with this response or intended to allege liability is denied.

23. This Defendant denies the allegations set forth in Paragraphs 36, 37, and 38 of Plaintiff's Complaint and demands strict proof thereof.

24. This Defendant denies the allegations set forth in Paragraph 39 of Plaintiff's Complaint as written and demands strict proof thereof. Subject to this objection, this Defendant does not deny that Mr. Clyburn may have developed certain injuries and/or conditions while a resident at the Facility, however, this Defendant denies that such injuries or conditions were the result of deficient care. Conversely, this Defendant would affirmatively assert that its care and treatment of Mr. Clyburn was at all times in compliance with the applicable standard of care.

25. In answering the allegations set forth in Paragraph 40 of Plaintiff's Complaint, this Defendant would restate its answers set forth in the above paragraphs as if stated verbatim herein.

26. This Defendant admits the allegations set forth in Paragraph 41 of Plaintiff's Complaint only insofar as it alleges that this Defendant owed a certain duty of care to Mr. Clyburn. This Defendant denies the alleged scope of the duty of care asserted by the Plaintiff. Any allegations inconsistent with this response are hereby denied and this Defendant would further assert that it complied with the applicable standard of care in the care and treatment of the Plaintiff

27. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

28. In answering the allegations set forth in Paragraph 44 of Plaintiff's Complaint, this Defendant would restate its answers set forth in the above paragraphs as if stated verbatim herein.

29. In responding to the allegations in Paragraph 45 of the Complaint, this Defendant admits that as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. However, this Defendant affirmatively state that such statutes and regulations do not establish the standard of care or provide for a cause of action. This Defendant denies any and all allegations inconsistent with the above response.

30. This Defendant denies the allegations set forth in Paragraphs 46, 47, 48, and 49 of Plaintiff's Complaint and demands strict proof thereof.

31. In answering the allegations set forth in Paragraph 50 of Plaintiff's Complaint, this Defendant would restate its answers set forth in the above paragraphs as if stated verbatim herein.

32. This Defendant denies the allegations set forth in Paragraphs 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

33. In answering the allegations set forth in Paragraph 61 of Plaintiff's Complaint, this Defendant would restate its answers set forth in the above paragraphs as if stated verbatim herein.

34. The allegations contained in Paragraphs 62 and 63 of the Complaint call for legal conclusions, and therefore no response is required by Defendant. Further responding, to the extent the allegations in the above Paragraphs are intended to allege liability or damage against this Defendant, they are denied and strict proof is demanded thereof.

35. This Defendant denies the allegations set forth in Paragraphs 64, 65, 66, 67, 68, and 69 of Plaintiff's Complaint, including all subparts, and demands strict proof thereof.

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

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

37. This Court lacks jurisdiction over this matter because Plaintiff's claims as to this Defendant are subject to arbitration pursuant to a valid arbitration agreement entered into between the parties hereto, and therefore this matter should be dismissed and compelled to arbitration.

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

38. Pursuant to the South Carolina Uniform Arbitration Act and Section 4 of the Federal Arbitration Act, this action must be stayed until the validity of the Plaintiffs Arbitration Agreement is determined by the court where this action is pending. This Defendant hereby provides notice that a Motion to Compel Arbitration and associated Motion to Stay is forthcoming.

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

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

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

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

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

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

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

42. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

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

43. This Defendant would affirmatively assert that it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Economic Development, Citizen and Small Business Protection Act and the South Carolina Medical Malpractice Reform Law including, but not limited to §15-38-15; §15-32-200; §15-32-210; §15-

32-220; §15-32-230; §15-32-240; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

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

44. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action.

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

45. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiff were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete bar to this action.

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

46. This Defendant would assert that some, or all, of the state and federal laws cited by the Plaintiff do not create a standard of care applicable to Plaintiff's claims in this matter.

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

47. Plaintiff's claims of fraud fail to meet the standards imposed by Rule 9(b) of the South Carolina Rules of Civil Procedure.

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

48. Plaintiff, as personal representative, lacks standing to bring some or all of the claims asserted against this Defendant pursuant to S.C. Code Ann. § 15-5-90. Plaintiff also lacks standing to bring certain claims in a representative capacity.

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

49. This Defendant hereby raises the doctrine of election of remedies as a defense to Plaintiff's claims.

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

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

YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.
D. Jay Davis, Jr.
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J. Joseph Owens
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*Attorneys for the Defendant SSC Sumter East
Operating Company, LLC d/b/a Sumter East Health
and Rehabilitation Center*

Charleston, South Carolina

Dated: November 17, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Andrietta Atkinson and Debra Clyburn-Wilson,	)	C/A No. 2017-CP-43-1740
individually and as Personal Representatives of the	)	
Estate of Willie Mae Clyburn,	)	
	)	
	)	AMENDED SUMMONS
Plaintiffs,	)	(Jury Trial Demanded)
	)	
Versus	)	
	)	
SSC Sumter East Operating Company, LLC d/b/a	)	
Sumter East Health and Rehabilitation Center and	)	
Paul Granger,	)	
	)	
Defendants.	)	

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action, of which a copy is hereby served upon you, and to serve a copy of your Answer to the said Amended Complaint to said Plaintiff's attorneys D. Nathan Hughey, A. Stuart Hudson and Bradley H. Banyas, at their office located at 1311 Chuck Dawley Blvd, Suite 201, Post Office Box 348, Mt. Pleasant, South Carolina 29465-0348, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

s/ A. Stuart Hudson
D. Nathan Hughey (SC Bar #68409)
A. Stuart Hudson (SC Bar #71691)
Bradley H. Banyas (SC Bar #101668)
HUGHEY LAW FIRM, LLC
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Attorneys for the Plaintiff

June 22, 2019
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Andrietta Atkinson and Debra Clyburn-Wilson,	)	C/A No. 2017-CP-43-1740
individually and as Personal Representatives of the	)	
Estate of Willie Mae Clyburn,	)	
	)	
Plaintiffs,	)	AMENDED COMPLAINT
	)	(Jury Trial Demanded)
Versus	)	
	)	
SSC Sumter East Operating Company, LLC d/b/a	)	
Sumter East Health and Rehabilitation Center and	)	
Paul Granger,	)	
	)	
Defendants.	)	

The Plaintiffs, Andrietta Atkinson and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn, complaining of the Defendants, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center and Paul Granger ("Defendants"), alleges as follows:

1. The Plaintiffs are citizens and residents of the State of South Carolina.
2. Upon information and belief, the Defendant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center, is a business corporation organized and existing pursuant to the laws of the State of Delaware which conducts business in Sumter County, South Carolina at 880 Carolina Avenue, Sumter, South Carolina.
3. Upon information and belief, the Defendant, Paul Granger, is a citizen and resident of Sumter County, South Carolina and is the administrator of Sumter East Health and Rehabilitation Center.
4. The Defendants had the right and/or power to direct and control its employees and/or agents in the business of delivering care for a fee through skilled nursing facilities and they are personally, jointly and severally liable for the acts and omissions committed.
5. The Defendants delivered care for a fee and had authority, express or implied, to control the means and agents employed to execute care at the Defendants' facilities at all times during the residency

of Willie Mae Clyburn.

6. Attached as Exhibit A is an expert affidavit specifying at least one negligent act.

7. This Court has personal and subject matter jurisdiction over this case and venue is proper in this Court.

GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

8. The Plaintiffs are informed and believe that at all times material to this Complaint the Defendants' employees and/or agents were acting on behalf of or, in place of the Defendants in making decisions regarding the care of Willie Mae Clyburn. Additionally, the Plaintiffs are informed and believe that at all times material to this Complaint that all of the employees of the Defendants were acting within the course and scope of their employment in regard to their care and treatment of Willie Mae Clyburn.

9. On the application for the license in effect at the time of Willie Mae Clyburn's injury, Sumter East Health and Rehabilitation Center, being sworn under oath, acknowledged that it was required to comply with the standards set forth in South Carolina Regulation 61-17 and further that understood in order to maintain a license to operate, it was required to comply with applicable State, Federal, and local laws, codes, and regulations applicable to the facility prior to Willie Mae Clyburn's injury.

10. The State of South Carolina required that Sumter East Health and Rehabilitation Center have policies and procedures that accurately reflected actual practice regarding care, treatment, procedures, and services - including nursing services, the operation of the facility, and how Sumter East Health and Rehabilitation Center was going to meet the specialized needs of the residents with Alzheimer's disease and/or related dementia such as Willie Mae Clyburn - and the State of South Carolina required that Sumter East Health and Rehabilitation Center make the policies and procedures available be accessible to staff. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

11. The State of South Carolina required that Sumter East Health and Rehabilitation Center

have a documented regimen of appropriate care, treatment, services or written action plan prepared by the facility for Willie Mae Clyburn, based on assessment data, e.g., social services, which was to be implemented for the benefit of Willie Mae Clyburn as well as other residents. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

12. The State of South Carolina required that Sumter East Health and Rehabilitation Center keep a record of each incident involving residents or staff members or volunteers, occurring in the facility or on the facility grounds, and directed that it was required to be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

13. Willie Mae Clyburn's injuries constituted reportable incidents.

14. The State of South Carolina required that Sumter East Health and Rehabilitation Center keep a legible and complete medical record, to include and any all incidents involving Willie Mae Clyburn as well as other residents. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

15. The State of South Carolina required Sumter East Health and Rehabilitation Center to describe in its care plan for Willie Mae Clyburn as well as other residents the services that Sumter East Health and Rehabilitation Center was going to furnish to her, *i.e.*, what assistance Sumter East Health and Rehabilitation Center was going to provide to her, how much assistance Sumter East Health and Rehabilitation Center was going to provide to her, who at Sumter East Health and Rehabilitation Center was going to provide the assistance, how often, and when. Sumter East Health and Rehabilitation Center

acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

16. The State of South Carolina required that Sumter East Health and Rehabilitation Center to administer treatment and services to Willie Mae Clyburn as well as other residents in a caring and humane manner, *effectively* and *safely*, and staff were required to respond to a signal system call from a resident to provide care or assistance in a prompt manner. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

17. The State of South Carolina required Sumter East Health and Rehabilitation Center to assure that Willie Mae Clyburn did not develop pressure-related wounds unless the resident's clinical condition demonstrates that they were unavoidable and to address treatment of existing pressure-related wounds. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

18. The State of South Carolina required Sumter East Health and Rehabilitation Center to take an interdisciplinary approach to decrease the risk of pressure-related wounds, and institute measures to prevent and treat wounds that are consistent with each resident's clinical condition, risk factors, and goals. Such actions were required to include but not be limited to: body position of bed or chair bound residents changed in accordance with the ICP; proper skin care provided for bony prominences and weight bearing parts to prevent discomfort and the development of pressure areas, unless contraindicated by physician's orders; and soiled or wet bed linen replaced promptly with clean, dry linen and clothing after being soiled. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via

signing its application for the same under oath subject to penalty of perjury.

19. The State of South Carolina required Sumter East Health and Rehabilitation Center to provide appropriate staff members in numbers and training to perform those duties that result in compliance with 61-17, to suit the needs and condition of the residents, and to meet the demands of effective emergency on-site action that might arise, and to provide training and qualifications for the tasks performed in compliance with all State, Federal, and local laws, and current professional organizational standards. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

20. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure that staff members Direct care staff members, in addition to meal service staff have at least the following qualifications: ability to render care and services to residents in an understanding and gentle manner; sufficient education to be able to perform their duties and have a working knowledge of regulations applicable to their scope of work. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

21. The State of South Carolina required Sumter East Health and Rehabilitation Center to have direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs and that direct care staff be assigned only duties for which they are trained. Further, the State of South Carolina required Sumter East Health and Rehabilitation Center to have licensed nurse staff members currently and continuously licensed to practice nursing in South Carolina during the period they are staff members, and that only individuals appropriately licensed may perform duties requiring a registered or licensed practical nurse. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent

to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

22. The State of South Carolina required Sumter East Health and Rehabilitation Center to have an adequate number of licensed nurses be on duty to meet the total nursing needs of residents. Licensed nursing staff were required to be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

23. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure staff members were provided the necessary training to perform the duties for which they were responsible and that, before performing any duties, all newly-hired staff members were to be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members were to be instructed in the provisions of S.C. Code Ann. Section 43-35-5 *et seq.* (1976, as amended), "Omnibus Adult Protection Act" and S.C. Code Ann. Section 44-81-10 *et seq.* (1976, as amended), "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in 61-17. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

24. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure all staff were provided inservice training programs that identify training needs related to problems, needs, care of residents and infection control and were sufficient to assure staff's continuing competency. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

25. The State of South Carolina required Sumter East Health and Rehabilitation Center to acknowledge its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

26. The State of South Carolina required Sumter East Health and Rehabilitation Center to ensure all entries in the resident record were legible and complete, and separately authenticated and dated promptly by the individual, identified by name and discipline, responsible for providing or evaluating the service or care furnished. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

27. The State of South Carolina required Sumter East Health and Rehabilitation Center to admit only individuals identified as appropriate for the level of care, services, or assistance offered. The facility was required to establish admission criteria that are consistently applied and comply with State, Federal, and local laws and regulations, and permitted to admit and retain only those individuals whose needs could be met by the accommodations and services for which the facility is licensed. Anyone who had a need for medical care for acute illness or injury that was beyond the scope of the facility to provide, and where hospitalization was consistent with the individual's condition was not permitted to be retained as a resident. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

28. The State of South Carolina required Sumter East Health and Rehabilitation Center to have practices that promote conditions that prevent the spread of infectious, contagious, or communicable diseases and provide for the proper disposal of toxic and hazardous substances. These preventive measures and practices were required to be in compliance with applicable regulations and guidelines of the Occupational Safety and Health Administration, *e.g.*, the Bloodborne Pathogens Standard; the Centers for

Disease Control and Prevention, *e.g.*, Immunization of Health-Care Workers: Recommendations of the Advisory Committee on Immunization Practices and the Hospital Infection Control Practices Advisory Committee; the Department's South Carolina Guidelines For Prevention and Control of Antibiotic Resistant Organisms in Health Care Settings, and R.61-105; and other applicable State, Federal and local laws and regulations. The State of South Carolina required Sumter East Health and Rehabilitation Center to have an infection control/QI committee that meets at least annually to address infection control issues consisting of the medical director and representatives from at least administration, nursing, dietary, and housekeeping staff to assure compliance with 61-17 regarding infection control. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

29. The State of South Carolina required Sumter East Health and Rehabilitation Center to have a written, implemented quality improvement program that provided effective self-assessment and implementation of changes designed to improve the care, treatment and services provided by the facility. Sumter East Health and Rehabilitation Center acknowledged its awareness of this requirement as a condition precedent to having a license to operate a nursing home in South Carolina via signing its application for the same under oath subject to penalty of perjury.

30. Willie Mae Clyburn was admitted to the Defendants' facility, Sumter East Health and Rehabilitation Center, for long term residency on or about October 13, 2016.

31. While at the facility, the Defendants allowed Ms. Clyburn to develop preventable injuries which the Defendants had a duty to prevent, caused by a breach of that duty, including but not limited to pressure sores, and suffer horrific, painful, disfiguring, permanent and life-threatening injuries which caused great pain and suffering and ultimately death.

32. Upon information and belief, the Defendants were licensed under the laws of the State of South Carolina and were required to provide reasonable and prudent nursing home care to Willie Mae Clyburn.

33. The Defendants had an obligation to employ nursing assistants, nurses and orderlies who were qualified to render reasonable care to a patient in the condition of Willie Mae Clyburn and in accordance with federal and state regulations as well as the representations made by the Defendants.

34. Additionally, pursuant to South Carolina law, the Defendants had a duty to ensure that care/services were rendered effectively and safely, and precautions taken for residents with special conditions, e.g., Alzheimer's disease and/or related dementia, etc. and to provide appropriate assistance in activities of daily living were required to be provided to residents, as needed.

35. Furthermore, without limitation, the Defendants had a duty to comply with all current federal, state, and local laws and regulations concerning resident care, resident rights and protections, and privacy and disclosure requirements, e.g., Section 44-81-10, et seq., of the S.C. Code of Laws, 1976, as amended, Resident's Bill of Rights, Alzheimer's Special Care Disclosure Act, and the Omnibus Adult Protection Act notice, Section 43-35-5, et seq. as well as all local, state, and federal laws and current professional organizational standards.

36. Upon information and belief, the Defendants failed to assign sufficient and qualified staff to ensure that all necessary care was delivered to Willie Mae Clyburn.

37. Upon information and belief, the Defendants failed to ensure that the proper treatment and standard of care was delivered to Willie Mae Clyburn.

38. Upon information and belief, the Defendants failed to properly train, monitor and supervise the staff necessary to provide a reasonably prudent standard of care to Willie Mae Clyburn.

39. In particular, while at the Defendants' facility, Willie Mae Clyburn acquired a stage IV wound.

FOR A FIRST CAUSE OF ACTION
(Negligence)

40. The Plaintiffs reallege and reiterate all previous paragraphs as fully as if set forth in this paragraph and in their entirety.

41. The Defendants undertook the duty to render nursing home care to Willie Mae Clyburn in accordance with the prevailing and acceptable professional standards of care for nursing homes and their employees and agents in the national community and as further required by the state and federal laws applicable to the same.

42. Notwithstanding undertaking that duty and while Willie Mae Clyburn was under the care of the Defendants, the Defendants departed from prevailing and acceptable professional standards of care and treatment of Willie Mae Clyburn and were thereby negligent, careless, grossly negligent, reckless and in violation of the duties owed to Willie Mae Clyburn, and they are liable for one or more of the following acts of omission or commission, any or all of which are departures from the prevailing and acceptable professional standards of care:

- a. In failing to comply with those provisions of 61-17 recited above and to which the Defendants' swore under oath subject to penalty of perjury that they would comply;
- b. In failing to properly monitor the resident's physical well-being while residing at the Defendants' facility;
- c. In failing to properly supervise the personnel and staff and employees at the Defendants' facility with regard to Willie Mae Clyburn's care;
- d. In failing to properly revise and modify plans of care for Willie Mae Clyburn in response to Willie Mae Clyburn's needs;
- e. In failing to properly utilize equipment, including medications and devices to prevent and to minimize or reduce injuries resulting from improper care;
- f. In violating state and/or federal regulations requiring actions to protect the safety and health of Willie Mae Clyburn, so as to constitute negligence per se;
- g. In failing to ensure that the Defendants' personnel and employees had sufficient, adequate and current training, credentials and skills to properly prevent Willie Mae Clyburn from suffering from injury and pain;
- h. In failing to have in place proper and adequate policies, procedures, protocols, rules and regulations for the care and treatment of nutritional and infection control issues and fall prevention issues at the Defendants' facility, or if such policies, procedures, protocols, rules and regulations were in place, in failing to enforce them;

- i. In failing to properly and adequately assess, monitor and update policies, procedures, protocols, rules and regulations in response to knowledge garnered from published guidelines and case reviews relating to proper nutritional and infection control procedures and pressure ulcer prevention procedures;
- j. In failing to ensure that manuals, instructions and warnings relating to appropriate nutrition and infection control procedures and pressure ulcer prevention procedures were available to agents, servants and employees of the Defendants;
- k. In failing to properly train and educate its employees or, if properly trained and educated, in failing to allow its employees to exercise independent skill and judgment;
- l. In failing to ensure that Willie Mae Clyburn had proper care;
- m. In failing to properly document significant clinical findings;
- n. In failing to properly document the medical records of Willie Mae Clyburn;
- o. In failing to follow and ensure that its employees follow the South Carolina Residence Bill of Rights for Long Term Care Facilities, South Carolina Department of Health and Environmental Control Regulation 61-84;
- p. In failure to provide sufficient number of personnel to meet the needs of residents;
- q. In failure to ensure that a resident maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical conditions demonstrates that this is not possible;
- r. In failing to ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source are reported immediately to the administrator of the facility and to other officials in accordance with State Law through established procedures (including to the State survey and certification agency);
- s. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- t. In failing to conduct assessments promptly after a significant change in the resident's physical or mental condition;
- u. In failing to notify family members or authorities after incidents;
- v. In failing to transfer Willie Mae Clyburn to a higher level of care as needed, and
- w. In such other particulars as may be ascertained through discovery or shown at trial.

43. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness and departure from the professional standards of care by the Defendants and their agents,

servants and/or employees, Willie Mae Clyburn suffered from severe debilitating injuries which resulted in permanent decline, as a result of which Willie Mae Clyburn has suffered severe and extreme emotional distress, anxiety, physical injuries, medical bills, the likes of which no person should endure, for which the Plaintiffs are entitled to recover in an amount to be determined by a jury at the trial of this action.

FOR A SECOND CAUSE OF ACTION
(Negligence per se)

44. The Plaintiffs reallege and reiterate all previous paragraphs as fully as if set forth in this paragraph in their entirety.

45. The Defendants are a long term health care providers who have a duty to abide by certain federal and state regulations in the care and treatment of their residents.

46. The federal and state regulations combine to form minimum standards of care which the Defendants must meet and exceed in order to ensure proper treatment of patients, including, specifically, Willie Mae Clyburn.

47. The Defendants failed to abide by the standards, rule and regulations promulgated by the United States Government and the State of South Carolina in their treatment and care of Willie Mae Clyburn.

48. The standards, rule and regulations promulgated by the United States Government and the State of South Carolina were specifically enacted for the benefit of the class of persons for which Willie Mae Clyburn was a member.

49. As a direct and proximate result of the Defendants' negligence, recklessness, willfulness and wantonness in failing to abide by the standards of care, rules and regulations standards, rule and regulations promulgated by the United States Government and the State of South Carolina, Willie Mae Clyburn suffered severe injuries as described above and ultimately death, constituting negligence per se.

FOR A THIRD CAUSE OF ACTION
(Fraud and Misrepresentation)

50. The Plaintiffs reallege and reiterate all previous paragraphs as fully as if set forth in this paragraph in its entirety.

51. The Defendants, through deception, artifice, and circumvention, successfully defrauded Plaintiffs, who trustingly submitted to care at the Defendants' facilities on the basis of explicit and implicit representations:

- a. That the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure Willie Mae Clyburn received safe and adequate care;
- b. That the Defendants would adequately staff the skilled nursing facility and she would enjoy confident and adequately trained employees;
- c. That the Defendants would provide high quality professional care and would accurately and truthfully document the condition of Willie Mae Clyburn and the care rendered to her;
- d. Such other misrepresentations as may be set forth above in this Complaint or as may later be set forth;

52. At the time of the Willie Mae Clyburn's admission to care, the Defendants promoted and disseminated the above representations and information which would lead Willie Mae Clyburn, her family, and other similarly situated consumers to believe the above representations were true.

53. The Defendants purposefully disseminated such representations and promotions in order to induce Willie Mae Clyburn, her family, and others like them into placing themselves or their relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.

54. The Defendants fraudulently concealed its inability to care for Willie Mae Clyburn according to acceptable standards required by law and represented by the Defendants, and the representations made were false.

55. The representations made and concealments done by the Defendants were material to Willie Mae Clyburn and her family.

56. At the time the Defendants made such representations, they knew such affirmative claims of service were false.

57. Willie Mae Clyburn and her family were unaware of the falsity of the representations made by the Defendants.

58. Willie Mae Clyburn and her family had a right to rely on the representations and concealments made by the Defendants.

59. As a result of the Defendants' fraud, misrepresentations and concealments, Willie Mae Clyburn subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

60. As a proximate cause of the Defendants' fraud and misrepresentation, Willie Mae Clyburn suffered physical injuries, pain and suffering as previously alleged and ultimately death.

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

61. The Plaintiffs reallege and reiterate all previous paragraphs as fully as if set forth in this paragraph in its entirety.

62. Willie Mae Clyburn and Defendants are "persons" within the meaning of Section 39-5-10(a), Code of Laws of South Carolina, 1976, as amended.

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

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

- a. Representing to the general public and to Willie Mae Clyburn and her family: that the Defendants would comply on a continuing basis with those licensure requirements, regulations, laws and professional standards designed to assure Willie Mae Clyburn received safe and adequate care; that the Defendants would adequately staff the skilled nursing facility and she would enjoy confident and adequately trained employees; that they would provide high quality professional care and would accurately and truthfully document the condition of Willie Mae Clyburn and the care rendered to her; and such other particulars as are set forth above in this Complaint or may be shown through discovery or trial;
- b. Further, at the time of the Willie Mae Clyburn's admission to care, the Defendants promoted and disseminated the above representations and information which would lead Willie Mae Clyburn, her family, and other similarly situated consumers to believe the above representations were true. The Defendants purposefully disseminated such representations and promotions in order to induce Willie Mae Clyburn, her family,

and others like them into placing herself or his relatives in the exclusive control and custody of the Defendants, and once there, allowing such persons to remain.

- c. The Defendants fraudulently concealed their inability to care for Willie Mae Clyburn according to acceptable standards required by law and represented by the Defendants, and the representations made were false.
- d. The representations made and concealments done by the Defendants were material to Willie Mae Clyburn and her family.
- e. At the time the Defendants made such representations, they knew such affirmative claims of service were false.
- f. Willie Mae Clyburn and her family were unaware of the falsity of the representations made by the Defendants.
- g. Willie Mae Clyburn and her family had a right to rely on the representations and concealments made by the Defendants.
- h. As a result of the Defendants' fraud, misrepresentations and concealments and deceptive and unfair representations, Willie Mae Clyburn subsequently suffered damages and injuries while a patient/resident at the Defendants' facilities.

65. The Defendants' acts are capable of repetition, and, upon information and belief, have been repeated with other residents.

66. The Defendants' conduct adversely affects the public interest of South Carolina.

67. The Defendants knew or reasonably should have known their conduct violated the Unfair Trade Practices Act.

68. As a direct, foreseeable, and proximate result of Defendants' unfair and deceptive practices, Willie Mae Clyburn suffered an ascertainable loss of money, physical injuries, pain and suffering as previously alleged, and ultimately death.

69. The Plaintiffs are entitled to recover her actual damages, which amount should be trebled, pursuant to South Carolina law, together with interest and attorneys' fees.

FOR A FIFTH CAUSE OF ACTION
(Negligence - Wrongful Death)

70. The Plaintiffs reallege and reiterate all previous paragraphs as fully as if set forth in this paragraph in its entirety.

71. As a direct and proximate result of the negligence, carelessness, gross negligence, recklessness by the Defendants and their agents, servants and/or employees, Willie Mae Clyburn suffered from severe debilitating injuries which resulted in her death, as a result of which Willie Mae Clyburn's statutory beneficiaries have lost the aid, comfort, support, society and companionship of the decedent, and have suffered severe and extreme emotional distress, anxiety, grief and sorrow, the likes of which no person should endure, for which the Plaintiffs are entitled to recover on behalf of statutory beneficiaries, actual and punitive damages pursuant to section 15-51-10, et. seq., Code of Laws of South Carolina (1976, as amended) in an amount to be determined by a jury at the trial of this action.

FOR A SIXTH CAUSE OF ACTION
(Negligence - Survivorship)

72. The Plaintiffs reallege and reiterate all previous paragraphs as fully as if set forth in this paragraph in its entirety.

73. Willie Mae Clyburn's estate, as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, has incurred expenses in the form of funeral and burial expenses. The Plaintiffs are further informed and do believe that as a direct and proximate result of the negligence, carelessness, gross negligence, and recklessness of the Defendants, as stated, Willie Mae Clyburn suffered fear, physical pain, and suffering, medical expense and mental and emotional distress and anguish in the time before his death, for which Willie Mae Clyburn's estate is entitled to an award of actual and punitive damages pursuant to section 15-5-90, Code of Laws of South Carolina (1976) in an amount to be determined by a jury at the trial of this action.

WHEREFORE, the Plaintiffs pray as follows: (a) that the Plaintiffs recover a judgment against the Defendants in an amount sufficient to compensate them for injuries and damages as described above; (b) that the Plaintiffs recover a judgment for an amount of punitive damages as authorized by law and; (c) that the Plaintiffs recover all costs associated with this action and the Plaintiffs recover such other relief as the court may deem just and proper.

s/ A. Stuart Hudson
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A. Stuart Hudson (SC Bar #71691)
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Attorneys for the Plaintiff

June 22, 2019
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
ANDRIETTA ATKINSON AS POWER	)	CASE NO. 2017-CP-43-01740
OF ATTORNEY FOR WILLIE MAE	)	
CLYBURN ,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	DEFENDANT SSC SUMTER EAST
	)	OPERATING COMPANY, LLC D/B/A
SSC SUMTER EAST OPERATING	)	SUMTER EAST HEALTH AND
COMPANY, LLC D/B/A SUMTER	)	REHABILITATION CENTER'S
EAST HEALTH AND	)	ANSWER TO AMENDED COMPLAINT
REHABILITATION CENTER AND	)	
PAUL GRANGER ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: D. NATHAN HUGHEY, A. STUART HUDSON, AND BRADLEY H. BANYAS,
ATTORNEYS FOR THE PLAINTIFF:

The Defendant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center (hereinafter referred to as “this Defendant” or the “Facility”), by and through its undersigned counsel and subject to and without waiving its right to compel this matter to arbitration, hereby responds and answers the Plaintiffs’ Amended Complaint as follows:

1. Any and all allegations set forth in the Plaintiffs’ Amended Complaint not hereinafter admitted, denied, qualified, or otherwise explained are hereby expressly denied and strict proof is demanded thereof.

2. This Defendant is without sufficient knowledge or information to respond to the allegations set forth in Paragraph 1 of the Plaintiffs’ Amended Complaint and, therefore, denies the same and demands strict proof thereof.

3. This Defendant admits the allegations set forth in Paragraph 2 of the Plaintiffs' Amended Complaint.

4. Responding to the allegations set forth in Paragraph 3 of the Plaintiffs' Amended Complaint, this Defendant admits that Paul Granger was the administrator employed by this Defendant during all or part of Willie Mae Clyburn's residency. The remaining allegations set forth in Paragraph 3 are directed at parties other than this Defendant and, therefore, no response is required.

5. The allegations contained in Paragraph 4 of the Plaintiffs' Amended Complaint call for legal conclusions and, therefore, no response is required. To the extent a response is required, these allegations are denied.

6. This Defendant denies the allegations contained in Paragraph 5 of the Amended Complaint, as stated. Without waiving said denial, this Defendant admits Ms. Clyburn was a resident of the Facility and a fee was paid on her behalf for services related thereto. Any and all allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

7. The allegations in Paragraph 6 of the Amended Complaint are not directed at this Defendant and, therefore, require no response. To the extent the allegations in Paragraph 6 are intended to allege liability or damage against this Defendant, they are denied and strict proof is demanded thereof. Further responding, this Defendant admits there is a photocopy of an affidavit attached as Exhibit A to the Plaintiffs' Amended Complaint.

8. The allegations contained in Paragraph 7 of the Plaintiffs' Amended Complaint call for legal conclusions and, therefore, no response is required by this Defendant. To the extent

a response is required, these allegations are denied. This Defendant further asserts that the Plaintiffs' claims are subject to a binding arbitration agreement.

9. In responding to the allegations in Paragraph 8 of the Amended Complaint, this Defendant admits that Ms. Clyburn was a resident of the Facility at times relevant to this action. Further responding, this Defendant affirmatively asserts that its employees and staff provided care to Ms. Clyburn in compliance with the applicable standard of care at all times. To the extent that the allegations in Paragraph 8 call for legal conclusions, no response is required. To the extent the allegations in Paragraph 8 are intended to allege liability or damages against this Defendant, they are denied and strict proof is demanded thereof.

10. In responding to the allegations in Paragraph 9 of the Amended Complaint, this Defendant admits that, as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant further affirmatively states that, at all times, care was provided to Ms. Clyburn in compliance with the applicable standard of care. To the extent that the allegations in Paragraph 9 of the Plaintiffs' Amended Complaint call for legal conclusions, no response is required. All allegations in Paragraph 9 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

11. This Defendant denies the allegations set forth in Paragraph 10 of the Plaintiffs' Amended Complaint as written. Without waiving such denial, this Defendant admits that the Facility's employees had a duty to comply with the standard of care applicable to Ms. Clyburn and affirmatively asserts that it complied with the applicable standard of care. To the extent the allegations contained in Paragraphs 10 of the Amended Complaint call for legal conclusions, no

response is required. All allegations in Paragraph 10 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

12. This Defendant denies the allegations set forth in Paragraph 11 of the Plaintiffs' Amended Complaint as written. Without waiving this denial, the Facility admits that it is subject to certain applicable statutes and regulations as the licensed operator of a skilled nursing facility. This Defendant affirmatively states that such statutes and regulations do not establish the applicable standard of care. This Defendant admits only that the Facility's employees had a duty to comply with the standard of care applicable as to Ms. Clyburn. The allegations contained in Paragraph 11 of the Amended Complaint, in part, call for legal conclusions and, therefore, no response is required by this Defendant. This Defendant affirmatively states that, at all times, care was provided to Ms. Clyburn within the applicable standard of care and that an appropriate care plan was in place. Any allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

13. This Defendant denies the allegations of Paragraph 12 of the Plaintiffs' Amended Complaint as written. The allegations contained in Paragraph 12 of the Amended Complaint, in part, call for legal conclusions and, therefore, no response is required by this Defendant. In further responding, the Facility admits that, as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. This Defendant affirmatively states that, at all times, care was provided to Ms. Clyburn within the applicable standard of care. Any allegations in Paragraph 12 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

14. The allegations contained in Paragraph 13 of the Amended Complaint call for legal conclusions and, therefore, no response is required by this Defendant. To the extent a response is required, the allegations set forth in Paragraph 13 are denied as written. This Defendant craves reference to the skilled nursing facility chart and records to establish the existence, nature, and condition of any of Ms. Clyburn's alleged injuries.

15. This Defendant denies the allegations set forth in Paragraph 14 of the Plaintiffs' Amended Complaint as written. Without waiving such denial, the Facility admits that, as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. The allegations contained in Paragraph 14 of the Amended Complaint, in part, call for pure legal conclusions and, therefore, no response is required by this Defendant. This Defendant affirmatively states that, at all times, it complied with the applicable standard of care. Any allegations in Paragraph 14 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

16. This Defendant denies the allegations set forth in Paragraph 15 of the Plaintiffs' Amended Complaint as written. Without waiving this denial, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. The allegations contained in Paragraph 15 of the Amended Complaint, in part, call for pure legal conclusions and, therefore, no response is required. This Defendant affirmatively states that, at all times, it complied with the applicable standard of care. Any allegations in Paragraph 15 inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

17. This Defendant denies the allegations set forth in Paragraph 16 of the Plaintiffs' Amended Complaint as written. Without waiving this denial, the Facility admits that as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. The allegations contained in Paragraph 16 of the Amended Complaint call, in part, for pure legal conclusions and, therefore, no response is required by this Defendant. This Defendant affirmatively states that, at all times, it complied with the applicable standard of care. Any allegations in Paragraph 16 inconsistent with this response or intended to allege liability or damages against Defendant are denied.

18. This Defendant denies the allegations set forth in Paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29 of the Plaintiffs' Amended Complaint as written. Without waiving such denials, the Facility admits that, as the licensed operator of a skilled nursing facility, it is subject to certain applicable statutes and regulations. This Defendant affirmatively states that such statutes and regulations do not establish the standard of care. To the extent the allegations contained in these Paragraphs call for pure legal conclusions, they do not require a response. This Defendant affirmatively states that, at all times, it complied with the applicable standard of care. Any allegations set forth in the above referenced Paragraphs which are inconsistent with this response or intended to allege liability or damages against these this Defendant are denied.

19. In responding to the allegations set forth in Paragraph 30 of the Plaintiffs' Amended Complaint, this Defendant admits only that Ms. Clyburn was admitted to its skilled nursing facility on October 13, 2016. This Defendant craves references to the skilled nursing

facility chart of Ms. Clyburn and denies all allegations set forth in Paragraph 30 inconsistent with Ms. Clyburn's skilled nursing facility chart.

20. This Defendant denies the allegations set forth in Paragraph 31 of the Plaintiffs' Amended Complaint and demands strict proof thereof. This Defendant affirmatively asserts that its care of Ms. Clyburn was at all times in compliance with the applicable standard of care and, to the extent Ms. Clyburn developed any injuries at the Facility, such injuries (if any) were not a result of deficient care. All allegations set forth in Paragraph 31 intended to assert liability or damages against this Defendant are denied.

21. This Defendant admits the allegations set forth in Paragraph 32 of the Plaintiffs' Amended Complaint only insofar as it is alleged that the Facility was a licensed skilled nursing facility and was required to provide care to Ms. Clyburn in accordance with the applicable standard of care. All allegations inconsistent with the above response or intended to allege liability or damages against this Defendant are hereby denied.

22. In response to the allegations set forth in Paragraphs 33, 34, and 35 of the Plaintiffs' Amended Complaint, the Defendant admits that the Facility was required to provide care to its residents in compliance with the governing standard of care. To the extent the allegations contained in the Paragraphs 33, 34 and 35 call for legal conclusions, they do not warrant a response. All allegations inconsistent with this response or intended to allege liability or damages against this Defendant are denied.

23. This Defendant denies the allegations set forth in Paragraphs 36, 37, and 38 of the Plaintiffs' Amended Complaint and demands strict proof thereof.

24. This Defendant denies the allegations set forth in Paragraph 39 of the Plaintiffs' Amended Complaint as written and demands strict proof thereof. This Defendant affirmatively

asserts that its care and treatment of Ms. Clyburn was at all times in compliance with the applicable standard of care.

25. In answering the allegations set forth in Paragraph 40 of the Plaintiffs' Amended Complaint, this Defendant restates its answers set forth in the above paragraphs as if stated verbatim herein.

26. This Defendant admits the allegations set forth in Paragraph 41 of the Plaintiffs' Amended Complaint only insofar as it alleges that this Defendant owed a certain duty of care to Ms. Clyburn. This Defendant denies the alleged scope of the duty of care asserted by the Plaintiffs. Any allegations inconsistent with this response are hereby denied and this Defendant further asserts that it complied with the applicable standard of care.

27. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of the Plaintiffs' Amended Complaint, including all subparts, and demands strict proof thereof.

28. In answering the allegations set forth in Paragraph 44 of the Plaintiffs' Amended Complaint, this Defendant restates its answers set forth in the above paragraphs as if stated verbatim herein.

29. In responding to the allegations in Paragraph 45 of the Amended Complaint, this Defendant admits that, as the licensed operator of a skilled nursing facility, the Facility is subject to certain applicable statutes and regulations. However, this Defendant affirmatively states that such statutes and regulations do not establish the standard of care and do not provide for a cause of action. This Defendant denies any and all allegations inconsistent with the above response.

30. This Defendant denies the allegations set forth in Paragraphs 46, 47, 48, and 49 of the Plaintiffs' Amended Complaint and demands strict proof thereof.

31. In answering the allegations set forth in Paragraph 50 of the Plaintiffs' Amended Complaint, this Defendant restates its answers set forth in the above paragraphs as if stated verbatim herein.

32. This Defendant denies the allegations set forth in Paragraphs 51, 52, 53, 54, 55, 56, 57, 58, 59, and 60 of the Plaintiffs' Amended Complaint, including all subparts, and demands strict proof thereof.

33. In answering the allegations set forth in Paragraph 61 of the Plaintiffs' Amended Complaint, this Defendant restates its answers set forth in the above paragraphs as if stated verbatim herein.

34. The allegations contained in Paragraphs 62 and 63 of the Amended Complaint call for legal conclusions and, therefore, no response is required. Further responding, to the extent the allegations in Paragraphs 62 and 63 are intended to allege liability or damage against this Defendant, they are denied and strict proof is demanded thereof.

35. This Defendant denies the allegations set forth in Paragraphs 64, 65, 66, 67, 68, and 69 of the Plaintiffs' Amended Complaint, including all subparts, and demands strict proof thereof.

36. In answering the allegations set forth in Paragraph 70 of the Plaintiffs' Amended Complaint, this Defendant restates its answers set forth in the above paragraphs as if stated verbatim herein.

37. This Defendant denies the allegations set forth in Paragraph 71 of the Plaintiffs' Amended Complaint.

38. In answering the allegations set forth in Paragraph 72 of the Plaintiffs' Amended Complaint, this Defendant restates its answers set forth in the above paragraphs as if stated verbatim herein.

39. This Defendant denies the allegations set forth in Paragraph 73 of the Plaintiffs' Amended Complaint.

40. This Defendant denies the allegations set forth in the Plaintiffs' Prayer for Relief.

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

41. This Court lacks jurisdiction over this matter because the Plaintiffs' claims as to this Defendant are subject to arbitration pursuant to a valid arbitration agreement entered into between the parties hereto and, therefore, this matter should be dismissed and compelled to arbitration.

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

42. Pursuant to Section 4 of the Federal Arbitration Act, this action must be stayed until the validity of the parties' Arbitration Agreement is determined by the court where this action is pending. This Defendant hereby provides notice that a Motion to Compel Arbitration and associated Motion to Stay is forthcoming.

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

43. The Plaintiffs' Amended Complaint fails to state facts sufficient to constitute a cause of action and fails to state a claim upon which relief can be granted by the Plaintiffs' against this Defendant and should be dismissed pursuant to South Carolina Rules of Civil Procedure or Federal Rules of Civil Procedure 12(b)(6).

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

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

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

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

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

46. This Defendant hereby gives notice that it intends to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert any such defenses.

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

47. This Defendant would affirmatively assert that it would be entitled to any and all benefits, joint and several liability protections, emergency situations limitations on liability, any and all monetary limitations or caps of liability and/or damages under the Economic Development, Citizen and Small Business Protection Act and the South Carolina Medical Malpractice Reform Law including, but not limited to §15-38-15; §15-32-200; §15-32-210; §15-

32-220; §15-32-230; §15-32-240; §15-36-100; and §15-79-125 and any other applicable provisions under the acts.

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

48. This Defendant would affirmatively assert the defense of intervening and superseding negligence of third parties not a party to this action.

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

49. This Defendant would allege, upon information and belief, that any injuries or damages sustained by the Plaintiffs' and their decedent were due to, caused and occasioned by a natural disease process over which this Defendant had no control and, as such, this Defendant pleads such a natural disease process as a complete bar to this action.

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

50. This Defendant would assert that some, or all, of the state and federal laws cited by the Plaintiffs do not create a standard of care applicable to the Plaintiffs' claims in this matter.

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

51. The Plaintiffs' claims of fraud fail to meet the standards imposed by Rule 9(b) of the South Carolina Rules of Civil Procedure.

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

52. The Plaintiffs, as personal representatives, lack standing to bring some or all of the claims asserted against this Defendant pursuant to S.C. Code Ann. § 15-5-90. The Plaintiffs also lack standing to bring certain claims in a representative capacity.

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

53. This Defendant hereby raises the doctrine of election of remedies as a defense to the Plaintiffs' claims.

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

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

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

55. This Defendant would assert that it complied with the applicable standard of care at all times during the timeframe alleged in the Amended Complaint.

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

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YOUNG CLEMENT RIVERS, LLP

By: s/D. Jay Davis, Jr.

D. Jay Davis, Jr.

Perry M. Buckner, IV

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*Attorneys for the Defendant SSC Sumter East
Operating Company, LLC d/b/a Sumter East Health
and Rehabilitation Center*

Charleston, South Carolina

Dated: July 8, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
ANDRIETTA ATKINSON AND DEBRA	)	CASE NO. 2017-CP-43-1740
CLYBURN-WILSON, INDIVIDUALLY	)	
AND AS PERSONAL	)	
REPRESENTATIVES OF THE ESTATE	)	
OF WILLIE MAE CLYBURN,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	SSC SUMTER EAST OPERATING
	)	COMPANY, LLC'S
SSC SUMTER EAST OPERATING	)	MOTION TO DISMISS AND COMPEL
COMPANY, LLC D/B/A SUMTER	)	ARBITRATION
EAST HEALTH AND	)	
REHABILITATION CENTER AND	)	
PAUL GRANGER ,	)	
	)	
DEFENDANTS.	)	
	)	

TO: STUART HUDSON, ESQ., ATTORNEY FOR PLAINTIFFS:

PLEASE TAKE NOTICE that the Defendant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center (hereinafter referred to as the "Defendant") by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) and compelling this action to arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiffs have sued the Defendant for negligence, negligence per se, fraud and misrepresentation, violation of South Carolina Unfair Trade Practices Act and wrongful death based upon allegations related to the residency of Plaintiffs' decedent, Willie Mae Clyburn ("Ms. Clyburn"), at this Defendant's skilled nursing facility (the "Facility"). However, Ms. Clyburn

and the Facility entered into the Dispute Resolution Program Agreement (the “DRP Agreement”) in October 2016, which covers all of the allegations set forth in the Plaintiff’s Complaint by its express terms. (See DRP Agreement, attached hereto as **Exhibit A**).

Under the DRP Agreement, Plaintiffs’ decedent, Plaintiff Debra Clyburn Wilson¹ and the Facility agreed that *all disagreements* between them and/or certain third parties relating in any way to Ms. Clyburn’s residency at the Facility would be resolved with finality through the specific alternative dispute resolution process outlined in the Agreement. (See **Ex. A, p. 1, ¶4; p. 7, ¶5**). Specifically, the DRP Agreement states:

BY AGREEING TO HAVE ALL DISAGREEMENTS RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM, THE PARTIES AGREE TO WAIVE THE RIGHT TO A JUDGE OR A JURY TRIAL AND TO HAVE THE DISPUTE RESOLVED THROUGH VARIOUS STEPS, CULMINATING IN A DECISION BY AN ARBITRATOR.

(See **Ex. A, p. 1, ¶4**). And:

BY AGREEING TO HAVE ALL DISAGREEMENTS RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM, THE PARTIES AGREE TO WAIVE THE RIGHT TO A JUDGE OR A JURY TRIAL. THE ARBITRATOR’S DECISION IS FINAL AND BINDING, AND CANNOT BE APPEALED TO ANY STATE OR FEDERAL COURT, UNLESS PROVIDED FOR [BY] STATE OR FEDERAL LAW.

(See **Ex. A, p. 7, ¶5**).

The DRP Agreement provides that when arbitration is requested by one party to resolve a disagreement, the other party is required to submit to such arbitration. (See **Ex. A, p. 5, ¶1**). Furthermore, Ms. Clyburn, Plaintiff Debra Wilson Clyburn and the Facility each agreed that only arbitration – *and not adjudication in the courts* – would provide a “final” determination of the

¹ Plaintiff Debra Clyburn-Wilson is a party to the DRP Agreement, having represented that “**I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this (DRP) Agreement, the Legal Representative or Family member binds both the Resident and themselves individually**” immediately above her signature on October 13, 2016. (See **Ex. A, p. 9**). Additionally, both Plaintiff Andrietta Atkinson and Plaintiff Debra Clyburn-Wilson are also intended third party beneficiaries according to the definition of “parties” in the DRP Agreement. (See **Ex. A, p. 3 – DEFINITIONS**).

claims and that “the parties are required to follow the arbitrator’s decision.” (See **Ex. A, p. 5, ¶1**). The obligation to arbitrate the parties’ claims – and the benefits that derive therefrom - applies mutually and equally to all parties should any of them have a claim. (See **Ex. A, pp. 3-5**).

Under the DRP Agreement, the term “parties” is defined and expressly includes:

- (a) any and all family members who would have a right to bring a claim in state court on behalf of the resident or the resident’s estate, including a power of attorney for healthcare and/or financial matters or a court appointed guardian, or any other person that may have a cause of action arising out of or relating in any way to the resident’s stay at the facility.

(See **Ex. A, p. 2**). Plaintiff Andrietta Atkinson and Plaintiff Debra Clyburn Wilson are daughters of Ms. Clyburn and have filed this lawsuit as personal representatives of her estate. By the express terms of the DRP Agreement, both Plaintiffs are intended and direct third party beneficiaries of the DRP Agreement and are bound by its terms.

The DRP Agreement is a valid, enforceable contract under South Carolina law, as it represents (i) the Defendant’s offer, (ii) Plaintiff Debra Clyburn-Wilson’s and Ms. Clyburn’s acceptance of that offer, and it is supported (iii) by valid consideration as a result of the parties mutual promises to arbitrate and the exchange of services for compensation as to Ms. Clyburn’s residency at the Facility. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). *O’Neil v. Hilton Head Hosp.*, 115 F.3d 272 (4th Cir. 1997)(holding that mutual promises to arbitrate support valid, sufficient legal consideration); see also *Rickborn v. Liberty Life Insurance Co.*, 321 S.C. 291, 468 S.E.2d 292, 300 (1996); see also *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999). According to well-established South Carolina contract law, both Plaintiffs are also direct third party beneficiaries of the DRP Agreement. See *Bob Hammond Const. Co., Inc. v. Banks Const. Co.*, 312 S.C. 422, 424 S.E.2d 890 (Ct. App. 1994) (citing to *Cothran v. Rock Hill*, 211 S.C. 17, 43 S.E.2d 615 (1947)).

The DRP Agreement, by its own terms and by law, is governed by the Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1-16; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014)(holding that skilled nursing facility admission agreements and residencies implicate interstate commerce and, thus, arbitration agreements executed between a skilled nursing facility and a resident are governed by the FAA). Indeed, Ms. Clyburn, Plaintiff Debra Clyburn-Wilson and the Facility expressly agreed in the DRP Agreement that the arbitration would be governed by the FAA, rather than by state law, because the services provided and paid for with respect to Ms. Clyburn during her residency at the Facility involved interstate commerce. (See **Ex. A, p. 6, ¶4**).

Under the FAA, any written provision in “a contract evidencing a transaction involving commerce” providing that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, **the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.**

9 U.S.C. § 4 (emphasis added). “By its terms, the [FAA] leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). The parties agreed that the DRP Agreement is governed by the FAA as to arbitration and, accordingly, Ms. Clyburn and the Facility should proceed to arbitration in accordance with the terms of their valid, enforceable agreement. 9 U.S.C. § 4.

The Defendant has requested that Plaintiffs submit their claims to arbitration as required by the DRP Agreement, and Plaintiffs have rejected this request. Plaintiffs' filing of the instant lawsuit is in breach of express contractual duties and obligations under the DRP Agreement that were agreed to by Ms. Clyburn, Plaintiff Debra Clyburn-Wilson and the Facility, and which likewise apply to Plaintiff Andrietta Atkinson as a direct third party beneficiary of the agreement that both her co-personal representative and Ms. Clyburn entered into with the Facility.

Accordingly, for the reasons set forth herein, the Defendant respectfully requests that this Court grant its Motion to Dismiss and Compel Arbitration of this matter. Further, the Defendant respectfully requests that this Honorable Court specifically stay any requirement to file any further responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiffs while the current Motion is pending.

In accordance with the Supreme Court of South Carolina's Order 2015-09-10-01 regarding the Civil Motions Pilot Program, the Defendant submits this Motion as its explanation of the basis for this Motion and is not submitting a supporting memorandum of law, at this time, but shall submit one to the extent requested by the Court or otherwise to the extent it is appropriate to offer additional information to support this Motion. This Motion is supported by the DRP Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

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Operating Company, d/b/a Sumter East Health and
Rehabilitation Center

Charleston, South Carolina

Dated: February 27, 2020

Wiley M.
Clyburn

DISPUTE RESOLUTION PROGRAM

TO BE COMPLETED BY ADMISSIONS STAFF DURING ADMISSIONS PROCESS

DEFENDANT'S
EXHIBIT

A

TO BE COMPLETED BY ADMISSIONS STAFF DURING ADMISSIONS PROCESS

AGREEMENT ACCEPTED

DCW

AGREEMENT DECLINED

AGREEMENT FOR DISPUTE RESOLUTION PROGRAM

PLEASE READ CAREFULLY

We have a program to resolve disagreements with residents and their families or legal representatives called the Dispute Resolution Program ("DRP"). The purpose of DRP is to enhance the quality of care that is provided to our residents, and to resolve any disagreements about care and other services that we provide and that may arise.

DRP is valuable to all parties because it offers a streamlined process to settle disagreements. DRP increases the likelihood that disagreements can be resolved more quickly and less expensively than by litigation and that residents themselves will actually benefit from faster resolution of disagreements. Participation in DRP also helps to reduce the costs of health care for everyone.

THIS AGREEMENT IS SUBJECT TO ARBITRATION DISPUTES

BY AGREEING TO HAVE ALL DISAGREEMENTS RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM, THE PARTIES AGREE TO WAIVE THE RIGHT TO A JUDGE OR A JURY TRIAL AND TO HAVE THE DISPUTE RESOLVED THROUGH VARIOUS STEPS, CULMINATING IN A DECISION BY AN ARBITRATOR.

DRP PROGRAM DESCRIPTION

WHAT ARE MY RIGHTS AND RESPONSIBILITIES UNDER THIS AGREEMENT?

YOUR PARTICIPATION IN DRP IS VOLUNTARY. BY SIGNING THIS AGREEMENT, YOU AGREE TO PARTICIPATE IN THE DISPUTE RESOLUTION PROGRAM. THIS AGREEMENT MAY BE REVOKED BY SENDING A WRITTEN NOTICE OF REVOCATION WITHIN THIRTY (30) DAYS FROM THE DATE OF ADMISSION OR THE DATE ON WHICH THIS AGREEMENT IS SIGNED, WHICHEVER OCCURS LATER. A DECISION TO REVOKE THIS AGREEMENT WILL IN NO WAY ADVERSELY AFFECT THE RESIDENT'S STATUS AT THE FACILITY. WE WILL NOT REFUSE TO ADMIT, ATTEMPT TO DISCHARGE THE RESIDENT OR TAKE ANY OTHER ADVERSE ACTION

AGAINST THE RESIDENT BASED ON A REVOCATION OF THE OPPORTUNITY TO PARTICIPATE IN DRP.

YOU UNDERSTAND THAT YOU HAVE THE RIGHT TO CONSULT WITH AN ATTORNEY OF YOUR CHOICE.

YOU AGREE THAT YOUR PARTICIPATION IN DRP WILL BENEFIT AND BIND YOUR FAMILY, HEIRS, SUCCESSORS, ASSIGNS, AGENTS, INSURERS, TRUSTEES, AND/OR YOUR LEGAL REPRESENTATIVES, INCLUDING THE PERSONAL REPRESENTATIVE OR EXECUTOR OF YOUR ESTATE, AND HIS/HER SUCCESSORS, ASSIGNS, AGENTS, INSURERS, TRUSTEES AND REPRESENTATIVES. BY AGREEING TO PARTICIPATE ALL DISAGREEMENTS MUST BE RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM. LIKEWISE, THE FACILITY AND ALL OF ITS PARENTS, AFFILIATE, SUBSIDIARY COMPANIES, OWNERS, OFFICERS, DIRECTORS, EMPLOYEES, SUCCESSORS, ASSIGNS, AGENTS, INSURERS AND REPRESENTATIVES WILL BE REQUIRED TO RESOLVE DISAGREEMENTS PURSUANT TO THE PROGRAM.

INFORMATION RELATING TO THE SETTLEMENT OF A DISAGREEMENT IS CONFIDENTIAL AND MUST NOT BE DISCLOSED TO ANY THIRD PARTY, INCLUDING, WITHOUT LIMITATION, DISCOVERY RESPONSES, THE ARBITRATOR'S DECISION, AND THE ARBITRATION AWARD, UNLESS OTHERWISE REQUIRED BY LAW.

YOU UNDERSTAND, AGREE TO, AND HAVE RECEIVED A COPY OF THIS AGREEMENT, AND ACKNOWLEDGE THAT THE TERMS HAVE BEEN EXPLAINED TO YOU OR YOUR REPRESENTATIVE, BY OUR AGENT, AND THAT YOU OR YOUR REPRESENTATIVE HAVE HAD THE OPPORTUNITY TO ASK QUESTIONS ABOUT THIS AGREEMENT AND THE DISPUTE RESOLUTION PROGRAM.

NOTHING IN THIS AGREEMENT SHALL PREVENT YOU OR ANY OTHER PERSON FROM REPORTING ALLEGED VIOLATIONS OF LAW TO THE APPROPRIATE ADMINISTRATIVE, REGULATORY OR LAW ENFORCEMENT AGENCIES.

THE PARTIES AGREE THAT THIS AGREEMENT, INCLUDING PARTICIPATION IN THE DISPUTE RESOLUTION PROGRAM, WILL CONTINUE AFTER YOUR TRANSFER OR DISCHARGE FROM THE FACILITY.

DEFINITIONS:

1. "Parties" include (a) the resident, any and all family members who would have a right to bring a claim in state court on behalf of the resident or the resident's estate, a legal representative, including a power of attorney for healthcare and/or financial matters or a court appointed guardian, or any other person that may have a cause of action arising out of or relating in any way to the resident's stay at the facility and (b) the facility, any parent or subsidiary of the facility, any company affiliated with the facility, or any of the facility's officers, directors, managers, employees, or agents acting in such capacity or any other person that may have a cause of action arising out of or relating in any way to the resident's stay at the facility.

2. "Dispute" means (a) any claim or dispute totaling \$50,000.00 individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law (b) this agreement does not prevent either party from initiating a grievance proceeding, complaint to survey agencies, appeal proceedings with the appropriate state or federal entity regarding an involuntary transfer or discharge, or any such claim or dispute involving solely a monetary claim in an amount less than \$50,000.00. Any such claim shall not be deemed a dispute under this agreement.

Notwithstanding the foregoing the parties may agree voluntarily to mediate or arbitrate the claims listed in Section (b) above in accordance with the terms of the Agreement, and applicable State or Federal law.

DRP consists of three steps that must be followed:

STEP 1 NOTICE OF THE DISAGREEMENT

If a party to this Agreement has a disagreement with the other party, the party with the disagreement must notify the Administrator, in writing, regarding the specific nature of the dispute. The written Notice should include details regarding the incident(s) or circumstance(s) that is the subject of the dispute. The details should include dates, times, a description of the incident(s) or circumstance(s), and identification of the individuals involved. The Administrator will forward the Notice to the DRP Review Committee within five (5) days of receipt. The members of the DRP Review Committee will include the Regional Vice President of Operations, the Regional Clinical Director, the District Human Resources Representative and the Risk Services Coordinator. Within fourteen (14) days of receiving the written Notice of a Dispute the Committee must will review the details of the Notice and inform the parties in writing of the Review Committee's decision.

STEP 2 MEDIATION BY A THIRD PARTY

If the DRP Review Committee is unable to resolve the dispute, either party may request mediation in writing within thirty (30) days of the DRP Review Committee's decision, or, in the event that the DRP Committee fails to render a decision, within forty-four (44) days of receiving the Written Notice of a Dispute. Written requests must be submitted to the facility administrator within the applicable limitations period provided by law for the dispute. Mediation is an informal process in which an impartial third party (someone not associated with the parties) will meet face-to-face with both parties to help them reach a mutually agreeable solution. The mediator does not have the authority to impose a decision that the parties are required to follow. An impartial third party experienced in mediation can help each party understand the other party's point of view, which often leads to a resolution. Under no circumstances will mediation be a condition precedent to arbitration.

STEP 3
ARBITRATION

If a satisfactory resolution of the disagreement cannot be reached within sixty (60) days of a request for mediation, either party may request arbitration in writing within thirty (30) days of the conclusion of mediation. A written demand for Arbitration must be submitted to the facility administrator within the applicable limitations period provided by law for the dispute. This is the third and final step of the Program. Arbitration is a process in which an impartial third party called an arbitrator (who usually is a retired judge or attorney) conducts a hearing, reviews evidence from the parties, and renders an opinion on legal responsibility and damages in the form of an "award." Unlike Mediation, the arbitrator's decision is final, and the parties are required to follow the arbitrator's decision.

ADDITIONAL INFORMATION

IS THERE A DEADLINE FOR BRINGING DISAGREEMENTS UNDER THE DRP?

The parties agree that they will notify the other party of all disagreements under DRP within the deadline by which the disagreements would be required to be filed under applicable federal law or the state statute of limitations.

WHO WILL MEDIATE OR ARBITRATE THE DISAGREEMENT?

The mediation and arbitration of all disagreements under DRP must be settled by the rules and procedures of the National Arbitration Forum ("NAF") or the Judicial Arbitration and Mediation Service ("JAMS"). One arbitrator can hear the dispute if the parties can mutually agree on the appointment of one arbitrator. If the parties cannot agree on the appointment of one arbitrator, each party will appoint an arbitrator and the two appointed arbitrators must appoint a third arbitrator using the applicable rules and procedures. In this instance, the award will be binding based on a decision of the majority of the arbitrators. The parties may agree to use a local arbitrator(s) in accordance with the process described above using the JAMS' rules and procedures or such other rules and procedures as the parties may agree to use.

WHERE WILL THE MEDIATION OR ARBITRATION TAKE PLACE?

The parties must agree on the place where the mediation or arbitration will take place and inform the mediator or arbitrator of the location. If the parties cannot agree on the location for the mediation or arbitration, the mediator or arbitrator will have the authority to determine the place for the mediation or arbitration in accordance with JAMS or NAF rules (as applicable) and considerations of fairness, which is called due process. The mediator or arbitrator will take into account such factors as the subject matter of the disagreement, the convenience of the parties and witnesses, and the resources of the parties. Unless the parties agree otherwise, the mediator or arbitrator will set the date and time for each proceeding.

HOW MUCH WILL MEDIATION OR ARBITRATION COST?

Under DRP, the Facility will pay for ninety percent (90%) of the fees for mediation and arbitration and you will pay for the remaining ten percent (10%). Each party shall be responsible for their own attorneys' fees. This includes the costs associated with presenting claims and/or defenses (including attorney fees and costs) unless state or federal law requires that the party who succeeds at mediation or arbitration be entitled to payment for all or part of these costs, in which case state or federal law will apply.

ARE AWARDS FOR DAMAGES AVAILABLE UNDER THE DRP?

If the matter is resolved by arbitration, the arbitrator may award damages to either party in accordance with all applicable laws, rules, and regulations and this Agreement. The parties are entitled to all damages that would be available to them through the judicial process. All awards under DRP will be restricted to the limits on damages set forth in federal or state law where permitted by relevant federal or state law. If it is determined that any requirement regarding the award of damages in this Agreement is invalid, unenforceable, or contrary to public policy, relevant federal or state law will control all damage awards.

HOW WILL THE TERMS OF THIS AGREEMENT BE ENFORCED?

The arbitrator is required to apply and enforce the terms of this Agreement. Any party may bring an action in any proper court to require arbitration under this Agreement and to enforce an arbitration award.

WHAT LAW APPLIES TO THE RESOLUTION OF DISAGREEMENTS UNDER THIS AGREEMENT?

DRP and the nature and extent of our business activities substantially affects, relates, and involves the purchase of substantial quantities of goods and services that are produced outside of the state and shipped across state lines to the Facility, which is referred to as interstate commerce. As such, the Federal Arbitration Act ("FAA"), not state law, will control and applies to the arbitration of disagreements between the parties and the parties agree to incorporate such laws into this Agreement. This Agreement will otherwise be governed by the State law where the Facility is located. This shall include local court rules governing discovery, and state law governing state medical liability act(s), if applicable. If it is determined that the FAA does not apply to arbitration under this Agreement, the parties agree to resolve any disagreement through arbitration under control of state law.

WHAT IF A PROVISION OF THIS AGREEMENT IS HELD TO BE INVALID, UNENFORCEABLE, OR CONTRARY TO PUBLIC POLICY?

This Agreement is intended to be performed in accordance with all applicable laws, ordinances, rules and regulations. If any term or phrase or provision of this Agreement is held to be invalid,

~~unenforceable, or contrary to public policy, it will not invalidate the remainder of this Agreement. Instead, this Agreement will be determined to be amended to conform with applicable federal or state laws, ordinances, rules, or regulations and will otherwise remain in full force and effect.~~

WHAT IF A PARTY WAIVES A TERM OR CONDITION OF THIS AGREEMENT?

The waiver by either party of any term or condition of this Agreement or the breach of this Agreement is not a waiver of any other term or condition of this Agreement.

WHAT HAPPENS IF A PARTY FILES A LAWSUIT INSTEAD OF PARTICIPATING IN DRP?

If a party to this Agreement files a lawsuit in connection with a disagreement instead of participating in DRP, the other party does not lose its right to mediation or arbitration if a demand to enforce DRP is served on the other party before the first day of a judge or jury trial. The party who files such lawsuit instead of proceeding under this program will be liable for the other party's reasonable costs and fees incurred to have the lawsuit dismissed and the disagreement transferred to a mediation or an arbitration proceeding.

If a judge or jury enforces DRP with respect to a disagreement for which a lawsuit has been filed, the party who brought the lawsuit follow the three steps set forth in this Agreement within the deadline by which his or her disagreement would be required to be filed under applicable federal law or the state law in which the Facility is located.

This Agreement constitutes the entire agreement of the parties with respect to the Program, as a complete and final integration thereof. All understandings and agreements heretofore had between the parties are merged into this Agreement, which alone fully and completely expresses their understandings. In entering this Agreement, no party has relied upon a representation or warranty made by another party which is not contained in this Agreement or expressly referred to herein.

BY AGREEING TO HAVE ALL DISAGREEMENTS RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM, THE PARTIES AGREE TO WAIVE THE RIGHT TO A JUDGE OR A JURY TRIAL. THE ARBITRATOR'S DECISION IS FINAL AND BINDING, AND CANNOT BE APPEALED TO ANY STATE OR FEDERAL COURT, UNLESS PROVIDED FOR STATE OR FEDERAL LAW.

~~If resident is competent, complete this section:~~

Signature of Resident

Date:

*(Sign where resident is mentally competent to
consent to this Agreement under State law)*

Signature of Representative

Date:

*(Sign where mentally competent resident is
unable to physically execute the Agreement
and authorizes a Representative to sign Agreement
on the resident's behalf)*

Signature of Facility Witness One

Date:

Signature of Facility Witness Two

Date:

Signature of Facility Representative

Date:

If resident is adjudged incompetent, complete this section:

I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves individually.

Debra Cyburn Wilson

Date: 10-13-16

Signature of Legal Representative or Family Member

Date: _____

Signature of Facility Witness One

Date: _____

Signature of Facility Witness Two

Quenele Mahle

Date: 10-13-16

Signature of Facility Representative

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Andrietta Atkinson and Debra Clyburn-Wilson,	)	C/A No. 2017-CP-43-1740
individually and as Personal Representatives of the	)	
Estate of Willie Mae Clyburn,	)	
	)	
Plaintiffs,	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION OF DEFENDANT SSC
Versus	)	SUMTER EAST OPERATING COMPANY,
	)	LLC'S MOTION TO DISMISS AND
	)	COMPEL ARBITRATION
SSC Sumter East Operating Company, LLC d/b/a	)	
Sumter East Health and Rehabilitation Center and	)	
Paul Granger,	)	
	)	
Defendants.	)	

The Plaintiffs, Andrietta Atkinson and Debra Clyburn-Wilson, individually and as Personal Representatives of the Estate of Willie Mae Clyburn hereby serve their Memorandum in Opposition to Defendant SSC Sumter East Operating Company, LLC's (hereinafter "Defendant") Motion to Dismiss and Compel Arbitration.

FACTS

Willie Mae Clyburn was admitted to the Defendant's facility, Sumter East Health and Rehabilitation Center, on October 13, 2016 for short-term rehabilitation and wound care. (See Admission Agreement, Exhibit A). The Defendant operates a skilled nursing facility, licensed by the South Carolina Department of Health and Environmental Control, R.61-17, *Standards for Skilled Nursing Facilities*.

While a resident in the Defendant's facility, Ms. Clyburn was allowed to develop pressure sores which resulted in her decline and eventual death on February 5, 2018. Andrietta Atkinson, Ms. Clyburn's daughter, filed the original action as Power of Attorney for Willie Mae Clyburn on September 20, 2017. Upon Willie Mae Clyburn's death, Andrietta Atkinson and Debra Clyburn-Wilson, another daughter, were appointed as Personal Representatives of the Estate of Willie Mae Clyburn on March 5, 2018 by the Sumter County Probate Court. The Complaint was then amended to substitute the Personal Representatives as the Plaintiff's in this action on her behalf and include causes of action for Wrongful Death and Survivorship.

STANDARD OF REVIEW

In determining whether a particular dispute can be compelled into arbitration, this Court must first determine whether a valid agreement to arbitrate exists between the parties. All waivers of trial by jury must be known, voluntary, and intentional. The signatory must have legal authority or legal capacity to sign on behalf of the Plaintiff resident. **The burden of proof is on the party attempting to compel the arbitration to prove a valid contract.** "A parties' right to a jury trial in South Carolina is governed by state law. See Pelfrey v. Bank of Greer, 270 S.C. 691, 693, 244 S.E.2d 315, 316 (1978).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524

S.E. 2d 839, 844 (Ct. App., 1999). Arbitration is available only when the parties involved contractually agree to arbitrate. Id. South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. Player v. Chandler, 299 S.C. 101, 105, (1989). Arbitration will be denied if a court determines no agreement to arbitrate existed. S.C. Code Ann. § 15-48-20(a).

ANALYSIS

I. THERE IS NOT AN ENFORCEABLE ARBITRATION AGREEMENT

- A. The Arbitration Agreement is not enforceable because Debra Clyburn-Wilson was not, at the time of admission, nor was she ever, Willie Mae Clyburn's legal guardian and Debra Clyburn-Wilson lacked actual or apparent authority to sign the Arbitration Agreement for Willie Mae Clyburn

Debra Clyburn-Wilson executed documents on behalf of Willie Mae Clyburn upon her entry to the Defendant's facility on October 13, 2016, including an Arbitration Agreement titled "Dispute Resolution Program" hereinafter referred to as "Arbitration Agreement" (Exhibit A to Defendant's Motion). The mere fact that an arbitration agreement exists does not automatically refer any dispute to arbitration. It must be valid and enforceable, signed by the parties who had the express and legal authority to do so. Debra Clyburn-Wilson was not the legal guardian of Willie Mae Clyburn, nor did she have any Power of Attorney Guardianship. In fact, when Willie Mae Clyburn did appoint a Power of Attorney over

five (5) months later on March 22, 2017, she appointed Andrietta Atkinson as her Durable Power of Attorney, not Debra Clyburn-Wilson. (See POA of Willie Mae Clyburn, ¶ 1, Exhibit B). Debra Clyburn-Wilson was never given permission by Willie Mae Clyburn to sign documents on her behalf. (See Deposition of Debra Clyburn-Wilson, p. 74, lns 1-25, Exhibit C). Debra Clyburn-Wilson was never given permission by Willie Mae Clyburn to waive Willie Mae Clyburn's right to a jury trial. (Id.) Further, Debra Clyburn-Wilson did not understand the Arbitration Agreement when she signed it and Sumter East Health and Rehabilitation Center did not explain the Arbitration Agreement to Debra Clyburn-Wilson prior to her signing. (Id.) Willie Mae Clyburn herself did not sign the Arbitration Agreement despite having the ability to sign documents or appoint a representative as she did on March 22, 2017 with the Durable Power of Attorney.

B. An Admission Agreement and an Arbitration Agreement are two separate agreements and one cannot be bound by the other.

Our South Carolina Supreme Court has ruled the difference between a residency contract and an arbitration agreement, and that just because the two agreements are contained in one document does not make them one in the same. The Supreme Court has ruled that:

Assent to this contract [the admission agreement] was a condition for Decedent's admission to Facility. On the other hand, the AA was not required for Decedent's admission, contained no provision for medical, nursing, or health care services to be provided for Decedent, and did not require any financial commitment to pay for such

services. The separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution.

Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014). A decision to admit a resident to a community residential care facility such as the Defendants' is a healthcare decision. As such, signing an admission agreement to a skilled nursing facility is a healthcare related agreement, not a legal agreement. Conversely, agreeing to settle disputes through arbitration is a legal decision. The Defendant's argument that all of the Plaintiff's claims are dependent on the duties which arise from the Admission Agreement is fundamentally flawed; an admission agreement involves making a healthcare decision, and an arbitration agreement involves making a legal decision. *see also* Thompson v. Pruitt Corp., 416 S.C. 43, 50, 784 S.E.2d 679, 683 (Ct. App. 2016) ("The Act confers authority on a health care surrogate to consent on the patient's behalf 'to the provision or withholding of health care' and to make financial decisions obligating the patient to pay for the medical care provided." (quoting Coleman, 407 S.C. at 351-52, 755 S.E.2d at 453)).

c. Debra Clyburn-Wilson did not possess statutory authority to bind Willie Mae Clyburn under the Arbitration Agreement.

a. S.C. Adult Health Care Consent Act

The South Carolina Adult Health Care Consent Act ("AHCCA"), defines "health care" as including intermediate or skilled nursing care. S.C. Code Ann. § 44-66-20(1). It also specifically includes

the placement or removal from a facility that provides these forms of care.” Id. A party may consent to health care on behalf of a patient, if the patient is deemed unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent. S.C. Code Ann. § 44-66-20(8). S.C. Code Ann. § 44-66-30 lists the appropriate persons who may make health care decisions for a patient who is unable to consent and provides an order of priority for who is able to make those decisions. It reads:

- (A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in the following order of priority:
- (1) a guardian appointed by the court pursuant to Article 5, Part 3 of the South Carolina Probate Code, if the decision is within the scope of the guardianship;
 - (2) an attorney-in-fact appointed by the patient in a durable power of attorney executed pursuant Section 62-5-501, if the decision is within the scope of his authority;
 - (3) a person given priority to make health care decision by another statutory provision;
 - (4) a spouse of the patient unless the spouse and the patient are separated pursuant to one of the following:
 - a. entry of a pendent lite order in a divorce or separate maintenance action;
 - b. formal signing of a written property or marital settlement agreement; or
 - c. entry of a permanent order of separate maintenance and support or of a permanent order approving a property or marital settlement agreement between the parties;
 - (5) an adult child of the patient, or if the patient has more than one adult child, a majority of the adult children who are reasonably available for consultation;
 - (6) a parent of the patient;
 - (7) an adult sibling of the patient; or if the patient has more than one adult sibling, a majority of the adult siblings who are reasonably available for consultation;
 - (8) a grandparent of the patient; or if the patient has more than one grandparent, a majority of the grandparents who are reasonably available for consultation;
 - (9) any other adult relative by blood or marriage who reasonably is believed by the health care professional to have a close personal relationship with the patient, or if the patient has more

than one other adult relative, a majority of those adult relatives who are reasonably available for consultation.

Defendant has put forth no evidence that Willie Mae Clyburn was unable to consent to treatment after two licensed physicians have examined the patient and certify an inability to consent, as required by the statute. Additionally, the AHCCA only deals with “health care” related decisions, and not legal decisions. Nowhere in the entire AHCCA is the word “legal” or “arbitration” mentioned. Clearly the legislature intended this Act to govern only those decisions as they relate to health care. The Court in Coleman held that the sister of a nursing home resident could not bind the resident to an arbitration agreement at the time of admission, and that the arbitration agreement was not valid because it exceeded the scope of the sister’s authority under the AHCCA. According to the Court, AHCCA specifically limited surrogates’ authority to making health care decisions and associated financial arrangements. Arbitration is not a health care or related financial decision, and thus exceeds the authority granted by the AHCCA. Id. At 351-52, 755, S.E. 2d at 453.

b. S.C. Bill of Rights for Residents of Long-Term Care Facilities

South Carolina Bill of Rights for Residents of Long-Term Care Facilities is codified in S.C. Code Ann. §44-81-10, et seq. Under the Bill of Rights, a “representative” is defined as “a resident’s legal guardian, committee, or next of kin, or other person acting as agent of a resident who does not have a legally

appointed guardian.” S.C. Code Ann. § 44-81-30(3). This is substantially the same as the AHCCA.

Under the Bill of Rights, decision making is limited to health care decisions, not legal decisions.

D. Federal Arbitration Agreement Act does not mandate enforcement of this Agreement

Under the FAA, arbitration is required when there is a valid arbitration agreement and a dispute exists which is within the scope of the agreement. Under the arbitration clause, neither prong is satisfied. As discussed above in Section I, there is no valid arbitration agreement because Debra Clyburn-Wilson did not have the legal authority to execute a valid arbitration. Second, Plaintiffs’ claims include negligence, negligence per se, fraud and misrepresentation, violations of the South Carolina Unfair Trade Practices Act, wrongful death and survivorship. Nowhere in the Defendant’s arbitration agreement are those causes of action listed. Accordingly, the FAA does not apply.

E. Plaintiffs are not equitably estopped from denying the Arbitration Agreement

Defendant also argues or intends to argue that Plaintiffs should be equitably estopped from denying enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense and the party asserting this defense bears the burden of proving all of its elements. Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conduct be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76,

84, 650 S.E.2d 465, 470 (2007). The party asserting the estoppel must lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on the conduct of the party to be estopped. Id.

Defendant has not met its burden to establish these elements. There is no evidence Debra Clyburn-Wilson acted in a way amounting to a false representation to Defendant regarding Willie Mae Clyburn's status or that Debra Clyburn-Wilson intended for Defendant to act in reliance on her conduct. Additionally, the evidence shows Defendant cannot meet its burden to show they lacked knowledge or the means of knowledge of the truth of the facts in question. Equitable doctrines such as estoppel favor diligent parties who actively endeavor to protect their rights. A person cannot claim to have been misled and cannot rely on equitable estoppel if the party, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in question. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-09 (Ct. App. 2001).

In this case, Defendant had the capacity to determine whether Debra Clyburn-Wilson had authority to sign an arbitration agreement on Willie Mae Clyburn's behalf. The Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. Defendant is, or should be, familiar with the legal concepts of guardianship and powers-of-attorney. Defendant had the ability to ask Debra Clyburn-Wilson whether she was Willie Mae

Clyburn's guardian or attorney-in-fact and had the ability to request supporting documentation. Since the Defendant has not cited or provided evidence on all required elements of equitable estoppel, Plaintiffs are not equitably estopped from denying the Arbitration Agreement.

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

As discussed above briefly, there were two separate agreements signed on the day of the admission, and they were not merged. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of merger not apply. The Admission Agreement's "Entirety of Agreement" provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibits merging the two separate agreements. (See Admission Agreement, p. 8, ¶ 6, Exhibit A). An admission contract with an "Entirety of Agreement" provision is

separate “on its face” from an arbitration contract where the provision identifies the two contracts distinctly—i.e. “this [Admission] Agreement *or* in the Arbitration Agreement.” Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). Even if the “Entirety of Agreement” clause creates an ambiguity as to merger, the law is clear that any ambiguity must be construed against the drafter, in this case, Defendant. Since there was no merger here, Defendant’s equitable estoppel argument must be denied. See Coleman, 407 S.C. at 355–56, 755 S.E.2d at 455 (rejecting estoppel argument by finding no merger).

As in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with “Page 9” while the Arbitration Agreement is a separate document. As in Thompson, the arbitration agreement announces its independence with its “Arbitration Agreement” title.

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

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

Therefore, Defendant cannot prove merger of the Admission Agreement and Arbitration Agreement. Defendant can also not claim to have been misled and cannot rely on equitable estoppel if, by the exercise of reasonable diligence, it could have acquired knowledge to determine the truth of facts in questions. Furthermore, Defendant had the capacity to determine whether Debra Clyburn-Wilson had authority to sign the Arbitration Agreement on Willie Mae Clyburn's behalf. Again, Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendant is familiar with the legal concepts of guardianship and powers-of-attorney and

had the ability to ask Debra Clyburn-Wilson for any power of attorney or court appointed guardianship documentation.

Defendant then argued Willie Mae Clyburn's admission to the Facility was the required "direct benefit." In doing so, Defendant tied its estoppel argument to the merger argument. See Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting nursing home's "equitable estoppel argument is premised on [the home's] contention that, under state law, the admission agreements and the [arbitration agreements] merged"). Admission can be the "direct benefit" that forces Plaintiff to arbitrate only if admission and arbitration are governed by the same contract. For the reasons outlined above, the two contracts are separate, they do not merge, and Willie Mae Clyburn's admission does not support equitable estoppel.

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

Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

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

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

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

However, the only alleged benefit Defendant cited is the admission itself, a benefit Defendant has admitted being separate from arbitration. Defendant never attempts to explain what supposed benefit of

the independent Arbitration Agreement Willie Mae Clyburn derived during her time as a resident in Defendant's facility. The Court of Appeals' ruling in Thompson speaks directly on this point, i.e., "any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial." 416 S.C. at 60, 784 S.E.2d at 688.

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

Lastly, Defendant claimed that the agreement is enforceable under a theory of third-party beneficiary. See Thompson, 416 S.C. at 57, 784 S.E.2d at 687 (holding as to the arbitration agreement between the appellants and Son in his individual capacity, a third-party beneficiary to an arbitration agreement cannot be required to arbitrate a claim unless the third party is attempting to enforce the contract containing the arbitration agreement.) With no valid underlying contract, there could be no third-party

beneficiary. First, Plaintiffs' action sounds solely in tort. There is no breach of contract claim asserted. Plaintiffs' pleading does not specifically refer to any written contract or necessarily rely upon the language of any written contract. Plaintiffs' tort claims presumably are based on common law and statutory or regulatory duties imposed by law. Second, as discussed above, the Arbitration Agreement is a separate and distinct agreement from the Admission Agreement. Plaintiffs do not rely upon the terms of the Arbitration Agreement to establish their tort claims.

F. Attorney's fees and costs

The Plaintiffs respectfully request the Court award attorney's fees and costs associated with the preparation and arguing of this motion. The undersigned has communicated with opposing counsel regarding the invalidity of the arbitration agreement, and the Defendant's failure to meet their burden of proof.

CONCLUSION

Based on the reasons set forth above, the Plaintiffs respectfully request the Defendant's Motion to Compel Arbitration be denied. This memorandum was filed prior to receiving any memorandum in support of the Defendant's Motion to Dismiss and Compel Arbitration. Should the Defendant file any such memorandums or replies, Plaintiff respectfully asks to be given time to adequately respond.

Respectfully Submitted,

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April 30, 2020

Mt. Pleasant, South Carolina

Willie
Mae
Clyburn

RESIDENT ADMISSION AGREEMENT



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RESIDENT ADMISSION AGREEMENT

This Resident Admission Agreement ("Agreement") sets forth the terms under which the Facility will provide long-term care health services to the Resident and how the Resident will pay for such services. Based upon the consideration, mutual promises and agreements set forth in this Agreement, the parties agree as follows:

I. PARTIES

shall be referred to in this Agreement as the Facility. Whenever the term, Facility, is used in this Agreement, it refers to the company that operates the Facility and the company that manages Facility, as well as their employees and agents.

shall be referred to in this Agreement as the Resident. Except in Section VI of this Agreement, and when the context clearly indicates otherwise, whenever the term Resident is used, it refers to the Resident and anyone with legal authority to make decisions on the Resident's behalf (e.g. an agent under a health care power of attorney, a guardian or conservator, or a surrogate decision maker).

shall be referred to in this Agreement as the Responsible Party.

II. TERM AND TERMINATION

Term. This Agreement is effective as of the date of the Resident's admission to the Facility. The Agreement will continue in full force and effect until any party terminates it as provided below.

Termination. The parties may mutually agree to terminate this Agreement at any time. The Resident may also terminate the Agreement by notifying the Facility that he or she is leaving the Facility with no intention of returning to the Facility. If the Resident is absent from the Facility for any reason for thirty (30) consecutive days, this Agreement will be deemed to be terminated. If the Resident wishes to be readmitted after such an absence, the Resident and the Facility will execute a new Resident Admission and Financial Agreement. The Facility may terminate this Agreement by discharging the Resident in accordance with state and federal law. The Responsible Party may terminate this Agreement, solely as it applies to the duties and responsibilities of the Responsible Party by providing the Facility thirty (30) days written notice.

III. RIGHTS AND OBLIGATIONS OF THE RESIDENT

Physician's Care. Resident shall remain under the care of an attending physician of his or her choice (Resident's Attending Physician) throughout the stay in Facility. Facility is authorized to contact Resident's Attending Physician or his/her designated alternate whenever the Resident needs medical services. If Resident's Attending Physician is unavailable, and the Resident requires medical services, Resident authorizes Facility to obtain on behalf of Resident the services of any other physician licensed to practice medicine in this state, at Resident's sole expense (if not covered by Medicaid, Medicare or third party payer).

Resident's Attending Physician shall be one who has agreed to abide by Facility's policies and who agrees to see Resident either by visiting the Facility or through office visits. A list of physicians who treat residents of the Facility is in the Facility Guide. Resident will notify Facility if he or she selects a different attending physician during his or her stay at the Facility. If the Resident does not select his or her own attending physician, or is unable to select an attending physician, the Facility may designate an attending physician for the Resident. The Resident recognizes and agrees that all physicians providing services to the Resident, including those the Facility may designate, are not employees or agents of the Facility. Accordingly, the Facility is not legally

responsible for any physician's act or omission in providing services to the Resident as attending physician. The Resident shall be solely responsible for paying (or arranging for payment by a third party payer) for all services rendered by the Resident's Attending Physician.

Refusal of Treatment and Issuance of Advance Directive. The Resident may refuse any medical or surgical treatment that is recommended by the Resident's Attending Physician. If the Resident refuses treatment, then the Facility will make its best effort to inform the Resident of the possible consequences of such refusal. The Resident may also issue an Advance Directive in accordance with state law that describes the Resident's wishes with respect to treatments that may be administered or withheld in the event the Resident becomes unable to make health care decisions for him or herself.

Facility Policies and Rules. The Resident agrees to abide by Facility policies and rules regarding resident conduct and responsibilities. All policies and rules applicable to Resident's conduct and responsibilities are printed in the Facility Guide or this Agreement. The Facility may amend its policies and rules from time to time and will make its best effort to notify the Resident and his or her Representative of important changes.

The Resident understands that as part of Facility's emergency preparedness plans the Facility will perform emergency preparedness drills from time to time. The Resident understands these drills are performed to assure the safety of all residents, staff and visitors and agrees to participate in all scheduled drills.

Pharmacy Services. Facility has an arrangement with a pharmacy to provide necessary prescription and over the counter medications to its residents. The Facility may participate in a therapeutic interchange program that, with the permission of the Resident's Attending Physician, allows the pharmacy to dispense less expensive medications that are the therapeutic equivalent of medications ordered by the Attending Physician. The Resident may choose another pharmacy only if that pharmacy will sign an agreement with the Facility to provide services in accordance with all applicable federal and state laws and Facility policies. The Resident agrees to pay for medications unless they are otherwise paid for by Medicaid, Medicare, or other third party payer. All medications, including over the counter medications, must be prescribed by a licensed physician or other individual authorized by state law to write prescriptions. Resident may not bring medications or drugs onto Facility premises unless the medications or drugs are labeled according to the requirements of State and Federal law. All medications must be administered according to physician's orders. Qualified staff shall administer medications unless the Resident's Attending Physician writes an order authorizing the Resident to self-administer medications, in which case the Resident may administer his or her own medications under the guidance of a registered or licensed practical nurse.

Right to Leave. The Resident's stay with the Facility is voluntary. The Resident may leave the Facility temporarily on therapeutic leave at any time. The Resident agrees that he or she will provide the Facility with advance notice of plans to leave the Facility temporarily and how long the Resident expects to remain away from the Facility, so that the Facility may consult the Resident's Attending Physician, make arrangements regarding the Resident's medication and the like. The Resident also agrees that he or she will follow Facility rules regarding signing in and out of the Facility whenever he or she leaves the Facility. The Resident also agrees to give the Facility advance notice if the Resident intends to leave the Facility permanently so that the Facility may obtain an appropriate discharge order from the Resident's Attending Physician. Facility will not be responsible for any personal injury, illness, or deterioration in Resident's condition while Resident is temporarily absent from the Facility. Resident and Responsible Party agree to release Facility from any and all related liability. If the Resident leaves the Facility permanently without an appropriate physician's order, then the Facility will document that the resident left against medical advice and will discharge the Resident.

Personal Items. The Facility desires to provide the Resident with a home-like environment. To that end, the Resident may bring personal items from home to the Facility. However, common sense should be used, and it is

best if items of large monetary or sentimental value are not brought to the Facility. The Resident shall complete an inventory form listing the Resident's personal items at the time of admission. Additions and deletions to the inventory shall be brought to the attention of the Facility's administration so that records are current. The Resident may ask the Facility to accept Resident's personal items for safekeeping. The Facility assumes no liability for the security of personal items retained by Resident or kept in the Resident's room. All articles retained by the Resident, (including dentures, hearing aids, eyeglasses, jewelry and documents) shall be the responsibility of the Resident. At the time of transfer or discharge, the Facility shall be accountable only for the Resident's personal property items the Facility has accepted for safekeeping. The Resident must make arrangements to remove the Resident's personal property from the Facility within 72 hours of discharge unless alternate arrangements are made with Facility administration.

Residents may be permitted to bring personal refrigerators to Facility if there is appropriate space for the refrigerator, the refrigerator will not infringe on the personal space of other residents, and Facility's physical plant can support the use of the refrigerators (i.e. sufficient power source). Facility will provide a thermometer for checking refrigerator temperature, however Resident and/or Responsible Party is responsible for checking the temperature of the refrigerator and ensuring it is maintained at or below 41 degrees at all times. Further, Resident and/or Responsible Party is responsible for cleaning the personal refrigerator routinely, for ensuring that all items placed in Resident's personal refrigerator are dated and labeled to identify the contents, and for discarding expired food and drinks immediately. Facility staff will periodically perform inspections of personal refrigerators. If, at any time, during a periodic inspection Facility staff discover unidentified, undated or expired items in a personal refrigerator, then those items will be immediately discarded without the permission of Resident and/or Responsible Party. Resident and/or Responsible Party's failure to adhere to these requirements will be grounds for immediate removal of personal refrigerators.

Clothing. The Resident agrees to provide, to the extent possible, wash and wear clothing, properly labeled and marked in sufficient quantities for Resident to maintain a neat appearance.

IV. FACILITY OBLIGATIONS AND RIGHTS

Nondiscrimination. The Facility provides care on a non-discriminatory basis so that all residents are admitted and receive benefits and services without regard to race, religion, color, national origin, age, sex, disability, marital status or source of payment.

Facility Services. The Facility will provide the Resident with basic room and board as well as nursing and personal care and other ancillary items and services needed for the Resident's health, safety and well-being, consistent with the orders of the Resident's Attending Physician and the Resident's plan of care. If Resident's Attending Physician orders health care services that Facility does not have the capability to provide, Facility will arrange, with Resident approval, for the services to be provided by an outside provider or we will arrange for Resident to be transferred to the hospital or other health care provider.

Bed-hold Policy. Upon request, Facility shall hold Resident's bed when Resident is away from Facility for medical leave or on therapeutic leave, as long as the applicable bed-hold fee is paid. Except as provided below, the daily bed-hold fee is the current daily charge for the Resident's room and board. Medicaid will pay applicable bed-hold charges for up to 10 days for short-term hospitalization, up to 18 days each state fiscal year (July 1- June 30) for therapeutic deinstitutionalization with individual leave periods not to exceed nine days and periods of leave cannot be consecutive, up to 30 days for participation in an approved rehabilitation program with approval from the Director of the Division of Community and Facility Services, and for up to 96 days each state fiscal year (July 1- June 30), with leave of a maximum of 8 days per month for leave to an intermediate care facility for the mentally retarded. In some instances leave to an intermediate care facility for the mentally retarded may be allowed to exceed 8 days per month. If a Medicaid resident exceeds 10 days for short-term

hospitalization, 18 days per state fiscal year for therapeutic deinstitutionalization, 30 days for approved rehabilitation and/or 96 days per state fiscal year for leave to an intermediate care facility for the mentally retarded, the Facility may charge the Resident a bed-hold fee not to exceed the Medicaid daily rate. The Resident will be notified if bed-hold charges will be assessed, and must consent in writing to the additional charge. If bed-hold fees are not paid by Medicaid or the Resident, the Facility will not hold the Resident's bed. However, the Facility will readmit the Resident immediately upon the first availability of a bed in a semi-private room if the Resident requires the services provided by the Facility and is Medicaid eligible.

Transfer and Discharge. If a physician orders the Resident transferred to a hospital, the Facility will arrange for the transfer to the hospital. Facility will not charge the Resident past the day the Resident is transferred unless the Resident wishes to reserve the bed for when the Resident returns in accordance with the Facility's bed-hold policy.

If Resident is transferred from Facility, or is on a therapeutic home leave in excess of the number of days specified by regulations for Medicaid residents, without arranging for a bed-hold, Facility may discharge the Resident. Except in an emergency, Facility will not transfer or discharge Resident without prior consultation with Resident. Facility will provide Resident with prior written notice of any transfer or discharge to the extent required by law.

Room Changes. The Facility reserves the right to change the Resident's room or roommate when the Facility determines it is appropriate to do so. Resident and Responsible Party will be notified prior to a transfer and will have an opportunity to provide input on roommate selection and location. The Facility will make changes in accordance with state and federal regulations.

Personal Needs Account. The Resident may leave personal spending money with the Facility. If the Resident wants a personal needs account maintained by the Facility, the Resident must sign an authorization form. The Facility will not charge an additional fee for this service. The Facility or its contractor will hold the Resident's funds in trust in accordance with applicable federal and state laws. The Resident may see the Facility's records of the Resident's account upon reasonable request. Interest will be credited to Resident's account according to state and federal regulations.

Concerns and Issues. The Facility's policy is to support the Resident's right to voice concerns and to ensure that after a concern has been received, the Facility acts to resolve the issue and communicate the resolution to the Resident in a timely manner. In addition, the Resident may file a concern with the state survey and certification agency regarding grievances against the Facility, including allegations of resident abuse, neglect, misappropriation of property or Facility noncompliance with advance directive requirements.

V. RESIDENT PRIVACY

Release of Protected Health Information. The Facility will maintain the confidentiality of the Resident's protected health information, which includes but is not limited to information contained in the Resident's medical and financial records, in accordance with applicable state and federal law. Resident authorizes Facility to release the Resident's protected health information to the extent necessary to provide for continuity of care with other providers who render services to the Resident; to obtain payment for, or to allow other providers to obtain payment for, services rendered to the Resident; and to any agency or person with the right, by law, to review such records, including those who have a written authorization. Further, Resident authorizes other health care providers to release protected health information about the Resident to the Facility to the extent such information is reasonably related to the care that the Facility will provide or has provided to Resident.

MDS Privacy Act Notification. Facility is required by Medicare and Medicaid regulations to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity and health status. Facility is required to establish a database of resident assessment information and to electronically transmit this information to the state. The state is then required to transmit the data to the federal Central Office Minimum Data Set (MDS) repository of the Centers for Medicare and Medicaid Services (CMS). The primary use of this data is to aid in the administration of the survey and certification of Medicare/Medicaid long-term care facilities and to improve the effectiveness and quality of care given in those facilities. This system will also support regulatory, reimbursement, policy, and research functions. This system will collect the minimum amount of personal data needed to accomplish its stated purpose. The Computer Matching and Privacy Protection Act of 1988 permits the government to verify information by way of computer matches.

The information collected will be entered into the Long-Term Care Minimum Data Set (LTC MDS) system of records, System No. 09-70-1516. Information from this system may be disclosed, under specific circumstances, to: (1) a congressional office from the record of an individual in response to an inquiry from the congressional made at the request of that individual; (2) the Federal Bureau of Census; (3) the Federal Department of Justice; (4) an individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease of disability, or the restoration of health; (5) contractors working for HCFA to carry out Medicare/Medicaid functions, collating or analyzing data, or to detect fraud or abuse; (6) an agency of a State government for purposes of determining, evaluating and/or assessing overall or aggregate cost, effectiveness, and/or quality of health care services provided in the State; (7) another Federal agency to fulfill a requirement of a Federal statute that implements a health benefits program funded in whole or in part with Federal funds or to detect fraud or abuse; (8) Peer Review Organizations to perform Title XI or Title XVIII functions; or (10) another entity that makes payment for or oversees administration of health care services for preventing fraud or abuse under specific conditions.

Collection of the Resident's social security number is voluntary. However, failure to provide this information may result in the loss of Medicare benefits provided by the Facility. The social security number will be used to verify the association of information to the appropriate individual.

VI. PAYMENT FOR SERVICES

Resident's Obligations. The Resident agrees to pay Facility for all services and items that the Facility provides to the Resident, except to the extent that the Resident's care is covered by and paid for by Medicare, Medicaid, or another third party payment source, such as private insurance.

Responsible Party's Obligations. The Responsible Party agrees to pay Facility, out of the Resident's assets to which the Responsible Party has access, for all services and items that the Facility provides to the Resident, except to the extent that the Resident's care is covered by and paid for by Medicare, Medicaid or another third party payment source, such as private insurance. If the Responsible Party has access to Resident assets and fails to make payments to the Facility, the Responsible Party will be personally liable to the Facility to the extent of the Resident's assets that were not used to pay for the Resident's care. Notwithstanding anything else to the contrary in this Agreement, the Responsible Party shall not be liable to pay for the care Facility provides to the Resident unless Responsible Party fails to make payment to Facility for such care out of the Resident's assets to which the Responsible Party has access.

Private Pay. If the Resident's care is not covered by and paid for by Medicare, Medicaid or another third party payment source, such as private insurance, the Resident and Responsible Party agree to pay the rate established for the type of room the Resident is placed in, as well as the amount of any ancillary charges related to items or services that the Facility provides to the Resident or arranges to provide to the Resident. A list of the room types and the daily fee for each is attached to this Agreement as Exhibit 1. The Facility may increase the daily rate at

any time by providing the Resident or Responsible Party written notice of the new rate at least thirty (30) days before the new rate becomes effective. One month's room and board charge, prorated based on the day of the month Resident is admitted to Facility, is payable to Facility at the time of admission. The Facility will provide the Resident or Responsible Party with a monthly invoice that itemizes all charges incurred by the Resident. The Facility will bill room and board charges in advance and ancillary charges in arrears. Payment of the invoice is due within ten (10) days of receipt of the invoice.

Medicaid Residents. If the Resident is a Medicaid beneficiary at the time of admission, then the State Medicaid program will pay for much of the Resident's care at the Facility. The services and items covered by Medicaid for which the Facility may not charge the Resident, as well as those non-covered items and services, are listed on Exhibit 1 and 2 to this Agreement. If the Resident or Responsible Party requests that the Facility provide services or items that are not covered by the Medicaid program, then the Resident and Responsible Party agree to pay for such non-covered items and services. In addition to the amounts paid by the State Medicaid program for the Resident's care, the state sets an amount of money, called the Resident Liability that the Resident must pay to or have paid directly to the Facility. Facility will invoice the Resident the amount of the Resident Liability and the amount of any non-covered items or services on a monthly basis. The Resident and Responsible Party agree to pay the Facility within ten (10) days of receipt of invoice, or by such deadline that exists under State law. From time to time, the State may make adjustments to the Resident Liability owed by the Resident. In the event the State makes such an adjustment retroactively, the Resident and Responsible Party agree to pay the adjusted amount to the Facility within thirty (30) days of notice of the adjustment. If the Resident's Medicaid coverage expires or lapses for any reason, then Resident shall be classified as a Private Pay Resident, and the terms of this Agreement applicable to Private Pay Residents shall apply to Resident, unless an alternative third party payer is available.

Medicaid Pending Residents. Residents who have applied for Medicaid benefits and meet clinical need and financial criteria but who have not been approved for Long Term Care Medicaid at the time of admission will be referred to as Medicaid Pending Residents. Medicaid Pending Residents agree to follow through all steps necessary to receive Medicaid benefits and to become enrolled in the Medicaid program as soon as possible after admission to Facility. Responsible Party agrees to take all steps necessary to assist the Medicaid Pending Resident to complete the application process to become eligible for Medicaid benefits. Facility may also provide the Medicaid Pending Resident with assistance to complete the application process. The Medicaid Pending Resident and Responsible Party agree to provide the state Medicaid program and Facility with such statements of the Resident's assets, income and other financial information as is reasonably requested. Facility will estimate the Medicaid Pending Resident's liability payment and will invoice the Resident the amount of the estimated resident liability payment and the amount of any non-covered items or services on a monthly basis. Resident and Responsible Party agree to make payment to Facility within ten (10) working days of receipt of invoice. Upon approval of the Medicaid Pending Resident into the state Medicaid program, Facility will compare the estimated resident liability payment with the amount of the resident liability payment set by the state. Facility will bill Resident or show a credit on Resident's account for the difference on the next invoice. In the event that the state denies Medicaid coverage for Resident, or determines that any portion of the Medicaid Pending Resident's stay at Facility is not covered by the Medicaid program, then, to the extent allowed by applicable laws, Resident and Responsible Party agree to pay Facility the private room and board rate applicable to the period of non-coverage, as well as Facility's customary rate for ancillary items and services that Facility provided during the period of non-coverage. If the Medicaid Pending Resident is not enrolled in the state Medicaid program within sixty (60) days of Admission, then Facility may begin discharge proceedings in accordance with applicable law.

2

Medicare Residents. Resident may be eligible to have all or a portion of his or her stay in Facility paid for by the Medicare Program. Generally, Medicare Part A pays for services to Residents who have recently been in the hospital for at least three consecutive midnights and who continue to require a certain level of nursing or

rehabilitation services. A list of items and services covered by Medicare Part A and a list of items and services that are not covered by Medicare Part A, are attached to this Agreement as Exhibits 1 and 3. Even though a Resident's stay is covered by Medicare, the Resident may be required to pay Facility coinsurance as required by Medicare regulations. The amount of the coinsurance is set annually by the Medicare program. The current amount of the coinsurance is set forth on Exhibit 1 to this Agreement. Facility will send Resident a monthly invoice listing any coinsurance amounts and charges for non-covered items and services. Resident and Responsible Party agree to pay Facility the amount shown on the invoice within 10 days of receipt. Medicare coverage is temporary. If the Resident remains in the Facility after Resident's Medicare coverage expires, the Resident and Responsible Party agree to (i) pay Facility the then current private pay daily rate plus the Facility's customary charges for ancillary services; or (ii) make other arrangements to have the Resident's care paid for, e.g., through the Medicaid program or private insurance. If Medicare denies payment for the Resident's stay in the Facility, then to the extent allowed by law, Resident shall be classified as a Private Pay Resident and the terms of this Agreement applicable to Private Pay Residents shall apply to Resident, unless another third party payer is available.

Other Payment Sources. If Resident's stay is covered by and paid for by any other third party payment source, then Resident and Responsible Party agree to pay Facility any applicable deductible, copayment, coinsurance or other amount, including payment for items and services not covered by the third party payment source within 10 days of receipt of an invoice from Facility.

Transportation. Facilities per diem or other daily rate includes the following transportation services:
 . Other scheduled and unscheduled transportation may be available upon request and then at applicable charges, as set forth in Exhibit 1.

Changes in Payment Source. Resident and Responsible Party understand that Resident's payment source may change over the course of Resident's stay in the Facility. For example, a resident may be admitted to Facility from the hospital with Medicare coverage. After such Medicare coverage expires, the Resident may have private insurance or Medicaid coverage to pay for the Resident's care, or the Resident may become private pay. Resident and Responsible Party agree to abide by the terms of this Agreement that are applicable to Resident's source of payment as such source of payment may change during the course of the Resident's stay at Facility. It is ultimately the Resident's and Responsible Party's responsibility to pay for or arrange for an alternative payment source to pay for all care the Facility provides to Resident during the Resident's stay at Facility.

Non-Sufficient Funds. If checks are returned for non-sufficient funds, Facility will charge a fee of \$35.00.

Payment. If Resident or Responsible Party fail to make any payment to Facility when due, then interest shall accrue on all unpaid amounts at 1.5% per month. If a check payable to Facility for payment is returned for insufficient funds, Resident or Responsible Party is responsible for all associated fees to the extent State law allows. If the Facility hires an attorney to collect any unpaid balances, Resident and Responsible Party (to the extent the Responsible Party may be personally liable) agree to pay Facility's reasonable attorney fees and costs of collection in addition to any other amounts owed pursuant to this Agreement.

Refunds. If the Resident is discharged from the Facility, the Facility will apply any prepayment towards amounts due and owing to the Facility, and will refund the difference within 30 days, or sooner, if required by law. In the event of the Resident's death, refunds shall be paid to the Resident's estate or appropriate family member within thirty (30) days, or sooner if required by law.

Assignment of Benefits. The Resident authorizes and requests that payment of authorized Medicare Part A and Part B benefits, Medicaid benefits and any other payments for services furnished by or on behalf of the Facility be made to the Facility.

VII. MISCELLANEOUS

Identity Theft. Federal Trade Commission and federal financial regulatory agencies have enacted policies and regulations to detect, prevent, and mitigate identity theft. Pursuant to these rules and regulations, Facility will take reasonable efforts to verify the identity of each resident. Further, the Federal Identity Theft Prevention Program has identified certain "red flags". If any identified "red flags" appear, then they will be reported to the appropriate state and federal authorities, as the law requires.

Contributions, Donations and Gifts. Contributions, donations and/or gifts made to Facility by a governmentally assisted resident, his or her Responsible Party or family are given solely at their discretion, and in no way affect the eligibility for admission or availability of or access to the normal services provided to all residents. Facility does not solicit, or in any way require, such contributions, donations, and/or gifts.

Private Duty Nurses/Geriatric Aids. If the Resident wants a private duty nurse or private duty geriatric aid, then the Resident is responsible for selecting a person licensed and/or certified according to state laws and regulations. Resident is also responsible for paying him or her, and for informing Facility that an aid or nurse has been hired. The person that Resident hires cannot be an employee or agent of Facility, but he or she must meet Facility standards and follow Facility policies and procedures. Employees of Facility will not serve as private duty nurses or private duty geriatric aids.

Photographs. Resident agrees to allow Facility to photograph or videotape Resident as a means of identification or for health related purposes. The photographs or videotapes may also be used to help locate Resident in the event of an unauthorized absence from Facility, but shall otherwise be kept confidential. If Facility intends to use the photograph or videotape for purposes other than those noted above, Facility shall get written permission from Resident in advance of such use. Resident retains the right to refuse the taking of a photograph at any time.

State Resident Rights. A complete copy of State Resident Rights is located in the Facility Guide.

Entirety of Agreement. This Agreement, including all Exhibits hereto, supersedes all other agreements, either oral or in writing, between the parties, and contains all of the promises and agreements between the parties. Each party to this Agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement. Except as stated in this Agreement and the Exhibits hereto, no other agreement, statement, or promise shall be valid or binding. This Agreement may be amended only by a written agreement signed on behalf of the Facility and the Resident.

Amendment Due to Reimbursement Changes. If the governmental agencies that administer Medicare or Medicaid, or any other payer, or any other federal, state or local government or agency adopts any law, rule, regulation, standard or interpretation at any time while this Agreement is in effect which affects the method or amounts of reimbursement or payment for services rendered under this Agreement, or which otherwise materially affects the obligations of Facility, Facility may give Resident/Responsible Party notice of its intent to amend this Agreement or, if applicable, increase charges in order to comply with the change in government law, rule, regulation, or standard or interpretation.

Section Headings. The section headings used in this Agreement are for reference purposes only and shall not be construed to add substantive content to the terms of this Agreement.

Counterparts. This Agreement may be signed in multiple counterparts, which taken together, shall be construed as a single document.

Savings Clause. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, that provision shall not affect any other part of the Agreement and this Agreement shall be construed as if that section had never been included.

Parties Bound. This Agreement shall be binding on the Facility and its assigns, the Resident, the Responsible Party and the Resident's heirs, executors and administrators.

In Witness Whereof, the Parties have executed this Agreement as of the dates set forth below.

For the Resident:

Signature: _____

Printed Name: _____

Date: _____

For the Facility:

Signature: Debbie Martule

Printed Name: Debbie Martule

Date: 10-13-16

For the Responsible Party:

Signature: Debra Clyburn Wilson

Printed Name: DEBRA CLYBURN WILSON

Date: 10-13-16

If an individual other than the Resident signs on behalf of the Resident, indicate the relationship to the resident and obtain copies of relevant documentation at the time of admission.

_____ Conservator/Guardian

_____ Medical or Health Care Power of Attorney

_____ Other: _____

_____ Surrogate Decision maker

_____ Relative (state relationship)

(Specify Relationship)

Exhibit 4

Consent to Treatment

The Resident acknowledges that the Facility renders services to the Resident under the general and specific instructions of the Resident's Attending Physician. The Resident authorizes and directs Facility to provide routine and emergency care as the Resident's Attending Physician or designee may direct from time to time. If Resident's Attending Physician and such attending physician's on-call designee are unavailable and the Resident requires medical services, or if the Attending Physician has not seen Resident in accordance with the timeframes established by law; then Resident authorizes Facility to obtain, on behalf of Resident, the services of any other physician licensed to practice medicine in this state, at Resident's sole expense (if not covered by Medicaid, Medicare or third party payer) until Resident's Attending Physician is available, or Resident has selected a new Attending Physician. In that event, Resident authorizes and directs Facility to provide routine and emergency care as required for Resident's well-being, health, and safety in accordance with the orders of such physician.

Willie M Clyburn
Resident Name (Print)

Resident Signature

Legal Representative Signature (e.g., Guardian)

Agent Signature (e.g., Agent through health care
Power-of-Attorney or Surrogate Decision-maker)

Debra Clyburn H. Son
Responsible Party Signature (e.g., Family member)

Debbie M. Matula
Facility Representative Signature

10-13-16
Date

FILED IN GREENVILLE COUNTY, SC
Rec: \$31.00
March 22, 2017 02:18:23 PM
2017023341
ELECTRONICALLY FILED
March 22, 2017 02:18:23 PM
2017023341
SUMMITER - COMMON PLEAS - CASE#2017CP4301740

MAR 22 2017

DATE
CERTIFIED TO BE A TRUE AND CORRECT COPY
OF DOCUMENT ON FILE IN THIS OFFICE

Trinity L. Hammy
REGISTER OF DEEDS, GREENVILLE COUNTY

**DURABLE POWER OF ATTORNEY
OF
WILLIE MAE CLYBURN**

I, Willie Mae Clyburn, hereby appoint Andrietta Clyburn Akinson to serve as my agent ("Agent") and to exercise the powers and discretions set forth below.¹

Statement of intent. By this instrument I intend to create a Durable Power of Attorney under the law of the state of South Carolina.²

ARTICLE I.

Modification of Agency. This instrument, and the appointments and succession of persons to serve as Agent hereunder, are subject to modification, as follows:

(1) **Revocation, amendment and resignation.** This instrument may be amended or revoked by me, at any time by the execution by me of a written instrument of revocation or amendment delivered to my Agent and to all Alternate Agents. If this instrument has been filed or recorded in the public records, then the instrument of revocation or amendment shall be filed or recorded in the same public records. My Agent and any Alternate Agent may resign by the execution of a written resignation delivered to me or, if I am mentally incapacitated, by delivery to any person with whom I am residing or who has the care and custody of me or, in the case of an Agent's resignation, by delivery to the Alternate Agent.³

(2) **Alternate Agent.** Any party dealing with any person named as Alternate Agent hereunder may rely upon as conclusively correct an affidavit or certificate under penalties of perjury of such Alternate Agent that those persons named as prior Agents are no longer serving.⁴

ARTICLE II.

Property and financial. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, as follows:⁵

(1) **Power to sell.** My Agent is authorized to sell any and every kind of property that I may own now or in the future, real, personal, intangible and/or mixed, including without being limited to contingent and expectant interests, marital rights and any rights of survivorship incident to joint tenancy or tenancy by the entirety, upon such terms and conditions and security as my Agent shall deem appropriate and to grant options with respect to sales thereof.⁶ My Agent is authorized to make such disposition of the proceeds of such sale or sales, including expending such proceeds for my benefit, as my Agent shall deem appropriate.⁷

¹ This clause appoints your Agent.

² This clause makes clear that you are creating a durable power of attorney in accordance with the provisions of state law that permit such a power.

³ This paragraph describes how the Power of Attorney may be revoked or amended and how the Agent may be removed or may resign.

⁴ This paragraph permits any alternate Agent to certify to third parties that such Alternate Agent is now able to serve because the Agents first named have died, resigned, etc.

⁵ This article contains a list and description of the powers you have granted your Agent to manage your property and make financial decisions for you.

⁶ This paragraph grants your agent broad power to sell your property.

⁷ This grants your agent the power to dispose of the sales proceeds from a sale of your property made by your Agent.

(2) **Power to buy.** My Agent is authorized to buy every kind of property, real, personal, intangible and/or mixed, upon such terms and conditions as my Agent shall deem appropriate; to obtain options with respect to such purchases; to arrange for appropriate disposition, use, safekeeping and/or insuring of any such property.⁸ My Agent is authorized to buy United States Government bonds redeemable at par in payment of the federal estate tax imposed at my death.⁹ My Agent is authorized to borrow money for the purposes described herein and to secure such borrowings in such manner as my Agent shall deem appropriate.¹⁰ My Agent is authorized to use any credit card held in my name to make such purchases and to sign such charge slips as may be necessary to use such credit cards.¹¹ My Agent is authorized to repay from any funds belonging to me any money borrowed and to pay for any purchases made or cash advanced using credit cards issued to me.¹²

(3) **Power to invest.** My Agent is authorized to invest and reinvest all or any part of my property in any property or interests, including undivided interests, in property, real, personal, intangible and/or mixed, wherever located, including without being limited to securities of all kinds, stocks of corporations regardless of class, interests in limited partnerships, real estate or any interests in real estate whether or not productive at the time of investment, commodities contracts of all kinds, interests in trusts, investment trusts, whether of the open and/or closed fund types, and participation in common, collective or pooled trust funds or annuity contracts without being limited by any statute or rule of law concerning investments by fiduciaries; to sell, including short sales, and terminate any investments whether may be me or any Agent; to establish, utilize and terminate savings and money market accounts with financial institutions of all kinds.¹³ My Agent is authorized to establish, utilize and terminate accounts with security brokers and in such accounts, to make short sales and to buy on margin and, for such purposes, my Agent may pledge any securities so held or purchased with such brokers as security for loans and advances made to the account.¹⁴ My Agent is authorized to establish, utilize and terminate agency accounts with corporate fiduciaries.¹⁵ My Agent is authorized to employ, compensate and terminate the services of financial and investment advisors and consultants.¹⁶

(4) **Power to manage real property.** With respect to real property, including but not limited to any real property I may hereafter acquire or receive and my personal residence, my Agent is authorized to lease, sublease, release: to eject, remove tenants or other persons from, and recover possession of by all lawful means; to accept real property as a gift or as security for a loan; to collect, such for, receive and receipt for rents and profits and to conserve, invest or utilize any and all of such rents, profits and receipts for the purposes described in this paragraph; to do any act of management and conservation, to pay, compromise, or contest tax assessments and to apply for refunds in connection therewith; to employ laborers; to subdivide, develop, dedicate to public use without consideration, and/or dedicate easements over; to maintain, protect, repair, preserve, insure, build upon, demolish, alter or improve all or any part thereof; to obtain or vacate plats and adjust boundaries; to adjust differences in valuation on exchange or partition by giving or receiving consideration; to release or partially release real property from a lien.¹⁷ My Agent is authorized to sell and to buy real property.¹⁸ My Agent is authorized to mortgage and/or convey by deed of trust or otherwise encumber any real property now or hereafter owned by me, whether acquired by me or for me by my Agent.¹⁹

⁸ This paragraph grants your agent the authority to purchase items for you.

⁹ This grants your agent authority to buy certain United States Government Savings Bonds that can be redeemed at full face value in payment of estate taxes at your death.

¹⁰ This grants your agent the authority to borrow money, if needed, to make purchases.

¹¹ This grants your agent the power to use your credit cards to make purchases for you.

¹² This grants your agent the power to repay your loans.

¹³ This paragraph grants your agent the power to invest your money to produce an income for you.

¹⁴ This clause grants your agent the power to establish brokerage accounts.

¹⁵ This clause grants your agent the power to establish agency accounts.

¹⁶ This grants your agent the power to employ financial consultants for your benefit.

¹⁷ This paragraph grants your agent broad authority to manage your real estate for your benefit.

¹⁸ This grants your agent the power to buy and sell your real estate.

¹⁹ This grants your agent the power to borrow money and grant real estate mortgages to secure such borrowing, all for your benefit.

(5) **Power to manage personal property.** With respect to personal property, my Agent is authorized to lease, sublease, and release; to recover possession of by all lawful means; to collect, sue for, receive and receipt for rents and profits therefrom; to maintain, protect, repair, preserve, insure, alter or improve all or any part thereof.²⁰ My Agent is authorized to sell and to buy the same or other personal property.²¹ My Agent is authorized to mortgage or grant deeds of trust, pledge and/or grant other security interests in any personal property or intangibles now or hereafter owned by me, whether acquired by me or for me by my Agent.²²

(6) **Power to operate businesses.** My Agent is authorized to continue the operation of any business, including a ranch or farm, belonging to me or in which I have a substantial interest, for such time and in such manner as my Agent shall deem appropriate, including but not limited to hiring and discharging my employees, paying my employees' salaries and providing for employee benefits, employing legal, accounting, financial and other consultants; continuing, modifying, terminating, renegotiating and extending any contractual arrangements with any person, firm, association or corporation whatsoever made by me or on my behalf; executing business tax returns and other government forms required to be filed by my business, paying all business related expenses, transacting all kinds of business for me in my name and on my behalf, contributing additional capital to the business, changing the name and/or the form of the business, incorporating the business, entering into such partnership agreement with other persons as my Agent shall deem appropriate; joining in any plan of reorganization, consolidation or merger of such business, selling, liquidating or closing out such business at such time and upon such terms as my Agent shall deem appropriate and representing me in establishing the value of any business under "Buy-out" or "Buy-Sell" agreements to which I may be a party; to create, continue or terminate retirement plans with respect to such business and to make contributions which may be required by such plans; to borrow and pledge business assets.²³ My Agent is authorized to exercise any right, power, privilege or option I may have or may claim under any contract of partnership whether as a general, special or limited partner; to modify or terminate my interest upon such terms and conditions as my Agent may deem appropriate; to enforce the terms of any such partnership agreement for my protection, whether by action, proceeding or otherwise as my Agent shall deem appropriate; to defend, submit to arbitration, settle or compromise any action or other legal proceeding to which I am a party because of my membership in such partnership.²⁴

(7) **Power to exercise rights in securities.** My Agent is authorized to exercise all rights with respect to corporate securities which I now own or may hereafter acquire, including the right to sell, grant security interests in and to buy the same or different securities; to establish, utilize and terminate brokerage accounts, including margin accounts; to make such payments as my Agent deems necessary, appropriate, incidental or convenient to the owning and holding of such securities; to receive, retain, expend for my benefit, invest and reinvest or make such disposition of as my Agent shall deem appropriate all additional securities, cash or property, including the proceeds from the sales of my securities, to which I may be or become entitled by reason of my ownership of any securities.²⁵ My Agent is authorized to vote at all meetings of securities holders, regular or special.²⁶ My Agent is authorized to lend money to any corporation in which I hold any shares and to guarantee or endorse loans made to such corporation by third parties.²⁷

(8) **Power to demand and receive.** My Agent is authorized to demand, arbitrate, settle, sue for, collect, receive, deposit, expend for my benefit, reinvest or make such other appropriate disposition

²⁰ This paragraph grants your agent the power to manage your personal property for your benefit.

²¹ This clause grants your agent the power to buy and sell your personal property if needed for your benefit.

²² This clause grants your agent the power to borrow money and give liens to secure the borrowing if necessary for your benefit.

²³ This paragraph grants your agent the power to operate any business you now or in the future may own.

²⁴ This clause grants your agent power over any partnership interest that you may own now or in the future.

²⁵ This paragraph grants your agent the power to exercise your rights in stocks and bonds.

²⁶ This clause grants your agent the power to vote stock.

²⁷ This clause grants your agent the power to lend money to any corporation in which you have an interest and to guarantee its loans.

of as my Agent deems appropriate, all cash, rights to the payment of cash, property, real, personal, intangible and/or mixed, debts, dues, rights, accounts, legacies, bequests, devises, dividends, annuities, rights and/or benefits to which I am now or may in the future become entitled, regardless of the identity of the individual or public or private entity involved, including but not limited to benefits payable to or for my benefit by any governmental agency or body, such as Supplemental Social Security (SSI), Medicaid, Medicare, and Social Security Disability Insurance (SSDI) and for the purposes of receiving social security benefits, my Agent is herewith appointed my "Representative Payee"; to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf, and to compromise claims and grant discharges in regard to the matters described herein.²⁸ My Agent is authorized to utilize all lawful means and methods to recover such assets and/or rights, qualify me for such benefits and claim such benefits on my behalf. The authority herein granted shall include but not be limited to converting my assets into assets that do not disqualify me from receiving such benefits or divesting me of such assets. In any divestment actions or assets conversions, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent, whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt such plan, then my Agent is directed to use my Agent's best efforts to restore such plan as and when the opportunity to do so is available to my Agent. If a transfer of cash by my Agent is made to a pecuniary legatee under my will, my Agent shall insure that such transfer is deemed a satisfaction of such legacy, pro tanto.

(9) **Exercise elective share rights.** My Agent is authorized to elect to take against any will and conveyances of my deceased spouse and/or any other person, if appropriate; to retain any property which I have the right to elect to retain; to file petitions pertaining to the election, including petitions to extend the time for electing and petitions for orders, decrees and judgments; and to take all other actions that my Agent deems appropriate in order to effectuate the election; provided however, that if any such actions by my Agent require the approval of any court, my Agent is authorized to seek such approval.²⁹

(10) **Power with respect to employment benefits.** My Agent is authorized to create and contribute to an employee benefit plan, including a plan for a self-employed individual, for my benefit; to elect retirement on my behalf; to select any payment option under any IRA or employee benefit plan in which I am a participant, including plans for self-employed individuals, or to change options I have selected; to make voluntary contributions to such plans; to make "roll-overs" of plan benefits into other retirement plans; to apply for and receive payments and benefits; to waive rights given to non-employee spouses under state or federal law.³⁰

(11) **Power with respect to bank accounts.** My Agent is authorized to establish accounts of all kinds, including checking and savings, for me with financial institutions of any kind, including but not limited to banks and thrift institutions; to modify, terminate, make deposits to and write checks on or make withdrawals from and grant security interests in all accounts in my name or with respect to which I am an authorized signatory, except accounts held by me in a fiduciary capacity, whether or not any such account was established by me or for me by my Agent, to negotiate, endorse or transfer any checks or other instruments with respect to such accounts; to contract for any services rendered by any bank or financial institution; and to execute, on my behalf as principal, agency or power of attorney forms furnished by any bank with respect to accounts with such bank, appointing as agent my Agent or any other person or persons.³¹

(12) **Power with respect to safe-deposit boxes.** My Agent is authorized to contract with any institution for the maintenance of a safe deposit box in my name; to have access to all safe-deposit boxes in

²⁸ This paragraph gives your agent the power to collect or receive any money or property to which you may be entitled.

²⁹ This paragraph permits your Agent to exercise any right you may have to elect against any will under which you may be a beneficiary or, in the alternative, not to make an election.

³⁰ This paragraph gives your agent authority to exercise your rights and collect your benefits as an employee.

³¹ This paragraph gives your agent the power to write checks on your bank accounts, etc.

my name or with respect to which I am an authorized signatory, whether or not the contract for such safe-deposit box was executed by me, either alone or jointly with others, or by my Agent in my name; to add to and remove from the contents of any such safe deposit box and to terminate any and all contracts for such boxes.³²

(13) **Power with respect to legal and other actions.** My Agent is authorized to institute, supervise, prosecute, defend, intervene in, abandon, compromise, arbitrate, settle, dismiss, and appeal from any and all legal, equitable, judicial or administrative hearings, actions, suits, proceedings, attachments, arrests or distresses, involving me in any way, including but not limited to claims by or against me arising out of property damages or personal injuries suffered by or caused by me or under such circumstances that the loss resulting therefrom will or may be imposed on me and otherwise engage in litigation involving me, my property or any interest of mine, including any property or interest or person for which or whom I have or may have any responsibility.³³

(14) **Power to borrow money.** My Agent is authorized to borrow money from any lender for my account upon such terms and conditions as my Agent shall deem appropriate and to secure such borrowing by the granting of security interests in any property or interests in property which I may now or hereafter own; to borrow money upon any life insurance policies owned by me upon my life for any purpose and to grant a security interest in such policy to secure any such loans, including the assignment and delivery of any such policies as security; and no insurance company shall be under any obligation whatsoever to determine the need for such loan or the application of the proceeds by my Agent.³⁴

(15) **Power to create, fund, amend and terminate revocable trusts.** My Agent is authorized to execute a revocable trust agreement with such trustee or trustees as my Agent shall select, and such trust shall provide that all income and principal shall be paid to me, to some person for my benefit or applied for my benefit in such amounts as I or my Agent shall request or as the trustee or trustees shall determine, and that on my death any remaining income and principal shall be paid to my personal representative, and that the trust may be revoked or amended by me or my Agent at any time and from time to time; provided, however, that any amendment by my Agent must be such that by law or under the provisions of this instrument such amendment could have been included in the original trust agreement; to deliver and convey any or all of my assets to the trustee or trustees thereof; to add any or all of my assets to such a trust already in existence at the time of the creation of this instrument or created by me at any time thereafter; and for the purpose of funding any trust, to enter and remove any of my assets from any safe-deposit box of mine, whether the box is registered in my name alone or jointly with one or more other persons.³⁵

(16) **Power to fund trusts created by the principal.** My Agent is authorized to transfer from time to time and at any time to the trustee or trustees of any revocable trust agreement created by me before or after the execution of this instrument, as to which trust I am, during my lifetime, a primary income and principal beneficiary, any and all of my cash, property or interests in property, including any rights to receive income from any source; and for this purpose to enter and remove from any safe-deposit box of mine, whether the box is registered in my name alone or jointly with one or more other persons, any of my assets and to execute such instruments, documents and papers to effect the transfers described herein as may be necessary or appropriate; incidental or convenient; to make such transfers absolutely in fee simple or for my lifetime only with the remainder or reversion of the property so transferred, remaining in me so that such property will be disposed of at my death by my will or by the intestacy laws of the state in which I shall die a resident.³⁶

³² This paragraph gives your agent access to your safe deposit box.

³³ This paragraph gives your agent authority to sue on your behalf and to defend you if you are sued.

³⁴ This paragraph gives your agent the power to borrow money for your benefit, including borrowing money on your insurance policies.

³⁵ This paragraph allows your agent to create a trust for you, transfer your property to the trust, and to amend or terminate the trust.

³⁶ This paragraph gives your agent power to transfer property to a trust created for your benefit.

(17) **Power to withdraw funds from trusts.** My Agent is authorized to withdraw and/or receive the income or corpus of any trust over which I may have a right of receipt or withdrawal; to request and receive the income or corpus of any trust with respect to which the trustee thereof has the discretionary power to make distributions to or on my behalf, and to execute and deliver to such trustee or trustees a receipt and release or similar document for the income or corpus so received; to exercise in whole or in part, release or let lapse any power of appointment held by me, whether general or special, or any power of amendment or revocation under any trust, including any trust with respect to which I may exercise any such power only with the consent of another person, even if my Agent is such other person, whether or not such power of appointment was created by me, subject however, to any restrictions upon such exercise imposed upon my Agent and set forth in other provisions of this instrument.³⁷

(18) **Power to renounce and resign from fiduciary positions.** My Agent is authorized to renounce any fiduciary position to which I have been or may be appointed or elected, including but not limited to personal representative, trustee, guardian, attorney-in-fact, and officer or director of a corporation; and any governmental or political office or position to which I have been or may be elected or appointed; to resign any such positions in which capacity I am presently serving; to file an accounting with a court of competent jurisdiction or settle on a receipt and release or such other informal method as my Agent shall deem appropriate.³⁸

(19) **Power to disclaim, renounce, release, or abandon property interests.** My Agent is authorized to renounce and disclaim any property or interest in property or powers to which for any reason and by any means I may become entitled, whether by gift, testate or intestate succession; to release or abandon any property or interest in property or powers which I may now or hereafter own, including any interests in or rights over trusts, including the right to alter, amend, revoke or terminate, and to exercise any right to claim an elective share in any estate or under any will. In exercising such discretion, my Agent shall consider any reduction in estate or inheritance taxes that may be due upon my death, and the effect of such renunciation or disclaimer upon persons interested in my estate and persons who would receive the renounced or disclaimed property; provided, however, that my Agent shall make no disclaimer that is expressly prohibited by other provisions of this instrument.³⁹

(20) **Power with respect to insurance.** My Agent is authorized to purchase, maintain, surrender, collect, or cancel (a) life insurance or annuities of any kind on my life or the life of any one in whom I have an insurable interest; (b) liability insurance protecting me and my estate against third party claims; (c) hospital insurance, medical insurance, Medicare supplement insurance, custodial care insurance, and disability income insurance for me or any of my dependents; and (d) casualty insurance insuring assets of mine against loss or damage due to fire, theft, or other commonly insured risk; to pay all insurance premiums, to select any options under such policies, to increase coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, and the foregoing powers shall apply to private and public plans, including but not limited to Medicare, Medicaid, SSI and Worker's Compensation.⁴⁰

(21) **Power with respect to taxes.** My Agent is authorized to represent me in all tax matters; to prepare, sign, and file federal, state, and/or local income, gift and other tax returns of all kinds, including, where appropriate, joint returns, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time to file returns and/or pay taxes, extensions and waivers of applicable periods of limitation, protests and petitions to administrative agencies or courts, including the tax court, regarding tax matters, and any and all other tax related documents, including but not limited to consents and agreements under Section 2032A of the Internal Revenue Code or any successor section thereto and consents to split

³⁷ This paragraph grants your agent the power to exercise any power you may have to withdraw funds from a trust for your benefit and exercise any power of appointment or power to amend or revoke the trust.

³⁸ This paragraph grants your agent the power to submit your resignation from any position you may hold.

³⁹ This paragraph grants your agent the power to disclaim, renounce, release or abandon any property that you may not need, which in some instances may provide a tax benefit for you or your family.

⁴⁰ This paragraph grants your agent authority over your life insurance, and permits your agent to buy insurance on you or surrender or cancel it.

gifts, closing agreements, and any power of attorney form required by the Internal Revenue Service and/or any state and/or local taxing authority with respect to any tax year; to pay taxes due, collect and make such disposition of refunds as my Agent shall deem appropriate, post bonds, receive confidential information and contest deficiencies determined by the Internal Revenue Service and/or any state or local tax law; to allocate any generation-skipping tax exemption to which I am entitled, and generally to represent me or obtain professional representation for me in all tax matters and proceedings of all kinds and for all periods before all officers of the Internal Revenue Service and state and local authorities and in any and all courts; to engage, compensate and discharge attorneys, accountants and other tax and financial advisers and consultants to represent and/or assist me in connection with any and all tax matters involving or in any way related to me or any property in which I have or may have an interest or responsibility; and on my behalf to execute IRS Form 2848 and appoint my Agent or any suitable person selected by my Agent as my representative before the Internal Revenue Service.⁴¹

(22) **Power to make loans.** My Agent is authorized to lend money and property at such interest rate, if any, and upon such terms and conditions, and with such security, if any, as my Agent may deem appropriate; to renew, extend, and modify any such loan or loans that I may have previously made.⁴² My Agent is authorized to guarantee the obligations of any such person; to consent to the renewal, extension and modification of such obligations.⁴³

(23) **Power to make gifts.** My Agent is authorized to make gifts, grants or other transfers without consideration, either outright or in trust, including the forgiveness of indebtedness, to and among my descendants and their spouses, as hereinafter described:⁴⁴

- a. Gifts made by my Agent may be made that qualify for treatment under IRC Section 2053(b), with or without spousal gift splitting.
- b. Gifts made by my Agent may be made for educational purposes as described in IRC Section 2503(e) (2) (A) and in such a way as to not be subject to the federal gift tax.
- c. Gifts made by my Agent may be made for medical expenses as described in IRC Section 2503(e) (2) (B) and in such a way as to not be subject to the federal gift tax.

In connection with tax procedures occasioned by gifts made by my Agent on my behalf or gifts as to which I may consent, my Agent is authorized and directed at my expense to cause federal and local gift tax and generation skipping transfer tax returns to be prepared and filed on my behalf, if necessary and to pay any tax shown to be due. My Agent shall not be disqualified from receiving a gift under this paragraph by reason of serving as my Agent.

ARTICLE III.

Care and control of the person. My Agent is authorized in my Agent's sole and absolute discretion from time to time and at any time, with respect to the control and management of my person, as follows:⁴⁵

(1) **Power to provide for principal's support.** My Agent is authorized to do all acts necessary for maintaining my customary standard of living, to provide a place of residence by purchase, lease or other arrangement, or by payment of the operating costs of my existing place of residence, including interest, amortization payments, repairs and taxes, to transportation, medicine, food and incidentals, and if necessary to make all necessary arrangements, contractual or otherwise, for me at any hospital, hospice, nursing

⁴¹ This paragraph grants your agent the power to sign your tax returns and to represent you before taxing authorities and take other actions in regard to your tax rights and obligations.

⁴² This paragraph grants your agent the power to lend your money or property to other persons.

⁴³ This clause grants your agent the power to guarantee, renew or extend your loans.

⁴⁴ This paragraph grants the power to make gifts of your property or cash.

⁴⁵ This article grants to your Agent broad authority over the care and control of your person.

home, convalescent home or similar establishment, or in my own residence should I desire it, and to assure that all of my essential needs are provided for at such a facility or in my own residence, as the case may be.⁴⁶

(2) **Power to provide for recreation and travel.** My Agent is authorized to provide opportunities for me to engage in recreational and sports activities, including travel, as my health permits.⁴⁷

(3) **Power to provide for spiritual or religious needs.** My Agent is authorized to provide for the presence and involvement of religious clergy or spiritual leaders in my care, provide them access to me at all times, maintain my membership in religious or spiritual organizations or arrange for membership in such groups, and enhance my opportunities to derive comfort and spiritual satisfaction from such activities, including religious books, tapes and other materials.⁴⁸

(4) **Power to provide for companionship.** My Agent is authorized to provide for such companionship for me as will meet my needs and preferences at a time when I am disabled or otherwise unable to arrange for such companionship myself.⁴⁹

(5) **Power to make advance funeral arrangements.** My Agent is authorized to make advance arrangements for my funeral and burial, including the purchase of a burial plot and marker, and such other related arrangements as my Agent shall deem appropriate, if I have not previously done so myself.⁵⁰

ARTICLE IV.

Health Care. My Agent is authorized in my Agent's discretion from time to time and at any time to exercise the authority described below relating to matters involving my health care. In exercising the authority granted to my Agent herein, I first direct my Agent to try to discuss with me the specifics of any proposed decision regarding my health care and treatment if I am able to communicate in any manner, however rudimentary. If I am unable to consent, or to refuse to consent, to my health care, and my Agent cannot determine the choice I would want made under the circumstances, my Agent shall give, withhold, modify, or withdraw such consent for me based upon any health care choices that I may previously have expressed on the subject while competent, whether under this instrument or otherwise. If my Agent cannot determine the treatment choice I would want made under the circumstances, then my Agent shall make such choice for me based upon what my Agent believes to be in my best interests. Accordingly, my Agent is authorized as follows:⁵¹

(1) **Medical records.** My Agent is authorized to request, receive and review any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to execute any releases or other documents that may be required in order to obtain such information, and to disclose or deny such information to such persons, organizations, firms or corporations as my Agent shall deem appropriate.⁵²

(2) **Health care personnel.** My Agent is authorized to employ and discharge health care personnel including physicians, psychiatrists, dentists, nurses, and therapists as my Agent shall deem

⁴⁶ This paragraph grants the power to spend your money for your support.

⁴⁷ This paragraph grants your agent the authority to provide for your recreation and travel.

⁴⁸ This paragraph grants your agent the power to maintain your membership in religious organizations and obtain tapes, books and other materials from such organizations for you.

⁴⁹ This paragraph grants your agent the power to provide for companionship for you.

⁵⁰ This paragraph grants your agent the power to make advance funeral arrangements for you.

⁵¹ This Article grants to your Agent broad powers to provide for your medical care based on treatment choices that you have expressed, and if none, then based on your agent's opinion as to your best interests.

⁵² This paragraph gives your Agent access to your medical records and similar information and the power to disclose that information to others, if necessary or appropriate.

necessary for my physical, mental and emotional well-being, and to pay them, or cause them to be paid, reasonable compensation.⁵³

(3) Health care treatment. My Agent is authorized to give, withhold, withdraw or modify consent to any health care procedures, tests or treatments, including surgery; to arrange for my hospitalization, convalescent care, hospice or home care; to summon paramedics or other emergency health care personnel and seek emergency treatment for me, as my Agent shall deem appropriate; to give, withhold, withdraw or modify consent to such procedures, tests and treatments, as well as hospitalization, convalescent care, hospice or home care which I or my Agent may have previously allowed or consented to or which may have been implied due to emergency conditions. My Agent's decisions should be guided by taking into account (1) the provisions of this instrument, (2) any reliable evidence of preferences that I may have expressed on the subject, whether before or after the execution of this document, (3) what my Agent believes I would want done in the circumstances if I were able to express myself, and (4) any information given to my Agent by the physicians treating me as to my health care diagnosis and prognosis and the intrusiveness, pain risks and side effects of the treatment.

(4) Psychiatric treatment. My Agent is authorized to arrange, upon the execution of a certificate by two independent psychiatrists who have examined me and in whose opinions I am in immediate need of hospitalization because of mental disorder, alcoholism or drug abuse, for my voluntary admission to an appropriate hospital or institution for treatment of the diagnosed problem or disorder; to arrange for private psychiatric and psychological treatment for me; and to revoke, modify, withdraw or change consent to such hospitalization, institutionalization or private treatment which I or my Agent may have previously given. The consent of my Agent to my hospitalization for psychiatric help, alcoholism or drug abuse shall have the same legal effect, subject to applicable local law, as a voluntary admission made by me.⁵⁴

(5) Right to privacy. My Agent is authorized to exercise all state and federal rights that I may have, including but not limited to my right of privacy to make decisions regarding my health care even though the exercise of those rights might hasten my death or be against conventional health care advice.⁵⁵

(6) Relief from pain. My Agent is authorized to consent to and arrange for the administration of pain-relieving drugs of any kind, or other surgical or health care procedures calculated to relieve my pain, including unconventional pain-relief therapies which my Agent believes may be helpful to me, even though such drugs or procedures may lead to permanent physical damage, addiction or even hasten the moment of, but not intentionally cause, my death.⁵⁶

(7) Releases. In conjunction with any instructions given under this Article, my Agent is authorized to grant releases to hospital staff, physicians, nurses and other health care providers who act in reliance on instructions given by my Agent or who render written opinions to my Agent in connection with any matter described in this Article from all liability for damages suffered or to be suffered by me; to sign documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice" as well as any necessary waivers of or releases from liability required by any hospital or physician to implement my wishes regarding medical treatment or non-treatment.⁵⁷

ARTICLE V.

⁵³ This paragraph allows your Agent to hire and fire doctors, nurses and other medical personnel for you.

⁵⁴ This paragraph grants your agent the power to consent or withhold consent to psychiatric treatment.

⁵⁵ This paragraph grants your agent the power to protect your right to privacy, particularly in health care decisions.

⁵⁶ This paragraph grants your agent the power to authorize medical or surgical procedure or drugs to relieve pain, even if there are damaging side effects, if your agent thinks such action is in your best interest.

⁵⁷ This paragraph allows your Agent to grant releases to hospitals, physicians, and other medical personnel who are called upon by the agent to render or withdraw medical treatment. Such a power may be necessary to persuade hospitals and medical personnel to act under the agent's instructions.

Withdrawal of life support.⁵⁸ I wish to live and enjoy life as long as possible. However, I do not wish to receive health care treatment that will only postpone the moment of my death from an incurable and terminal condition or prolong an irreversible coma. For purposes of this instrument, (1) "terminal condition" shall refer to a condition that is reasonably expected to result in my death within twelve (12) months regardless of the treatment I may receive, and (2) "irreversible coma" shall refer to a permanent loss of consciousness from which there is no reasonable possibility that I will return to a cognitive and sapient life and shall include but shall not be limited to that condition known as a persistent vegetative state.

Therefore, if two licensed, qualified physicians who are familiar with my condition have diagnosed and noted in my health care records that:

- (i) I am unable to give informed consent to my health care treatment that is proposed or available for my condition and my condition is terminal as defined above, or
- (ii) I have been in a coma for at least sixty days and that the coma is irreversible as defined above,

Then, my Agent is authorized to:

- (a) direct that health care treatment which will only postpone the moment of my death or prolong my irreversible coma, whether or not such treatment is directed toward my terminal condition, be withheld or, if previously begun, to direct that such treatment be withdrawn; whether or not such treatment is related to my terminal condition or irreversible coma; and
- (b) request, require or consent to the writing of a "No-Code" or "Do Not Resuscitate" order by any of my attending physicians; and
- (c) sign on my behalf any documents necessary to carry out the authorizations described in this instrument, including waivers or releases of liability required by any health care provider; and
- (d) order whatever is appropriate to keep me as comfortable and free of pain as is reasonably possible, including the administration of pain relieving drugs of any kind or other surgical or medical procedures calculated to relieve my pain, including unconventional pain-relief therapies which my Agent believes may be helpful, even though such drugs or procedures may lead to permanent physical damage, addiction or hasten the moment of, but not intentionally cause, my death.

I desire that my wishes be carried out through the authority given to my Agent by this instrument despite any contrary feelings, beliefs or opinions of members of my family, relatives, friends, conservator or guardian.

In exercising the authority granted to my Agent herein, my Agent shall first follow the instructions of this document and any other subsequent instructions, oral or written, that I may give my Agent while I am competent. Notwithstanding such instructions, if my Agent cannot determine the treatment choice I would want made under the circumstances, then my Agent should make such choice for me based upon what my Agent believes to be in my best interest.

⁵⁸ This Article authorizes your Agent to refuse medical treatment on your behalf and withdraw life-support systems based on instructions contained in this document. Your agent is instructed to carry out any treatment choices you may have expressed and if none, then to act in your agent's opinion as to your best interests. Your agent may also authorize pain relief treatment, even if there are damaging side effects, if your agent believes it to be in your best interest.

If no Agent designated in this instrument is able or willing to serve as my Agent or to exercise the powers granted in this article, then I request that this document be given the same force and effect as any other written expression of intent under applicable law.

It is my intention that this instrument, both as a self-executing document and a delegation of power to my Agent, shall be deemed an exercise of all rights and interests that I may have under the United States Constitution, the constitution of the state of my domicile, state and federal laws, rules, regulations and decisions, judicial and administrative, to refuse health care treatment, including but not limited to artificially administered nutrition and artificial hydration.

I authorize my Agent to establish a new residency or domicile for me, from time to time and at any time, within or without this state, and within or without the United States, for the purpose of exercising effectively the powers granted to my Agent in this Article.

In addition, if I have been in an irreversible coma, as defined above, for sixty (60) days or more, or if because of my terminal condition as defined above it is no longer possible to nourish me without severe discomfort, and the two physicians described above also conclude that the nourishment will not improve my physical condition and I will not experience pain as a result of the withdrawal of nutrition or hydration, then my Agent may require that procedures used to provide me with nutrition and hydration, including, by way of example only, all forms of intravenous and parenteral feeding, all forms of tube feeding and misting, be withheld or, if previously instituted, to require that they be withdrawn.⁵⁹

Custodian of "Living Will". In addition, my Agent is authorized to receive and retain custody of any instrument signed by me that is effective under law to require the withdrawal or withholding of life sustaining treatment or procedures, including but not limited to a "Living Will," "Directive to Physician" and a "Declaration of a Desire for Natural Death," hereinafter referred to in the aggregate as my "Advance Directives" and if the circumstances described above authorizing my Agent to require that life sustaining treatment be withheld or withdrawn have occurred, then as an alternative or supplement act, I authorize my Agent to deliver to my physicians, health care providers and other appropriate recipients, this instruments and any other writings and Advance Directives signed by me that express my desire under the circumstances to require the withholding or withdrawal of futile health care treatment, and to instruct such physicians, health care providers and other appropriate recipients to act immediately in accordance with my desires.⁶⁰

ARTICLE VI.

Incidental Powers. In connection with the exercise of the powers and discretions herein described, my Agent is fully authorized and empowered to perform any acts and things and to execute and deliver any documents, instruments, affidavits, certificates and papers necessary or appropriate to such exercise or exercises, including without limitation the following:⁶¹

(1) **Resort to courts.** My Agent is authorized to seek on my behalf and at my expense:

- a. a declaratory judgment from any court of competent jurisdiction interpreting the validity of this instrument and any of the acts authorized by this instrument, but such declaratory judgment shall not be necessary in order for my Agent to perform any act authorized by this instrument:

⁵⁹ This clause states that the life-support systems that may be withdrawn include food and water.

⁶⁰ Your agent also is authorized to retain custody of any "living will" you may have made and may give it to your physician when your Agent believes that you should no longer be kept alive with life-sustaining devices.

⁶¹ This clause is an introduction to certain administrative, incidental and other powers that are necessary or helpful to the agent in carrying out the primary authorizations in this power of attorney.

- b. a mandatory injunction requiring compliance with my Agent's instructions by any person, organization, corporation, or other entity obligated to comply with instructions given by me;
- c. actual and punitive damages, and the recoverable costs, fees and expenses of such litigation, against any person, organization, corporation or other entity obligated to comply with instructions given by me who negligently or willfully fails or refuses to follow such instructions.⁶²

(2) **Hire and fire.** My Agent is authorized to employ, compensate and discharge such domestic, health care and professional personnel including lawyers, accountants, doctors, nurses, brokers, financial consultants, advisors, consultants, companions, servants and employees as my Agent deems appropriate.⁶³

(3) **Sign documents and incur costs.** My Agent is authorized to sign, execute, endorse, seal, acknowledge, deliver and file or record instruments and documents, including but not limited to contracts, agreements, and conveyance of real and personal property, instruments granting and perfecting security instruments and obligations, orders for the payment of money, receipts, releases, waivers, elections, vouchers, consents, satisfactions and certificates. In addition, any Agent of mine who has the authority to incur costs on my behalf may render the bills for such costs to any Agent of mine who has been granted the authority to pay such costs or to any trustee of any revocable living trust of mine, or guardian, committee or conservator who has authority to pay such costs and I request that such costs be paid promptly. Any recipient thereof (i.e. my Agent with authority to pay or my trustee) shall promptly pay such costs.⁶⁴

(4) **Borrow, spend, liquidate, secure.** My Agent is authorized to expend my funds and to liquidate my property or to borrow money in order to produce such funds and to secure any such borrowings with security interests in any property, real, personal, or intangible that I may now or hereafter own.⁶⁵

(5) **Miscellaneous.** My Agent is authorized to open, read, respond to and redirect my mail; to represent me before the U.S. Postal Service in all matters relating to mail service; to establish, cancel, continue or initiate my membership in organizations and associations of all kinds, to take and give or deny custody of all of my important documents, including but not limited to my will, codicils, trust agreements, deeds, leases, life insurance policies, contracts and securities and, bearing in mind the confidential nature of such documents, to disclose or refuse to disclose such documents; to obtain and release or deny information or records of all kinds relating to me, to any interest of mine or to any person for whom I am responsible; to house or provide for housing, support and maintenance of any animals or other living creatures that I may own and to contract for and pay the expenses of their proper veterinary care and treatment; and if the care and maintenance of such animals or other living creatures shall become unreasonably expensive or burdensome in my Agent's opinion, to irrevocably transfer such animals to some person or persons willing to care for and maintain them.⁶⁶

ARTICLE VII.

⁶² This paragraph grants your agent the power to ask the courts to enforce the Agent's instructions.

⁶³ This paragraph allows the Agent to hire and fire employees, professionals (such as lawyers, accountants, etc.) and others who perform services for you.

⁶⁴ This paragraph allows your Agent to sign papers and incur costs on your behalf. It also requires that such costs be paid by any Agent having power over your funds or by a trustee of a revocable living trust, if you have previously created or should later create such a trust.

⁶⁵ This paragraph allows your Agent to borrow money to do the things you have instructed the Agent to do, to spend it for such purposes, to sell assets in order to raise money for you, and to secure borrowings.

⁶⁶ This paragraph allows your Agent to do other miscellaneous acts on your behalf, including dealing with the U.S. Mail, having access to your important documents, care of pet animals, etc.

Third party reliance. For the purpose of inducing all persons, organizations, corporations and entities, including but not limited to any physician, hospital, nursing home, health care provider, bank, broker, custodian, insurer, lender, transfer agent, taxing authority, governmental agency, or other party, all of whom will be referred to in this article as a "Person" to act in accordance with the instructions of my Agent as authorized in this instrument, I hereby represent, warrant and agree that:⁶⁷

(1) **Revocation and amendments.** If this instrument is revoked or amended for any reason, I, my estate, my personal representative, will hold any person, organization, corporation or entity, hereinafter referred to in the aggregate as "Person", harmless from any loss suffered, or liability incurred by such Person acting in accordance with the instructions of my Agent acting under this instrument prior to the receipt by such Person of actual written notice of any such revocation or amendment.⁶⁸

(2) **Agent has power to act alone.** The powers conferred on my Agent by this instrument may be exercised by my Agent along and my Agent's signature or act under the authority granted in this instrument may be accepted by Persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. Consequently, all acts lawfully done by my Agent hereunder are done with my consent and shall have the same validity and effect as if I were personally present and personally exercised the powers myself, and shall inure to the benefit of and bind me, my estate and personal representative.⁶⁹

(3) **No liability for reliance on Agent.** No person who relies in good faith upon the authority of my Agent under this instrument shall incur any liability to me, my estate or my personal representative. In addition, no person who acts in reliance upon any representations my Agent may make as to (a) the fact that my Agent's powers are then in effect, (b) the scope of my Agent's authority granted under this instrument, (c) my competency at the time this instrument is executed, (d) the fact that this instrument has not been revoked or amended, or (e) the fact that my Agent continues to serve as my Agent shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent.⁷⁰

(4) **Principal's heirs bound.** No Person who relies upon any affidavit or certificate under penalties of perjury that this instrument specifically authorizes my Agent to execute and deliver shall incur any liability to me, my estate or my personal representative for permitting my Agent to exercise any such authority, nor shall any Person who deals with my Agent be responsible to determine or insure the proper application of funds or property by my Agent.⁷¹

(5) **Authorization to release information.** All Persons from whom my Agent may request information regarding me, my personal or financial affairs or any information which I am entitled to receive are hereby authorized to provide such information to my Agent without limitation and are released from any legal liability whatsoever to me, my estate or my personal representative for complying with my Agent's requests.⁷²

(6) **Authorization to release medical information.** I hereby authorize all physicians and psychiatrists who have treated me, and all other providers of health care, including hospitals, to release to

⁶⁷ This Article contains provisions designed to persuade persons (with whom the agent will deal) to honor the power of attorney.

⁶⁸ This paragraph provides that third parties dealing with the Agent are not liable for revocation or amendment of the Power of Attorney if they are unaware of such changes.

⁶⁹ This paragraph provides that your Agent has the power to act alone, without the consent of any other person and that the agent's actions legally bind you.

⁷⁰ This paragraph provides that third parties dealing with the Agent will not be liable to you because they relied on your Agent.

⁷¹ This paragraph allows your Agent to give third parties some assurances in the form of an affidavit that your agent has the power to act.

⁷² This paragraph authorizes third parties to release general confidential information to your Agent.

my Agent all information or photocopies of any records which my Agent may request. If I am incapacitated at the time my Agent shall request such information, all Persons are authorized to treat any such request for information by my Agent as the request of my legal representative and to honor such requests on that basis. I hereby waive all privileges which may be applicable to such information and records and to any communication pertaining to me and made in the course of any confidential relationship recognized by law. My Agent may also disclose such information to such Persons as my Agent shall deem appropriate.⁷³

ARTICLE VIII.

Restrictions on powers. Notwithstanding any provision herein to the contrary, my Agent:⁷⁴

(1) **Life insurance on Agent's life.** My Agent shall have no power or authority whatsoever with respect to any interest in or incidents of ownership in any policy of insurance I may own on the life of my Agent.⁷⁵

(2) **Prior transfers.** My Agent shall have no power or authority whatsoever with respect to (a) any irrevocable trust created by my Agent as to which I am a trustee or a beneficiary or (b) any asset given to me by my Agent.⁷⁶

(3) **Benefits to Agent.** My Agent shall be prohibited, excepted as specifically authorized in this instrument, from (a) appointing, assigning or designating any of my assets, interests or rights directly or indirectly to my Agent, my Agent's estate, my Agent's creditors, or the creditors of my Agent's estate, (b) exercising any power of appointment I may hold in favor of my Agent, my Agent's estate, my Agent's creditors, or the creditor's of my Agent's estate, (c) disclaiming assets to which I would otherwise be entitled if the effect of such disclaimer is to pass assets directly or indirectly to my Agent or his or her estate, or (d) using my assets to discharge any of my Agent's legal obligations, including any obligation of support which my Agent may owe to others, excluding those whom I am legally obligated to support.⁷⁷

(4) **Fiduciary Powers.** My Agent shall be prohibited from exercising any fiduciary powers that I now hold or may hereafter acquire.⁷⁸

(5) **Avoid disrupting estate plan.** If it becomes necessary for my Agent to liquidate my assets in order to provide support for me, or if liquidation or conversion of assets becomes necessary for any other reason, whether specified in this instrument or otherwise, or such liquidation is deemed by my Agent to be appropriate or convenient, I direct that my Agent, to the extent reasonably possible, avoid disrupting the dispositive provisions of any estate plan of mine known to my Agent, whether or not such estate plan is embodied in a will, a trust, non-probate property, or otherwise. If it is necessary to disrupt the dispositive provisions of such plan, then my Agent is directed to use my Agent's best efforts to restore the dispositive provisions of such plan as and when the opportunity to do so is available to my Agent. My Agent shall make reasonable efforts to obtain and review my estate plan and any person having knowledge thereof or possession of any documents implementing such estate plan is authorized to make disclosure thereof to my Agent, and to furnish my Agent with copies of such documents.

⁷³ This paragraph authorizes doctors and hospitals to release medical information to your Agent and permits your agent to disclose it to such persons as your agent may deem necessary.

⁷⁴ This Article contains certain restrictions on the powers of your Agent which might otherwise create tax problems for you or your estate.

⁷⁵ This paragraph provides that your Agent has no authority over any life insurance owned by you insuring your Agent's life.

⁷⁶ This paragraph provides that your Agent has no authority over an irrevocable trust created by your Agent so as to avoid the inclusion of the trust principal in your Agent's estate upon your Agent's death.

⁷⁷ This paragraph prohibits your Agent from using any of your cash or property for your Agent's benefit.

⁷⁸ This paragraph prohibits your Agent from exercising any power you as a trustee or other fiduciary may now have or later acquire.

ARTICLE IX.

Durability provision. This power of attorney shall not be affected by physical disability or mental incompetence of the principal which renders principal incapable of managing principal's own estate.⁷⁹

ARTICLE X.

Administrative provisions.

The following provisions shall apply:⁸⁰

(1) **Reimbursement of Agent.** My Agent shall be entitled to reimbursement for all reasonable costs and expenses, including reasonable attorney's fees, actually incurred and paid by my Agent on my behalf at any time under any provision of this instrument.⁸¹ My Agent shall not be entitled to compensation for services rendered hereunder.⁸²

(2) **No guardian or conservator appointed.** By executing this instrument upon the advice of legal counsel, I have carefully and deliberately created the means and manner by which I desire that my person and property be cared for, managed and protected in the event I shall become unable to execute such responsibilities myself. Accordingly, it is my intention and my desire that I herewith express in the strongest possible terms, that no Guardian or Conservator be appointed for me so long as there is an Agent named in this instrument who is willing and able to act and is acting under this instrument. I request that any court of competent jurisdiction that receives and is asked upon a petition for the appointment of a guardian or conservator for me give the greatest possible weight to my intention and desires expressed herein.⁸³

(3) **Waiver for acts of omission.** My Agent and my Agent's estate and personal representative, acting in good faith, is hereby released and forever discharged from any and all civil liability and from all claims or demands of all kinds whatsoever by me or my estate or my personal representative arising out of the acts or omissions of my Agent, except for willful misconduct or gross negligence.⁸⁴

(4) **Waiver of duty to produce income and against self-dealing transactions.** My Agent shall have no responsibility to make my property productive of income, to increase the value of my estate or to diversify my investments. My Agent shall have no liability for entering into transactions authorized by this instrument with my Agent in my Agent's individual capacity so long as my Agent believes in good faith that such transactions are in my best interests or the best interests of my estate and those persons interested in my estate. My Agent shall be eligible to serve in all other fiduciary capacities, for me or my benefit, but (not in my place where I may serve as a fiduciary for others) including but not limited to serving as Trustee, Guardian, Conservator, Committee, Executor and/or Administrator.⁸⁵

⁷⁹ This clause is required by law in order for your power of attorney to be durable. "Durable" means that the power of attorney continues to be effective even after your incapacity.

⁸⁰ This Article contains certain administrative powers and provisions which facilitate the use of the Power of Attorney and provide guides for its use.

⁸¹ This paragraph provides the Agent is entitled to reimbursement for any expenses.

⁸² This sentence provides that your Agent is not to receive any pay or commission for serving as Agent.

⁸³ This paragraph requests that no guardian or conservator be appointed for you so long as your Agent is serving under this Durable Power of Attorney.

⁸⁴ This paragraph releases your Agent for any acts or omissions that your Agent may be guilty of, except for willful misconduct or gross negligence.

⁸⁵ Under this paragraph, your Agent does not have a duty to make sure that your property produces an income and is authorized to enter into transactions between your Agent and you and is authorized to serve as a guardian or conservator for you as well.

(5) **No duty to monitor health.** My Agent shall have no responsibility to monitor on any regular basis the state of my physical health or mental capacity to determine if any actions need be taken under this instrument.⁸⁶

(6) **Severability.** If any part of any provision of this instrument shall be invalid or unenforceable under applicable law, such part shall be ineffective to the extent of such invalidity only, without in any way affecting the remaining parts of such provision or the remaining provisions of this instrument.⁸⁷

(7) **This instrument unaffected by lapse of time.** I intend that this power of attorney be legally unaffected by reason of lapse of time or staleness.

(8) **Agent authorized to sign power of attorney forms.** In carrying out the authorizations set forth in this instrument, if in the sole opinion of my Agent it is necessary or convenient for my Agent to sign my name, as principal, on forms of powers of attorney (the "Forms") required by governmental agencies, corporations or other entities in transactions with me, my agent is authorized to execute such Forms, appointing as agent to represent me, my Agent or any other suitable person.

(9) **Governing law.** This instrument shall be governed by the laws of the state of South Carolina in all respects, including its validity, construction, interpretation and termination.⁸⁸ To the extent permitted by law this instrument shall be applicable to all property of mine, real, personal, intangible or mixed, wherever and in whatever state of the United States or foreign country the situs of such property is at any time located, and whether such property is now owned by me or hereafter acquired by me or for me by my Agent.⁸⁹ In addition, in regard to health care treatment affecting me, I intend for this Power of Attorney to be honored in any jurisdiction when it may be presented and given the most liberal interpretation available for purposes of granting my Agent the fullest amount of discretion in making health care decisions on my behalf. I also intend that any such jurisdiction refer to the laws of the state referred to above to interpret and determine the validity of this instrument and any of the powers granted hereunder. Should any physician or health care provider fail to honor this Power of Attorney, then my Agent is authorized to terminate the services of such persons and to transfer my care to another physician or health care provider that will honor the instructions of my Agent.⁹⁰

(10) **Definitions.**⁹¹ Whenever the word:

- (a) "Agent" or any modifying or equivalent word or substituted pronoun therefore is used in this instrument, such word or words shall be held and taken to include both the singular and the plural, the masculine, feminine and neuter gender thereof.
- (b) "Guardian" or "Conservator" or any modifying or equivalent word or substituted pronoun is used in this instrument, such word or words shall be held and taken to mean respectively the fiduciary, appointed by a court of competent jurisdiction or by other lawful means, responsible for the person and/or the property of an individual.
- (c) "Descendants" or any modifying or equivalent word or substituted pronoun is used in this instrument, such word or words shall be held and taken to mean respectively

⁸⁶ This paragraph provides that your Agent has no responsibility to check on the state of your health.

⁸⁷ This paragraph provides that if, for any reason (and we know of none), a court would decide that any paragraph of your Power of Attorney is invalid, such invalidity will not affect the validity of other paragraphs of your power of attorney.

⁸⁸ This paragraph provides that the Power of Attorney is governed by the law of this state.

⁸⁹ This clause states your intention that the Power of Attorney be effective as to any property, real or personal, you may own in another state or country.

⁹⁰ This clause states your intention that the Power of Attorney be effective as to medical decisions your Agent may need to make in other states or counties.

⁹¹ This paragraph defines agent and guardian/conservator for purposes of your power of attorney.

children, grandchildren and other lineal issue of all degrees of the designated ancestor. The reference to "descendants" or "children" in the plural shall include a single descendant or child where the context so requires. References to "descendants", a "child", or "children" shall exclude stepchildren and foster children and shall include (a) a person adopted into the class during minority, (b) a person adopted into the class as an adult if the adopted person lived for a significant period during minority as a member of the household of the adopting parent or if the adopting parent is the spouse of a natural parent of the adopted person, and (c) a person naturally born into the class out of wedlock if the person lived for a significant period during minority as a member of the household of the relevant natural parent. An adoption of a descendant by another within or outside the family shall be disregarded for purposes of this instrument. Whether a person has "lived for a significant period during minority as a member of the household" of an adoptive or natural parent shall be determined in the reasonable discretion of the Agent.

(11) **Counterpart originals.** If this instrument has been executed in multiple counterpart originals, each such counterpart original shall have equal force and effect.⁹²

(12) **Photocopies.** My Agent is authorized to make photocopies of this instrument as frequently and in such quantity as my Agent shall deem appropriate. Each photocopy shall have the same force and effect as an original.⁹³

(13) **Binding effect.** This instrument and actions taken by my Agent properly authorized hereunder shall be binding upon me, my estate, and my personal representative.⁹⁴

ARTICLE XI.

Declarations of the Principal. As Principal, I make the following declarations relevant to my execution of this Durable Power of Attorney:

(1) **Employment and assistance of attorney.** I have employed my attorney to prepare this instrument according to my desires and intention expressed to my attorney.

(2) **Principal's Review and Acceptance of DPA.** The provisions that my attorney has included in this instrument, including but not limited to those referred to in this article, were discussed with me by my attorney and I have expressly approved the inclusion of such provisions in this instrument.

(3) **Direction to Attorney about Exculpatory Clauses.** In order to induce my Agent to serve as my agent under this instrument, I have directed my attorney to include in this instrument a provision exculpating my Agent from liability in certain instances.

(4) **Legal advice about DPA generally.** My attorney has explained to me the purposes of this instrument and in general, both the applicable law and the consequences of signing it or not signing it. After being so advised, I have executed this instrument.

(5) **Acceptance of risk.** I have carefully considered the risks involved in creating this Durable Power of Attorney, and the alternatives to a Durable Power of Attorney, as explained to me by my attorney. I have determined that accepting such risks offers benefits to me that I desire, and I therefore accept such risks.

⁹² This paragraph provides that any copy of the Durable Power signed by you has the same force and effect as an original.

⁹³ This paragraph provides that photocopies of original powers of attorney have the same force and effect as an original.

⁹⁴ This paragraph makes the actions of your Agent binding not only upon you and also, in the event of your death, upon your heirs and executors.

(6) **Withdrawal of life support.** I declare that I have read the provisions of this power of attorney authorizing and/or directing my Agent to withhold or withdraw health care treatment for me under the circumstances specified in this power of attorney, that such provisions have been explained to me to my satisfaction, that I understand such provisions, and that such provisions state my wishes and desires under the circumstances described.

IN WITNESS WHEREOF, I have executed this Durable Power of Attorney this 19 day of March 2017.

Willie Mae Clyburn
Willie Mae Clyburn

ATTESTATION

The foregoing durable power of attorney was this 19 day of March, 2017, signed, sealed, published and declared by the Principal as the Principal's appointment and empowerment of an attorney-in-fact, in the presence of us who at the Principal's request and in the Principal's presence and in the presence of each other, have hereunto subscribed our names as witnesses hereto.

Lorraine Peake
Witness

Hamarian Watts
Witness

PROBATE

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

Lorraine Peake
Witness

SWORN to before me this
19 day of March 2017

Lorraine M. Peake
Notary Public for South Carolina
My commission expires: 10-24-24



ACKNOWLEDGMENT AND ACCEPTANCE BY AGENT

The undersigned acknowledges and accepts appointment as Agent, and agrees to serve as Agent, under this instrument.


Signature of Agent – Andrietta Clyburn Atkinson

REDACTED

864-356-0986

Phone

ACKNOWLEDGMENT AND ACCEPTANCE BY AGENT

The undersigned acknowledges and accepts appointment as Agent, and agrees to serve as Agent, under this instrument.



Signature of Agent – Andrietta Clvburn Atkinson

REDACTED

Address

864-356-0986

Phone

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IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
SUMTER COUNTY

DEPOSITION OF DEBRA CLYBURN-WILSON
DECEMBER 4, 2019

ANDRIETTA ATKINSON as POWER OF ATTORNEY FOR
WILLIE MAE CLYBURN,

Plaintiff,

vs. CASE NO. 2017-CP-43-01740

SSC SUMTER EAST OPERATING COMPANY, LLC, D/B/A
SUMTER EAST HEALTH AND REHABILITATION CENTER AND
PAUL GRANGER,

Defendants.

TIME: 1:00 PM

LOCATION: SMITH ROBINSON
SUMTER, SC

REPORTED BY: MACKENZIE ALLEN
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM

1 A P P E A R A N C E S

2

3 ON BEHALF OF PLAINTIFF:

4 HUGHEY LAW FIRM
5 BY: STUART HUDSON
6 1311 Chuck Dawley Boulevard
Suite 201
Mount Pleasant, SC 29465

7

ON BEHALF OF DEFENDANT:

8

9 YOUNG CLEMENT RIVERS
BY: KATE METTLER
25 Calhoun Street
10 Suite 400
Charleston, SC 29401

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14:59:15 1 BY MR. HUDSON:

14:59:15 2 Q. I want to go over Exhibit 9 -- pay
14:59:20 3 attention. Pay attention.

14:59:20 4 A. I'm going to pay attention.

14:59:20 5 Q. Now, you were asked a bunch of questions
14:59:21 6 about signing documents. Do you recall that?

14:59:24 7 A. Yes, sir. Many, many questions.

14:59:26 8 Q. All right. Your mom never gave you any
14:59:29 9 permission to sign documents on her behalf, did
14:59:31 10 she? Did she?

14:59:36 11 A. No.

14:59:38 12 Q. Okay. Did your mom ever say, hey, you
14:59:42 13 can waive my right to a jury trial?

14:59:44 14 A. No.

14:59:44 15 Q. Okay. Did you understand that that's
14:59:46 16 what number 9 is about?

14:59:48 17 A. I didn't understand. No, I don't.

14:59:50 18 Q. Did anybody from the facility ever
14:59:53 19 explain that to you?

14:59:55 20 A. No, sir.

14:59:55 21 Q. Okay. Did you just sign these documents
14:59:58 22 because they put them in front of you?

15:00:04 23 A. Yes, sir.

15:00:04 24 MR. STUART: That's all I have.

15:00:04 25 Thank you.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMONS PLEAS
	)	
COUNTY OF SUMTER	)	THIRD JUDICIAL CIRCUIT
	)	
ANDRIETTA ATKINSON AND DEBRA	)	CASE NO. 2017-CP-43-1740
CLYBURN-WILSON, INDIVIDUALLY	)	
AND AS PERSONAL	)	
REPRESENTATIVES OF THE ESTATE	)	
OF WILLIE MAE CLYBURN,	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	DEFENDANT SSC SUMTER EAST
	)	OPERATING COMPANY, LLC D/B/A
	)	SUMTER EAST HEALTH AND
SSC SUMTER EAST OPERATING	)	REHABILITATION CENTER'S
COMPANY, LLC D/B/A SUMTER	)	MEMORANDUM IN SUPPORT OF
EAST HEALTH AND	)	MOTION TO COMPEL ARBITRATION
REHABILITATION CENTER AND	)	
PAUL GRANGER ,	)	
	)	
DEFENDANTS.	)	
	)	

COMES NOW the Defendant, SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center and hereinafter referred to as “this Defendant” or “Sumter East”), by and through its undersigned counsel, and submits the following Memorandum in Support of its Motion to Dismiss and Compel Arbitration pursuant to the Federal Arbitration Act 9 U.S.C. §§ 1-16.

INTRODUCTION

Plaintiff has sued this Defendant in tort upon allegations which arise solely out of and concern the residency of Plaintiffs’ decedent, Willie Mae Clyburn (“Ms. Clyburn”), at this Defendant’s skilled nursing facility. However, Plaintiff Debra Clyburn-Wilson, on behalf of her mother Willie Mae Clyburn (“Ms. Clyburn”) and individually in her own right, executed and entered into a valid, binding alternative dispute resolution agreement (the “Arbitration Agreement”) with Sumter East in connection with Ms. Clyburn’s residency at Sumter East. The

Arbitration Agreement covers all allegations raised in the Complaint and, according to its express terms, requires that the Plaintiff and Sumter East submit this matter to arbitration. **See Exhibit 1 – Arbitration Agreement.**

The Arbitration Agreement is a valid, binding and enforceable contract entered into by Sumter East and Ms. Clyburn, by and through Plaintiff Debra Clyburn-Wilson (collectively, the “Parties”, also as that term is defined in the Arbitration Agreement) for their respective, mutual benefit and the benefit of certain designated third parties. The Arbitration Agreement represents (a) this Defendant’s offer of alternative dispute resolution according to the terms of the Agreement to Ms. Clyburn and Plaintiff Debra Wilson-Clyburn and (b) Ms. Clyburn’s acceptance and Plaintiff Debra Clyburn-Wilson’s acceptance of this offer on October 13, 2016. A representative of Sumter East counter-signed the Arbitration Agreement on that same date. The Arbitration Agreement is clearly supported by valid, mutual consideration. Therefore, the elements of a valid, binding and enforceable contract have been satisfied by the Parties.

All indications are that Ms. Clyburn held Plaintiff Debra Clyburn-Wilson out - and Plaintiff Debra Clyburn-Wilson held herself out - as her agent with authority to enter into the Arbitration Agreement and the various other consents, refusals and agreements related to his residency at Sumter East on his behalf. There is absolutely no evidence that the Arbitration Agreement was entered into under duress. Further, the Arbitration Agreement is not substantively or procedurally unconscionable by its terms. The Arbitration Agreement is valid on its face and should be enforced as such. Moreover, Plaintiff Debra Clyburn-Wilson, by her own testimony as discussed further herein, possessed sufficient authority to enter into the Arbitration Agreement on behalf of her mother. Accordingly, and for the reasons more fully discussed herein, this Defendant respectfully requests that that the Court compel arbitration of Plaintiffs’ claims pursuant to the valid and binding contract between the Parties and, accordingly, dismiss or stay Plaintiff’s Complaint.

PROCEDURAL POSTURE OF CASE

This Defendant initially filed a motion to compel arbitration and enforce the terms of the arbitration agreement at issue on May 31, 2018. Subsequently, the parties agreed to engage in limited discovery, *without this Defendant waiving its objections to the jurisdiction of this Court and rights to compel this matter to arbitration*, in an attempt to resolve this matter through mediation and limit the cost associated with litigation. Accordingly, this Defendant voluntarily withdrew its first motion to compel arbitration with leave to refile pursuant to the agreement with Plaintiff and their counsel. To date, there has been an exchange of written discovery and the depositions of Plaintiffs, Andrietta Atkinson and Debra Clyburn-Wilson, have been completed. However, written discovery has not been completed and other depositions have not been taken pursuant to the agreement by the parties to conduct only certain limited discovery. Mediation was held on February 26, 2020 but was unsuccessful. Accordingly, this Defendant exercise its rights as acknowledged and agreed to by Plaintiffs' counsel and filed this instant Motion to Compel Arbitration on February 27, 2020.

FACTUAL BACKGROUND

Plaintiff's decedent, Ms. Willie Mae Clyburn was admitted to Sumter East on October 13, 2016 for rehabilitative wound care following a brief hospitalization. Upon admission, Ms. Clyburn was 73 years old and was suffering from a host of medical problems, which included a pre-existing stage IV left buttock pressure ulcer, stage V chronic kidney disease, spondylosis with myelopathy, Type II diabetes, hypertension, congested heart failure, and heart disease. Prior to her admission, Ms. Clyburn entered into a number of contracts with Sumter East Health and Rehabilitation Center. The contracts were each signed by her daughter, Plaintiff, Debra Wilson-Clyburn, as representative of Ms. Clyburn on October 13, 2016. **See Exhibit 1** - Arbitration Agreement; **Exhibit 2** - Resident Admission Agreement; **Exhibit 3** - Other Written Consents.

Based on the Admission Agreement and pursuant to the agreements set forth therein, Ms. Clyburn was admitted to the Facility and received skilled nursing care and treatment. During her stay at Sumter East, Ms. Clyburn accepted the benefits of the contracts entered into on her behalf by her daughter representative, Ms. Clyburn-Wilson. Such benefits included, but are not limited to, Ms. Clyburn's receipt of residential services and skilled nursing care during the time period of her residency. Ms. Clyburn never challenged any agreement's validity during the more than five (5) months that she resided at Sumter East and accepted the benefits from such agreements. Notably, Plaintiffs do not assert that the Admission Agreement is invalid or that Ms. Clyburn entered Sumter East unwillingly or without consent. Indeed, the deposition testimony of Plaintiff Debra-Clyburn Wilson supports that Ms. Clyburn provided her with the same authorization to admit her to Sumter East as she gave her to enter into the Arbitration Agreement. (See **Ex. 4 – Excerpts of Deposition of Debra Clyburn-Wilson**).

Upon admission, Ms. Clyburn-Wilson explicitly represented that she was authorized to admit Ms. Clyburn to the Facility and execute necessary documents on her behalf, including a the Arbitration Agreement, Advance Directives/Medical Treatment Decisions Acknowledgement, Psychoactive Medication Consent, Consent to Treatment Pneumococcal/Influenza Immunization Consent, and an Admission Agreement. (Attached hereto as **Ex. 1 and Ex. 3**, respectively). Ms. Clyburn- Wilson signed each document as the "Resident Representative" or "Responsible Party" of Ms. Clyburn.

The Arbitration Agreement at issue defines the "Parties" thereto to include:

(a) the resident, any and all family members who would have a right to bring a claim in state court on behalf of the resident or the resident's estate, a legal representative, including a power of attorney for healthcare and/or financial matters or a court appointed guardian, or any other person that may have a cause of action arising out of or relating in any way to the resident's stay at the facility and (b) the facility, any parent or subsidiary of the facility, any company affiliated with the facility or any of the facility's officers, directors, managers, employees, or agents acting in such

capacity or any other person that may have a cause of action arising out of or relating in any way to the resident's stay at the facility.

(Ex. 1, p. 3 - DEFINITIONS, ¶1). Pursuant to this definition, Ms. Clyburn (the resident), Plaintiffs (family members and legal representative with right to bring a claim on behalf of Ms. Clyburn's estate) and Sumter East are all "Parties" to the Arbitration Agreement. The term "Dispute" is defined in this Agreement as any claim or dispute of \$50,000 or more "individually or in the aggregate that would constitute a cause of action that either party could bring in a court of law." (Ex. 1, p. 4 - DEFINITIONS, ¶2). Here, Plaintiffs have brought both survival and wrongful death claims and certainly these claims equal \$50,000 or more and, therefore, this matter involves Disputes under the Arbitration Agreement.

The Arbitration Agreement prescribes a dispute resolution process for attempting to resolve a Dispute claimed by any Party. (Ex. 1, See pp. 3-4). Specifically, the steps in this dispute resolution process include (1) notice of the disagreement to a committee of officers and managers of Sumter East and an attempt to resolve the Dispute directly between the Parties, (2) mediation by an impartial third party who may issue a non-binding decision and (3) arbitration by an impartial arbitrator who will issue a binding decision. (See Ex. 1, pp. 3-4).

The Arbitration Agreement contains multiple provisions that bind the Parties to the prescribed alternative dispute resolution process, inclusive of arbitration. Such provisions state the following:

BY AGREEING TO HAVE ALL DISAGREEMENTS RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM, THE PARTIES AGREE TO WAIVE THE RIGHT TO A JUDGE OR A JURY TRIAL AND TO HAVE THE DISPUTE RESOLVED THROUGH VARIOUS STEPS, CULMINATING IN A DECISION BY AN ARBITRATOR.

(Ex. 1, p. 1). And:

BY AGREEING TO HAVE ALL DISAGREEMENTS RESOLVED THROUGH THE DISPUTE RESOLUTION PROGRAM, THE PARTIES AGREE TO

WAIVE THE RIGHT TO A JUDGE OR A JURY TRIAL. THE ARBITRATOR'S DECISION IS FINAL AND BINDING, AND CANNOT BE APPEALED TO ANY STATE OR FEDERAL COURT, UNLESS PROVIDED FOR [BY] STATE OR FEDERAL LAW.

(Ex. 1, p. 7).

Regarding Ms. Clyburn-Wilson's authority to sign on behalf of her mother, the Arbitration Agreement states above her signature line:

I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this (DRP) Agreement, the Legal Representative or Family member binds both the Resident and themselves individually.

(See Ex. 1, p. 9).

Additionally, Ms. Clyburn-Wilson testified¹ in a recent deposition and provided testimony supporting her authority to admit Ms. Clyburn to the Facility, but more importantly, affirming Plaintiff's decedent's own wishes to reside at Sumter East:

Defense counsel: Okay. So there was then a discussion about either going home or to a skilled nursing facility. Were you a part of those decisions?

Ms. Clyburn-Wilson: No, ma'am.

Defense counsel: Okay. Who was a part of those decisions?

Ms. Clyburn-Wilson: My mother.

Defense counsel: Okay. So your mother made decisions about where she would go? Did your mother—only your mother make the decision about where she was going to go after the hospital.

Ms. Clyburn-Wilson: My mother made the decision to go to that facility.

Defense counsel: Did your mother ever indicate at that time she wanted to go home?

Ms. Clyburn-Wilson: The hospital recommended that she go to that facility.

¹

Defense counsel: And she then agreed to go to Sumter East? It was her decision?

Ms. Clyburn-Wilson: Yes.

(See Debra Clyburn-Wilson deposition, p. 36, ln. 7-18, 23-25).

Ms. Clyburn-Wilson further testified:

Defense counsel: So who handled – did your mother make all the decisions on the consents – and we can go through those – to be admitted to the facility? Or did you participate in that process?

Ms. Clyburn-Wilson: My mother made all decisions.

(See Debra Clyburn-Wilson deposition, p. 38, ln. 15-20).

Plaintiffs will likely rely on testimony elicited in examination by Plaintiffs' counsel's redirection of Ms. Clyburn-Wilson during her deposition in opposition to this Motion in an attempt to refute Plaintiff Debra Clyburn-Wilson's clear agency authority to enter into the Arbitration Agreement. See **Ex. 4 - Redirect of Debra Clyburn-Wilson by Plaintiffs' Counsel**. This Defendant submits that only upon Plaintiffs' counsel's leading questioning did Plaintiff Debra Clyburn-Wilson concede that she did not have authority to execute the Arbitration Agreement. This Defendant submits that this is an issue of significant credibility for Plaintiff Debra Clyburn-Wilson, that her testimony under examination by Plaintiffs' counsel contradicted prior testimony as to her authority. However, neither Ms. Clyburn-Wilson nor Plaintiff Andrietta Atkinson in her deposition refuted in any way Ms. Clyburn-Wilson's authority to enter into the Admission Agreement on behalf of her mother and admit her mother to Sumter East. Plaintiffs have indeed *conceded* and do not refute that Plaintiff Debra Clyburn-Wilson had authority to admit her mother to Sumter East and sign the Admission Agreement. This undisputed agency is sufficient to render the Arbitration Agreement likewise valid and enforceable against Plaintiffs in this matter, as further discussed in Section III below.

If any Party to the Arbitration Agreement seeks to take the third step in the dispute resolution process, which is to arbitrate a Dispute, the Arbitration Agreement states that because:

. . . the nature and extent of (the Parties’) business activities substantially affects, relates, and involves purchase of substantial quantities of goods and services that are produced outside of the state and shipped across state lines to the Facility, which is referred to as interstate commerce. . . **the Federal Arbitration Act (“FAA”), not state law, will control and applies to the arbitration of disagreements between the parties and the parties agree to incorporate such laws into this Agreement.** (See Ex. 1, p. 6)(emphasis added).

Further, the Parties have agreed that such Disputes “must be settled by the rules and procedures of the National Arbitration Forum (“NAF”) or the Judicial Arbitration and Mediation Service (“JAMS”).” (See Ex. 1, p. 5).

As to the costs for arbitration, the Arbitration Agreement requires that Sumter East pay for ninety percent (90%) of the arbitration costs and the other Party pay for ten percent (10%) of such costs, with each Party paying for their own attorney’s fees, unless applicable law requires that the successful party be entitled to payment for all or part of the arbitration and attorneys’ costs. (See Ex. 1, pp. 5-6).

With the authority to admit Ms. Clyburn to Sumter East and execute various documents on her behalf to fulfill Ms. Clyburn’s wishes to reside at Sumter East, the Arbitration Agreement Ms. Clyburn-Wilson as “Legal Representative or Family Member” entered into the Admission Agreement, the Arbitration Agreement and various other documents on October 13, 2016. The Admission Agreement and the Arbitration Agreement were executed by Debbie Matule, the Admissions Director of Sumter East, on behalf of this Defendant. Ms. Clyburn resided at Sumter East for approximately five (5) months – from October 13, 2016 through March 8, 2017. None of Ms. Clyburn, Plaintiff Debra Clyburn-Wilson or Plaintiff Andrietta Atkinson or any other family members ever rescinded or repudiated Ms. Clyburn’s entering into to the Arbitration Agreement and Admission Agreement or Plaintiff Debra Clyburn-Wilson entering into the Arbitration

Agreement and Admission Agreement on her mother's behalf at any time during those five (5) months.

Because the acts complained of by Plaintiffs clearly fall within the scope of "Disputes" and clearly apply to the parties to this litigation, the Court should enforce the terms of the valid Arbitration Agreement between the Parties and grant this Motion to compel this matter to arbitration and dismiss or stay this matter.

ARGUMENT AND CITATION TO AUTHORITY

I. POLICY IN FAVOR OF ARBITRATION

As a general matter, there is a strong presumption in favor of the validity of arbitration agreements because of strong policy considerations favoring arbitration. O'Neil v. Hilton Head Hosp., 115 F.3d 272, 273 (4th Cir. 1997). Indeed, both federal and state policy favors arbitrating disputes. Heffner v. Destiny, Inc., 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "The federal policy favoring arbitration, as expressed in the [Federal Arbitration Act], is now binding even in state courts and supersedes inconsistent state law and statutes which invalidate arbitration agreements." Zabinski v. Bright Acres, 346 S.C. 580, 590, 553 S.E.2d 110 (S. Ct. 2001). Further, arbitration agreements are presumed valid, and "[t]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79, 91 (2000).

II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND MANDATES THAT THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT BE COMPELLED TO ARBITRATION

A. The Arbitration Agreement is Governed by the FAA

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is

contained within a contract involving interstate commerce. 9 U.S.C. § 2. The Arbitration Agreement, by its express terms and by law, is governed by the FAA. The Agreement states:

[The dispute resolution program] and the nature and extent of our business activities substantially affects, relates and involves the purchase of substantial quantities of goods and services that are produced outside of the state and shipped across state lines to the Facility, which is referred to as interstate commerce. As such, the Federal Arbitration Act (“FAA”), not state law, will control and applies to the arbitration of disagreements between the parties and the parties agree to incorporate such laws into this Agreement.

(Ex. 1, p. 5).

Pursuant to the FAA, any written provision in “a contract evidencing a transaction involving commerce” which provides that disputes be settled by arbitration is “valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The language of the Act is mandatory and requires the enforcement of all valid arbitration agreements. Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, **the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.**

9 U.S.C. § 4 (emphasis added).

The South Carolina Supreme Court ruled definitively in Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 382, 759 S.E. 2d 727, 733 (2014) that arbitration agreements executed between a skilled nursing facility and resident are governed by the FAA because they relate to the provision of healthcare and medical supplies, which in the aggregate are economic activities involving interstate commerce. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA).

The Arbitration Agreement between Sumter East, including its agents and affiliates, and Ms. Clyburn as resident is precisely the type of arbitration agreement which the South Carolina Supreme Court determined in Dean involves interstate commerce. Moreover, South Carolina law supports that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” Towles v. United HealthCare Corp., 338 S.C. 29, 41, 524 S.E. 2d 839, 846 (Ct. App. 1999) (internal quotations and citations omitted); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).

As further discussed herein, a binding and enforceable written agreement between Ms. Clyburn, by and through Plaintiff Debra Clyburn-Wilson, and Sumter East to arbitrate disputes that clearly involve and are related to interstate commerce exists in this case. Plaintiffs are clearly a “Party” by the express terms of the Arbitration Agreement. Plaintiff Debra Clyburn-Wilson is a “Party” by her own written representation upon signing it. (See Ex. 1, p. 9). Plaintiff Andrietta Atkinson is a “Party” on account of her mother’s and her sister’s – Plaintiff Debra Clyburn-Wilson’s – intention that she, as a legal representative and/or family member of Ms. Clyburn, be an intended third party beneficiary. (See Ex. 1, p. 2 – DEFINITIONS, ¶1). Upon agreement by Plaintiff Debra Clyburn-Wilson, in her individual capacity as well as her representative capacity of Ms. Clyburn her mother, these third party beneficiary rights vested in Plaintiff Andrietta Atkinson and cannot be withdrawn.² and Plaintiff’s claims in her Complaint undoubtedly fall within the definition of “Disputes” in the Arbitration Agreement. Clearly, the Arbitration Agreement is

² This Defendant acknowledges Plaintiffs’ argument that a contract may not be enforced against a third party beneficiary. See Plaintiffs’ Memorandum in Opposition This Defendant notes that Plaintiff Andrietta Atkinson is a third party beneficiary record and that any rights, if any, she has *individually* (versus in her capacity as a Personal Representative) to oppose arbitration and proceed through litigation is not a valid reason to deny or invalidate the enforceability of arbitration as to Plaintiffs as Personal Representatives of the Estate of Willie Mae Clyburn.

governed by the FAA. Therefore, the binding precedent of this State mandates that Plaintiff's claims be resolved pursuant to the FAA and Plaintiff's claims should be compelled to arbitration and this case should be dismissed or stayed, as the case may be.

B. The Arbitration Agreement Must Be Placed on Equal Footing with All Other Contracts.

"[The] basic purpose of the [FAA] is to overcome courts' refusals to enforce agreements to arbitrate", Allied-Bruce, 513 U.S. at 270, and to "ensure that arbitration will proceed in the event a state law would have a preclusive effect on an otherwise valid arbitration agreement." Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). "By its terms, the act leaves no place for the exercise of discretion by a . . . court, but instead mandates that . . . courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985). Additionally, the FAA ". . . requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Zabinski, 346 S.C. at 582.

While a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not do so based on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. Kindred Nursing Centers Ltd. P'ship v. Clark, 137 S. Ct. 1421, 1423 (2017) (citing AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011)); see also 9 U.S.C. § 2 (providing that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.")). The FAA requires that the Court place the Arbitration Agreement "on *equal footing with other contracts*" Concepcion, 563 U.S. at 339 (emphasis added).

III. THE ARBITRATION AGREEMENT IS A VALID AND ENFORCEABLE CONTRACT

When an arbitration agreement is governed by the FAA, the only question before the court is whether such arbitration agreement is a valid contract pursuant to South Carolina law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001). Under South Carolina law, it is well-settled that the necessary elements of a contract are (i) offer, (ii) acceptance and (iii) valuable consideration. Carolina Amusement Co., Inc. v. Connecticut Nat'l Life Ins. Co., 313 S.C. 215, 437 S.E. 2d 122 (Ct. App. 1993). Each of these elements are indisputably present with respect to the Arbitration Agreement made between Ms. Clyburn and Sumter East. With reference to Plaintiffs' Memorandum in Opposition, it appears that Plaintiffs do not dispute that Sumter East made an offer and that it was accepted by Plaintiff Debra Clyburn-Wilson in her individual capacity. Indeed, it appears that Plaintiffs' argument in opposition rests solely on their claim that Plaintiff Debra Clyburn-Wilson did not have authority to enter into the Arbitration Agreement, a position which should fail upon the Court's consideration of the below.

A. Plaintiff Debra Clyburn Wilson's Attestation of Authority in the Arbitration Agreement Binds Plaintiffs to the Arbitration Agreement as It is a Facially Valid Contract.

Plaintiff Debra Clyburn-Wilson represented herself to staff and admissions personnel at Sumter East as her mother's representative, with the authority to sign documents on her behalf, make decisions on her behalf and bind Ms. Clyburn and herself pursuant to those documents.

Indeed, immediately above Plaintiff Clyburn-Wilson's signature on the Arbitration Agreement, Plaintiff attests in bold font:

I am the spouse, responsible party, legal guardian or power of attorney of the resident and have the authority to sign the agreement on his/her behalf. In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves individually. (See Ex. 1, p. 9)(emphasis added in underline).

Plaintiff Clyburn-Wilson indisputably represented to Sumter East that she had authority to act on behalf of her husband in executing the Arbitration Agreement. It was clearly Plaintiff's intention to bind both her mother, Ms. Clyburn, and herself on the face of the Arbitration Agreement according to its plain language.³

Notably, the Court faced facts similar to the ones at bar in Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. al, 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (See Price Order Granting Defendant's Motion to Compel Arbitration, attached hereto as **Exhibit 5**) and in Josephine Spears v. Rehab Center of Cheraw, LLC et al, 2019-CP-13-00308 (January 10, 2020) (See Spears Order Granting Defendant's Motion to Compel Arbitration, attached hereto as **Exhibit 6**). In both of these cases, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in South Carolina. Further, the applicable resident's wife executed a number of documents on her husband's behalf upon the latter's admission to the facility, including an admissions agreement and arbitration agreement similar to the ones in the case at bar. (See Ex. 5, p. 2-3; see Ex. 6, p. 1). In both Price and Spears, despite each wife's representation to the respective skilled nursing facility that she had authority to enter into the arbitration agreement on behalf of her husband, after the defendant skilled nursing

³ As to Plaintiff Clyburn-Wilson's intent to bind herself, the Arbitration Agreement also provides: "YOU AGREE THAT YOUR PARTICIPATION IN DRP WILL BENEFIT AND BIND YOUR FAMILY, HEIRS, SUCCESSORS, ASSIGNS, AGENTS, INSURERES, TRUSTEES, AND/OR YOUR LEGAL REPRESENTATIVES, **INCLUDING THE PERSONAL REPRESENTATIVE OR EXECUTOR OF YOUR ESTATE.**" (See Ex. 1, p. 2)(emphasis added).

facility moved to compel arbitration, each wife subsequently filed an affidavit refuting that she actually had authority in opposition to the defendant's motion to compel arbitration. However, in both Price and Spears this Court found that the signatory plaintiff's attestation of authority in the arbitration agreement bound plaintiff to its terms.

Specifically, this Court determined in Price that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,] because was it clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the plain language terms of the arbitration agreement. (See Ex. 5, p. 5). Likewise, in Spears, the arbitration agreement at issue contained an express attestation of authority to enter into the agreement on behalf of the resident very similar to Plaintiff's attestation in the Arbitration Agreement noted above.⁴ As such, this Court in Spears held, in part, that the wife's authority to sign the arbitration agreement at issue was "valid on its face" by its plain language (and indeed the arbitration agreement as a whole was found to be valid on its face) and that the skilled nursing facility had no obligation whatsoever to inquire as to the signatory plaintiff's authority beyond her own attestation. (See Ex. 6, p. 4).

As in Price and in Spears, Plaintiff Clyburn-Wilson in this matter expressly attested to her own authority to enter into the Arbitration Agreement on behalf of her mother, Ms. Clyburn, and herself. As further discussed herein, Plaintiff Clyburn-Wilson is competent now to serve as one of the Personal Representatives in this litigation and there is absolutely no reason to believe she was not competent to have entered into the Arbitration Agreement as of October 13, 2016. By signing the Arbitration Agreement, Plaintiff is "presumed to have read, understood, and assented to [the] terms" of it. Gibson v. Epting, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct.

⁴ The arbitration agreement at issue in Spears contained the following attestation of authority: "By his/her signature below, the executing party represents that he/she has the authority to sign on Resident's behalf so as to bind the Resident as well as the Representative."

App. 2019)(“[O]ne who has signed a contract is presumed to have read, understood and assented to its terms.”). Therefore, the Court should find that Plaintiffs, on behalf of their mother’s Estate, is bound by the plain language of the Arbitration Agreement and the authority that Plaintiff Clyburn-Wilson attested to therein is sufficient to enforce the Arbitration Agreement and compel this matter to arbitration.

B. Ms. Clyburn-Wilson Possessed the Apparent and Inherent Authority to Bind Ms. Clyburn under the Arbitration Agreement, and should be Estopped from Denying the Validity of the Arbitration Agreement.

a. Agency Relationship – Apparent Authority

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, 145-146, 425 S.E.2d 764, 773 (Ct. App. 1992).

The doctrine of apparent authority provides that a principal may be bound by the acts of its agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in

reliance on this manifestation. Eadie v. H.A. Sack Co., 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

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

When signing the arbitration agreement, the brother in Carraway left the resident signature line blank and signed it as the "authorized representative" of his sister. Suit was later filed and the facility moved to compel arbitration, which the trial court granted. On appeal, the Alabama Supreme Court affirmed the trial court's decision holding, relevant here, that the resident's brother possessed the apparent authority to enter into the arbitration agreement on his sister's behalf, as evidenced by the fact that she never objected to him signing on her behalf and the arbitration agreement specifically provided that any person authorized by the resident may execute it on her behalf. Id. See also, Tenn. Health Mgmt. v. Johnson, 49 So. 3d 175 (Ala. 2010)(holding that a daughter possessed the apparent authority to enter into an arbitration agreement on her mother's behalf). Notably, the Supreme Court of Alabama's holding in Carraway was applied as "persuasive authority" by this Court in Price, *supra*. Ex. 5, p. 8.

Clearly, Plaintiff Clyburn-Wilson held herself out as an agent for her mother without any

indication to the contrary when she executed various admission documents on behalf of her husband, including the Arbitration Agreement. (See **Ex. 1**, **Ex. 2** and **Ex. 3**). She executed these documents in her capacity as Ms. Clyburn's "representative." Moreover, this Defendant submits that Ms. Clyburn held her daughter, Ms. Clyburn-Wilson, with whom she had been staying prior to admission at the facility, as her agent. As Plaintiffs note in their Memorandum in Opposition to this Motion, Ms. Clyburn was competent on admission and throughout the entirety of her residency. Ms. Clyburn knew that her daughter, Plaintiff Clyburn-Wilson, had effectuated Ms. Clyburn's admission to the facility and execution of the various documents associated with such admission. Ms. Clyburn did not reject or repudiate her admission at any time. Indeed, she accepted, ratified and voluntarily received the direct benefits of such admission to Sumter East effectuated by Plaintiff Clyburn-Wilson on her behalf. Therefore, it was Sumter East's reasonable and justified belief that Plaintiff was her husband's authorized agent/representative and that she had the authority to execute the documents on his behalf, including the Arbitration Agreement.

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

A holding that Plaintiff Clyburn-Wilson was *not* Ms. Clyburn's apparent agent would go against the fundamental concept of apparent agency: that an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act. As stated previously, Plaintiff Clyburn-Wilson testified that admission to the Facility was in fact, Plaintiff decedent's choice. Thus, Sumter East had reason to believe that (1) by allowing Ms. Clyburn-Wilson to sign the admissions paperwork, including the documents providing for Ms. Clyburn's stay and the skilled nursing care provided at the Facility and (2) by not repudiating her admission or otherwise revoking the agreements that she had entered into by and through Ms. Clyburn-Wilson, that Ms. Clyburn cloaked her daughter with the authority to execute the various documents related to his admission, including the Arbitration Agreement. Further, Plaintiff Andrietta Atkinson never repudiated or invalidated her sister's, Plaintiff Clyburn-Wilson's, actions on behalf of their mother until their opposition to the Arbitration Agreement after suit was filed. Instead, Ms. Clyburn accepted the benefits of the contracts with Sumter East by remaining at Sumter East and receiving residential and skilled nursing care and services.

It is clear that an apparent agency relationship existed between Ms. Clyburn-Wilson and her mother, as ratified and never repudiated by Plaintiff Andrietta Atkinson throughout the entirety of Ms. Clyburn's residency. Accordingly, the Arbitration Agreement should be deemed enforceable.

b. Inherent Agency Authority

Even if Plaintiff Clyburn-Wilson lacked apparent authority to enter into the terms of the Arbitration Agreement on behalf of Ms. Clyburn (though certainly possessed authority to enter into it individually), she still possessed sufficient inherent agency powers to render the agreement enforceable as to Ms. Clyburn. Such inherent powers are recognized by South

Carolina courts and are used to enforce agreements where supposed unauthorized actions “accompany or are incidental to transactions which the agent is authorized to conduct....” See, §§ 8A, 161 Restatement (Second) of Agency (1958); Smith v. Fitton & Pittman, Inc., 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds*)(examining whether party had properly demonstrated the existence of inherent agency powers); Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r, 309 P.3d 372 (Wash. 2013); Daly v. Aspen Ctr. for Women's Health, Inc., 134 P.3d 450, 452 (Colo. App. 2005); Menard, Inc. v. Dage-MTI, Inc., 726 N.E.2d 1206, 1210-11 (Ind. 2000); Cange v. Stotler & Co., 826 F.2d 581, 591 (7th Cir. 1987)(“[t]he powers of an agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.”)(citing to Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co., 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for the doctrine of inherent agency is that, as between an equally innocent principal and third party with reference to an agent’s purportedly “unauthorized” actions, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as Sumter East, should not be disadvantaged because they dealt with an agent rather than a principal.

As set forth above, there is no dispute as to whether the Plaintiff Clyburn-Wilson was authorized to admit her mother to Sumter East. To the extent Plaintiffs take issue with Ms. Clyburn-Wilson’s authority to bind their mother to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to Ms. Clyburn-Wilson’s authority to admit their mother as a resident at Sumter East. Sumter East should not be disadvantaged for acting in accordance with the express representations of Plaintiff Clyburn-

Wilson regarding her authority to execute the various documents related to her mother's admission, including the Arbitration Agreement.

b. Agency by Estoppel

"When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances." R & G, supra, 343 S.C. at 433, 540 S.E.2d at 118. To properly show estoppel in South Carolina, this Defendant must show: "(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially." Boyd v. Bellsouth Tel.Co., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006).

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

In the case at the bar, [the facility] had not knowledge or reason to believe that Plaintiff was not [her husband's] authorized agent for purposes of executing the Arbitration Agreement or and other admissions paperwork. [The facility] relied on the affirmative representations of Plaintiff in admitting her husband to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by [the facility] for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

(See **Ex. 5**, p. 9).

Similarly, in McCutcheon v. THI of S.C. at Charleston, LLC, No. 2:11-CV-02861, 2011 WL 6318575 (D.S.C. Dec. 15, 2011), the facts are also substantially similar to the case at bar.

(See McCutcheon – Order Granting Defendant’s Motion to Compel, attached hereto as **Exhibit 7**). There, the plaintiff was a family member of a resident of a nursing home facility in South Carolina who executed a number of documents on the resident’s behalf upon her admission to the facility, including an arbitration agreement. As is the case here, the admitting family member signed the documents as the resident’s authorized representative but did not have a power of attorney for the resident at the time. Nevertheless, as in this case, the admissions agreement in McCutcheon provided that plaintiff was the resident’s legal representative for the purposes of admission as he was her next-of-kin and represented himself to be authorized to make health care decisions on her behalf. Also like here, the arbitration agreement in McCutcheon was a separate document and was not a condition of admission to the facility.

In McCutcheon, the United States District Court of South Carolina determined that the arbitration and admission agreements should be merged under general principles of contract law (See Sec. III.C below - merger argument). Id. at *4. In addition, the McCutcheon court concluded the plaintiff was estopped from denying he had authority to bind his family member to arbitration, holding:

Even if the Arbitration Agreement and Admissions Agreement constitute two separate contracts, plaintiff takes inconsistent positions regarding these contracts, which were executed by the same parties under the same purported authority. [Accordingly,] [i]t would be inequitable [] to allow plaintiff to assert that Elijah McCutcheon had authority to sign the Admissions Agreement on behalf of [his wife], but lacked such authority to sign the Arbitration Agreement. For these reasons, the court finds that plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

Id. at *5.

As in Price and McCutcheon, it would be disingenuous and inequitable to allow Ms. Clyburn, by and through Plaintiff Clyburn-Wilson, to effectively admit that her daughter was his

authorized agent as to the Admission Agreement, but not the Arbitration Agreement.⁵ In the case at bar, Sumter East Health and Rehabilitation had no knowledge or reason to believe that Plaintiff Clyburn-Wilson was not Ms. Clyburn's authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Sumter East Health and Rehabilitation relied on the affirmative representations of Plaintiff Clyburn-Wilson in admitting her mother to the Facility for the provision of the skilled nursing care. Additionally, the Arbitration Agreement was signed and executed with the expectation that all disputes between the parties would be governed by its contents and such representations were relied upon by Sumter East, only for the Plaintiffs through the instant lawsuit to seemingly ignore the binding agreement. It is simply not equitable for Plaintiff Clyburn-Wilson to hold herself out to Sumter East as Ms. Clyburn's agent and representative, but conveniently repudiate that she had any authority in response to this instant Motion. Accordingly, Plaintiffs should be estopped from denying the validity of the Arbitration Agreement.

Relevant to the application of this equitable principle in the matter at bar is that there is an implied covenant of good faith and fair dealing in every contract, Adams v. G.J. Creel & Sons, Inc., and Plaintiff Clyburn-Wilson is no less bound by this covenant than Sumter East. Plaintiff Clyburn-Wilson, on behalf of *herself*, agreed to be bound by the terms of the Arbitration Agreement. Indeed, above her signature on the Arbitration Agreement, she acknowledges and agrees: **"In signing this Agreement, the Legal Representative or Family Member binds both the Resident and themselves individually."** (See Ex. 1, p. 9). There is no doubt, of course, that Plaintiff Clyburn-Wilson could and did bind herself to the Arbitration Agreement individually

⁵ To the extent Plaintiff argues that neither the Adult Health Care Consent Act, S.C. Code Ann. §§ 44-66-10 to -80 (the "AHCCA"), nor the Bill of Rights for Residents of Long-Term Care Facilities, S.C. Code Ann. §§ 44-81-10 to -70 (the "Resident's Bill of Rights"), gave Ms. Clyburn-Wilson authority to sign the Arbitration Agreement on her mother's behalf, these arguments would be of no moment because the instant Motion does not rely on the AHCCA or the Resident's Bill of Rights as having granted Ms. Clyburn-Wilson the authority to sign the Arbitration Agreement for and on behalf of Ms. Clyburn.

and there is no question here as to Plaintiff Clyburn-Wilson's competency to have done so. Thus, she owes Sumter East covenants of good faith and fair dealing, and it would be *inequitable, unfair* and *not in good faith* to permit Ms. Clyburn-Wilson to bind herself individually and as personal representative to the Arbitration Agreement and hold herself out throughout Ms. Clyburn's five (5) month residency as having authority to bind her mother to the Arbitration Agreement, yet succeed in repudiating that position now just because Sumter East seeks to enforce the terms of the Arbitration Agreement. To require good faith and fair dealing from Sumter East as a contracting party, but not Plaintiffs, acting on her own behalf and on behalf of her husband, just because the contract in issue is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed "on *equal footing* with other contracts." Concepcion, 563 U.S. at 339.

C. The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiffs Should Be Estopped from Denying the Parties' Mutual Right to Arbitration.

a. Merger

As additional grounds to compel arbitration and *in the alternative*, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiffs should be required to arbitrate their claims against Sumter East on this basis alone. The Arbitration Agreement and Admission Agreement were executed by Ms. Clyburn-Wilson on behalf of Ms. Clyburn. The validity of these agreements, including the Arbitration Agreement, must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010).

The Arbitration Agreement expressly contemplates that it relates to and concerns the very subject matter of the Admissions Agreement – Ms. Clyburn’s admission to Sumter East. Specifically, the Arbitration Agreement states that it concerns “a program to resolve disagreements with residents and their families or legal representatives” (See Ex. 1, p. 1), and defines “Parties” to include the resident and those other stated persons “that may have a cause of action arising out of or relating in any way to the resident’s stay at the facility” (See Ex. 1, p. 2). Plaintiff Clyburn-Wilson signed both the Admissions Agreement and the Arbitration Agreement on behalf of her mother on the same day and at the same time – upon Ms. Clyburn’s admission to Sumter East on October 13, 2016.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. Klutts Resort Realty, Inc. v. Down'Round Development Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. Id. See also Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will nevertheless still be construed together to determine the entire agreement between the parties. See Plaza Development Services v. Joe Hardin Builder, Inc., 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); accord Cafe Associates, Ltd v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991).

As indicated previously, the court in McCutcheon, Price and Spears analyzed facts similar to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. (See McCutcheon - Ex. 7; Price – Ex. 5; Spear – Ex. 6). Indeed, this Court has cited to McCutcheon on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under similar circumstances. See Abrams v. Fundamental Long-Term Care Holdings, LLC, et al, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); Campsen v. Fundamental Long-Term Care Holdings, LLC et al, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (See Abrams, Campsen attached hereto as **Exhibits 8 and 9**).

Accordingly, Ms. Clyburn, by and through the acts of his representative, Plaintiff Debra Clyburn-Wilson, and Plaintiff Clyburn-Wilson on her own behalf and Sumter East, all contemplated that the terms of the agreement to admit Ms. Clyburn were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff Clyburn-Wilson executed the Arbitration Agreement in connection with the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (the residency at Sumter East); the Arbitration Agreement and Admissions Agreement were agreed to by the same parties; and, therefore, the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

b. Equitable Estoppel of Merged Agreement

“Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity.” Int'l Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (citation and internal quotation marks omitted). “A nonsignatory is estopped from refusing

to comply with an arbitration clause ‘when it receives a direct benefit from a contract containing an arbitration clause.’” Id. (quoting Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2nd Cir. 1999)).

Because of the doctrine of merger referenced above, this legal principle is properly applied in this case. The doctrine of equitable estoppel “exists to prevent a litigant from unfairly receiving the benefit of a contract while at the same time repudiating what it believes to be a disadvantage in the contract, namely the contractual arbitration provision.” S. Ill. Bev., Inc. v. Hansen Bev. Co., 2007 U.S. Dist. LEXIS 76229 (S.D. Ill. 2007). Moreover, the Fourth Circuit has held that “no party suing on a contract should be able to enforce certain contract provisions while simultaneously attempting to avoid the terms of an arbitration provision therein.” United States v. Bankers Ins. Co., 245 F.3d 315, 323 (4th Cir. 2001).

“Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract.” E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates. S.A.S., 269 F.3d 187, 200 (3d Cir. 2001)(citing Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 (2d Cir. 1999) (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)). As noted by the Federal District Court in Jackson v. Iris.com:

It is an axiomatic rule of contract law that a party may not rely on the contract when it works to its advantage, and repudiate it when it works to its disadvantage.

....

[W]here . . . a signatory seeks to enforce an arbitration agreement against a non-signatory, the doctrine estops the non-signatory from claiming that he is not bound to the arbitration agreement when he

receives a direct benefit from a contract containing an arbitration clause.

524 F. Supp. 2d 742, 749-50 (E.D. Va. 2007)(quoting in part Hughes Masonry Co. v. Greater Clark Cnty. Sch. Bide. Corp., 659 F.2d 836, 839 (7th Cir. 1981)(citing in part Int'l Paper Co., 206 F.3d at 416)(internal quotations omitted); *accord* Spears, CA No. 2019-CP-13-00308 (Jan. 10, 2020)(See Ex. 5).⁶

In the present case, Ms. Clyburn received extensive benefits associated with the Admission Agreement with Sumter East. Indeed, Ms. Clyburn was admitted to Sumter East for treatment and rehabilitation following a hospitalization for a Stage IV pressure ulcer – which had developed while staying with her daughter prior to coming to the Facility. Sumter East provided skilled nursing care and residential services, as envisioned by the Admission Agreement, to Ms. Clyburn. Both Ms. Clyburn and her daughters – Plaintiff Clyburn-Wilson and Plaintiff Atkinson, both of whom had previously cared for their mother but could not appropriately care for her Stage IV pre-existing ulcer, received the benefits of her residency at Sumter East as provided by the Admission Agreement. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiffs cannot “have

⁶ See also THI of S.C. at Columbia, LLC v. Wiggins, C/A No. 3:11–888–CMC, 2011 WL 4089435, at *6 (D.S.C. Sept.13, 2011) (“Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate.”); *accord* THI of S.C. at Magnolia Manor-Inman, LLC v. Gilbert, No. 7:13-CV-2929-BHH, 2014 WL 6863550, at *4 (D.S.C. Oct. 31, 2014), *report and recommendation adopted*, No. CIV.A. 7:13-2929-BHH, 2015 WL 1268185 (D.S.C. Mar. 19, 2015).

it both ways” by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to their disadvantage. This Defendant submits, in any event, that alternative dispute resolution is in everyone’s advantage as the costs of litigation and lawyers in litigation is anecdotally known to be higher versus arbitration.

As previously noted, the Plaintiffs’ allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiffs cannot assert claims against this Defendant based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as is cited above, numerous courts hold that where a plaintiff receives the benefits of the contract, which all of Ms. Clyburn and Plaintiff Clyburn-Wilson certainly did, the non-signatory (*i.e.* the Estate of Willie Mae Clyburn and Plaintiff Atkinson) is estopped from denying an arbitration agreement merely because he did not sign the contract under which he received all of the benefits. Therefore, as was held in McCutcheon, Price and Spears, this Court should find that Plaintiffs are *equitably estopped* from refusing to comply with the Arbitration Agreement here. (See **Ex. 6**, **Ex. 7** and **Ex. 5**).

c. Coleman, Thompson, and Hodge are Distinguishable.

Plaintiffs have argued that the Arbitration Agreement and Admission Agreement are not merged pursuant to Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), and Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 769 (Ct. App. 2016), and the Arbitration Agreement and Admissions Agreement are separate stand-alone agreements, and Plaintiffs did not possess the authority to enter into the Arbitration Agreement.

Reliance on those cases is misplaced because the Arbitration Agreement here is distinguishable and should not be considered separate for purposes of merger.

In Coleman, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, “On its face, this clause recognizes the ‘separateness’ of the [arbitration agreement] and the admission agreement, not a merger of the two contracts . . . By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply.” Id.

In the present case, the agreements “were executed by the same parties, for the same purposes, and in the course of the same transaction” and, therefore, the documents merged. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (citing Klutts, *supra*, 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admission and Arbitration Agreements were signed by the Plaintiff, on her husband’s behalf, and agreed to by Sumter East as of October 13, 2016. The documents were signed by the exact same person: Ms. Clyburn-Wilson as representative for her mother and Debbie Matula as representative for Sumter East. The documents were agreed to for the same purpose and transaction of establishing Ms. Clyburn’s residency at the skilled nursing facility. There is no language in either the Admission or Arbitration Agreement akin to the language in Hodge or Coleman to indicate the parties desired the documents be considered as separate contracts. As such, Coleman and Hodge are not controlling and Plaintiffs’ claims should be compelled to arbitration pursuant to the contract. 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.

Further still, it must be remembered that the merger question examines whether, “where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction,”⁷ as indeed the Admission and Arbitration Agreements were here, there must be evidence to upset the *default presumption* that the contracting parties intended the instruments to be construed together as effectively one contract.

As a practical matter, if this presumption is to mean anything, upsetting it must require actual evidence of sufficient probity that, notwithstanding the concurrence of all the circumstances that must come together for the presumption of merger to even arise in the first place—i.e., same time, parties, purpose, and transaction—a reasonable, non-speculative inference can be drawn that the parties’ possessed a contrary intention. Such superficial things as the fact that the admission and arbitration agreements have their own titles, are separately paginated, and/or are separately signed cannot suffice to show evidence of intent contrary to merger. Even though, as noted above, the Arbitration Agreement was not a precondition to admission, this does not mean that the two instruments did not work hand-in-hand once the arbitration agreement came into existence (i.e., once it was in fact entered into). While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. In other words, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; but that is not what happened.

The Arbitration Agreement was in fact executed, of course, and it was executed under circumstances giving rise to *the presumption of merger*—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either

⁷ Coleman, 407 S.C. at 355, 755 S.E.2d at 455.

standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being and the very subject matter of any "Disputes" that could arise under it.

It matters not whether the Arbitration Agreement was a condition of admission (though it was not here), only that it was in fact agreed to in conjunction with admission; and, here, there can be no question that the Arbitration Agreement—once agreed upon as it was by Plaintiff Clyburn Wilson, Ms. Clyburn (by and through her daughter) and Sumter East—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. Clyburn's relationship with Sumter East. In fact, the Admission Agreement states, "Each party to this Agreement acknowledges that no representations, inducements, promises, **or agreements**, orally or otherwise, have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement." (Ex. 2, p. 8) (emphasis added). By acknowledging and signing this Agreement, and immediately subsequently signing the Arbitration Agreement, it was clearly the intent of both parties that the Arbitration Agreement was a part and parcel of the Admission Agreement. To find otherwise would be an absurd interpretation of the actions and intentions of the Parties.

Respectfully, the material facts of Coleman, Thompson, and Hodge, are different from the material facts of the instant case, and those other cases do not control the outcome here. Under the particular facts of this case, an intent contrary to merger cannot reasonably be found.

D. Alternatively, the Arbitration Agreement is an Amendment to the Admission Agreement.

Plaintiff has attempted to argue that the “Entirety of Agreement” clause in the Admission Agreement at issue envisions that the Arbitration Agreement and Admission Agreement were not intended to merge and precludes such merger. This Defendant submits that this is an interpretation of the clause which is absurd and inconsistent with the totality of the documents executed at the time of Ms. Clyburn’s admission. Indeed, In fact, the Admission Agreement states, “Each party to this Agreement acknowledges that no representations, inducements, promises, **or agreements**, orally or otherwise, have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement.” (Ex. 2, p. 8) (emphasis added). By acknowledging and signing this Agreement, and immediately subsequently signing the Arbitration Agreement, it was clearly the intent of both parties that the Arbitration Agreement was a part and parcel of the Admission Agreement. To find otherwise would be an absurd interpretation of the actions and intentions of the Parties.

Nevertheless, to the extent this Court is persuaded by Plaintiffs’ argument in this regard, the Admission Agreement expressly provides for envisions amendments to it: “This Agreement may be amended only by a written agreement signed on behalf of the Facility and the Resident.” (Ex. 2, p. 8). There is no temporal qualification of this ability to amend the Admissions Agreement or limitation on the form of the amendment, except of course it is impossible to amend something *prior* to making it. As stated previously, the Admission Agreement and the Arbitration Agreement were executed on the same date and approximately at the same time. Thus, by its own terms, the Admission Agreement permits amendments thereto *at any time* – contemporaneously or hours or weeks later. For this reason, if the Court is not in agreement that the Arbitration Agreement should merge for the reasons stated in Section III.D.i above, then it

should find that the Arbitration Agreement is nonetheless an amendment to the Admission Agreement, being a written agreement signed on behalf of the Facility and Plaintiff at some point in time which is *not prior* to the execution of the Admission Agreement. Thus, on this alternative grounds, if Plaintiffs' argument as to Entirety of Agreement clause are to be accepted, then it likewise requires a finding that the Arbitration Agreement, executed at the same time or after the Admission Agreement, is an amendment to the Admission Agreement and should be enforced accordingly.

E. The Arbitration Agreement is Not Unconscionable

For purposes of the record, though it does not appear Plaintiffs argue this in their initial memorandum, the Arbitration Agreement should not be rendered unenforceable on grounds it is unconscionable.

In South Carolina, unconscionability as it relates to arbitration agreements turns on whether the party objecting to arbitration (1) lacked a meaningful choice because the arbitration provisions are one-sided and (2) the terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 24-25, 644 S.E. 2d 663, 668 (2007). However, while this is a two-prong test, the prongs "invite similar proof and often overlap." Marzulli v. Tenet South Carolina, Inc., 2018 WL 1531507 at *3.

As to the first prong, courts should consider:

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

Simpson, 373 S.C. at 25, 644 S.E.2d at 669. This "meaningful choice" prong refers specifically to the bargaining process involved in entering into the Arbitration Agreement.

Here, the allegations of injuries relate to the very nature of the transaction entered into between the Plaintiffs and Sumter East and its agents – the provision of healthcare, and not injuries of a wholly separate character which would be unfair to include in the scope of Disputes to be arbitrated.

Plaintiffs' mother was offered admission to Sumter East for skilled nursing care separately and independently from her voluntary acceptance of and agreement to the terms of the Arbitration Agreement. Ms. Clyburn's admission to the Facility and her execution of the Admission Agreement, by and through Plaintiff Clyburn-Wilson, and the obligations of the Parties thereunder, were in no way predicated on the his agreement to the Arbitration Agreement. Plaintiff's agreement to the Arbitration Agreement was voluntary. Indeed, the Arbitration Agreement states conspicuously, beginning on its first page:

WHAT ARE MY RIGHTS AND RESPONSIBILITIES UNDER THIS AGREEMENT?

YOUR PARTICIPATION IN DRP IS VOLUNTARY.⁸

(Ex. 1, p. 1). Plaintiff Clyburn-Wilson was not required or forced to enter into the Arbitration Agreement in order for her husband to be admitted and receive care from Sumter East. Most importantly, Ms. Clyburn would still have been able to be admitted to Sumter East had Ms. Clyburn-Wilson decided not to choose alternative dispute resolution, including arbitration, vis-à-vis entering into the Arbitration Agreement on behalf of her mother.

Additionally, Plaintiff Clyburn-Wilson was expressly made aware of her right to consult with counsel prior to the execution of the Arbitration Agreement. Indeed, the terms of the Arbitration Agreement conspicuously notified her of her right to do so: "YOU UNDERSTAND

⁸ "DRP" stands for the Dispute Resolution Program, which as discussed previously under Factual Background herein, includes arbitration as an available dispute resolution mode either in sequence of the various DRP prescribed steps or independently of and without any conditions precedent to pursuing arbitration.

THAT YOU HAVE THE RIGHT TO CONSULT WITH AN ATTORNEY OF YOUR CHOICE.” (Ex. 1, p. 2). Further, whether a party does indeed consult counsel is not the nature of this element of consideration as set forth in Simpson for evaluating “meaningful choice”; rather, the Court should consider whether the party had an *opportunity* to do so or was otherwise prevented from seeking independent legal advice or requesting further time to review the arbitration agreement at issue. Marzulli, 2018 WL 131507 at *4. Sumter East did not do anything to prevent the Plaintiff from seeking legal counsel and, to the contrary, the terms of the Arbitration Agreement drafted and presented by Sumter East encouraged her to do so. (Ex. 1). Plaintiff Clyburn-Wilson, and her co-Personal Representative Plaintiff Atkinson, should be estopped from any argument that she did not have sufficient time to seek counsel.

While Ms. Clyburn-Wilson is an individual and the Defendant and various other Parties to the Arbitration Agreement are commercial entities, this fact alone is not sufficient to prove the absence of meaningful choice under the first prong of the Simpson analysis. Munoz v. Green Tree Financial Corp., 343 S.C. 531, 542 S.E. 2d 360, 365 n. 5 (S.C. 2001) (“[I]nequality of bargaining power alone will not invalidate an arbitration agreement.”).

In accordance with Simpson, the arbitration provisions of the Arbitration Agreement are conspicuously printed in all caps and/or set off in bold headings. (Ex. 1). Further, the arbitration provisions of the Arbitration Agreement are written in plain, layman’s language and not encumbered by difficult to comprehend legalese. Additionally, in agreeing to the Arbitration Agreement, Plaintiff acknowledged and agreed to the following:

YOU UNDERSTAND, AGREE TO, AND HAVE RECEIVED A COPY OF THIS AGREEMENT, AND ACKNOWLEDGE THAT THE TERMS HAVE BEEN EXPLAINED TO YOU OR YOUR REPRESENTATIVE , BY OUR AGENT, AND THAT YOU OR YOUR REPRESENTATIVE HAVE HAD THE OPPORTUNITY TO ASK QUESTIONS ABOUT THIS AGREEMENT AND THE DISPUTE RESOLUTION PROGRAM.

(Ex. 1, p. 3).

Accordingly, having (i) provided the Plaintiff with adequate time to consider the Arbitration Agreement, (ii) not conditioned Ms. Clyburn's admission to the Facility in any way on agreement to the Arbitration Agreement, (iii) conspicuously informed the Plaintiff Clyburn-Wilson of her right to independent legal counsel, and (iv) explained the terms of the Arbitration Agreement to Plaintiff Clyburn-Wilson as acknowledged by her in writing, this Defendant undoubtedly provided the Plaintiff Clyburn-Wilson with "meaningful choice" as to her agreement to arbitrate the claims in her Complaint.

As to the second prong of the unconscionability analysis set forth in Simpson, the most important consideration in determining whether the terms of an arbitration agreement are so oppressive that no reasonable person would make them and no fair and honest person would accept them is whether such arbitration agreement is "geared towards unbiased resolution of the parties' dispute by a neutral decision-maker." Marzulli, 2018 WL 1531507 at *4 (citing Simpson, 373 S.C. at 25, 644 S.E.2d at 668). In addition, mutuality of civil remedies of an arbitration agreement is probative of such agreement satisfying this second-prong, as "[i]t is difficult to deem a contract term one-sided when it applies equally to both sides". Id. (citing Simpson, 373 S.C. at 31, 644 S.E.2d at 672). Finally and importantly, whether the rules and procedures which will govern the arbitration at issue are of a well-regarded and neutral organization is an important consideration to the second prong of the Simpson analysis. Marzulli, 2018 WL 1531507 at *5.

The Arbitration Agreement provides that one arbitrator can hear a dispute if the parties can mutually agree on the appointment of one arbitrator. Alternatively, if the parties cannot mutually agree, then "each party will appoint an arbitrator and the two appointed arbitrators must appoint a third arbitrator using the applicable rules and procedures of the National Arbitration

Forum (“NAF”) or the Judicial Arbitration and Mediation Service (“JAMS”).” (Ex. 1, p. 5). The mutuality required in the appointment of an arbitrator ensures the neutrality of the single arbitrator or, in the alternative, of the decision of the panel of three arbitrators. Moreover, any arbitration of the parties’ disputes must be settled by the rules and procedures of the NAF or the JAMS, both of which are well-regarded and neutral arbitration organizations. Further, the scope of disputes covered by the Arbitration Agreement applies with equal application to the Plaintiffs and Sumter East, and the decision of the arbitrator is equally binding on the parties to the Arbitration Agreement which submit a dispute to arbitration. Finally, the Arbitration Agreement is more than fair to the Plaintiffs in its allocation of arbitration costs, with the Facility bearing ninety percent (90%) and the Plaintiffs being only ten percent (10%) of such costs. (Ex. 1, p. 4). Not a single term of the Arbitration Agreement can be considered “oppressive” such that a reasonable person would not make them or a fair and honest person would not accept them.

Accordingly, the Arbitration Agreement patently satisfies both prongs of the Simpson unconscionability analysis and, thus, should not be invalidated on any such grounds if claimed by Plaintiffs.

For the reasons set forth herein, a valid and enforceable Arbitration Agreement exists in this matter. Pursuant to the mandate of the FAA, this Court should enforce the Arbitration Agreement and compel Plaintiff and Sumter East to arbitration.

F. Should the Court Deny this Defendant’s Motion, the Parties Should be Permitted to Conduct Additional Discovery.

If the Court is not inclined to grant the instant Motion on any of the grounds contained in this Memorandum, this Defendant requests that the parties be allowed to conduct additional discovery on the issues raised in this Memorandum and by Plaintiffs in their briefing, including but not limited on any issues going to the validity of the Arbitration Agreement. In cases

involving similar issues, the Honorable Perry Gravely allowed the parties to conduct additional discovery on the issue of a mother's authority to execute an arbitration agreement on her son's behalf in connection with his admission to a skilled nursing facility. See James Boyd v. THI of South Carolina, LLC d/b/a at Magnolia Place-Greenville, et. al, 2018-CP-23-01934 (S.C. Com. Pls. July 9, 2018)(attached hereto as **Exhibit 10**). Likewise, the Honorable Alison Lee allowed the parties to conduct additional discovery on a wife's authority to execute an arbitration agreement on behalf of her husband. See Priscilla Brown, as Personal Representative of the Estate of James Brown v. THI of South Carolina at Columbia at Magnolia Manor d/b/a Midlands Health and Rehabilitation Center, 2017-CP-40-00516 (S.C. Com. Pls. Nov. 7, 2019) (attached hereto as **Exhibit 11**). As in Boyd and Brown, if the Court determines the record is insufficient to rule on the issues before it, additional discovery should be permitted as necessary. As noted previously, only a limited amount of discovery has been conducted on agreement of the parties to date.

CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order either dismissing or compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motion on any of the grounds asserted above or at the hearing, this Defendant requests that the parties be permitted to conduct additional discovery. Defendant also requests permission to be heard after such discovery is conducted and requests that it be permitted to submit supplemental memorandum along with any additional evidence procured.

[SIGNATURE BLOCK ON FOLLOWING PAGE]

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.

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Attorneys for the SSC Sumter East Operating
Company, LLC d/b/a Sumter East Health and
Rehabilitation Center

Charleston, South Carolina

Dated: April 30, 2020

Exhibit 4

Consent to Treatment

The Resident acknowledges that the Facility renders services to the Resident under the general and specific instructions of the Resident's Attending Physician. The Resident authorizes and directs Facility to provide routine and emergency care as the Resident's Attending Physician or designee may direct from time to time. If Resident's Attending Physician and such attending physician's on-call designee are unavailable and the Resident requires medical services, or if the Attending Physician has not seen Resident in accordance with the timeframes established by law; then Resident authorizes Facility to obtain, on behalf of Resident, the services of any other physician licensed to practice medicine in this state, at Resident's sole expense (if not covered by Medicaid, Medicare or third party payer) until Resident's Attending Physician is available, or Resident has selected a new Attending Physician. In that event, Resident authorizes and directs Facility to provide routine and emergency care as required for Resident's well-being, health, and safety in accordance with the orders of such physician.

Willie M Clyburn
Resident Name (Print)

Resident Signature

Legal Representative Signature (e.g., Guardian)

Agent Signature (e.g., Agent through health care
Power-of-Attorney or Surrogate Decision-maker)

Debra Clyburn Wilson
Responsible Party Signature (e.g., Family member)

Debbie Matula
Facility Representative Signature

10-13-16
Date

Exhibit 5 (continued)

Lock and Key for Personal Belongings

- ☐ Services Available.
- ☐ Resident requests a lock and key for the personal storage area located in his or her room for personal belongings.
- ☐ Resident declines the offer of a lock and key for the personal storage area located in his or her room for personal belongings.
- ☐ Services not available.

Consent to Photograph

- ☐ Resident/Responsible Party gives facility consent to photograph Resident for the purpose of display in frames/collages on display in Facility.
- ☐ Resident/Responsible Party declines consent and does not wish to be photographed at the Facility or any Facility event.

Request for Podiatric Services

- ☐ Resident requests podiatry care/services. This can be revoked at any time.
- ☐ Resident declines podiatry care/services. This can be changed at any time.

In the Event of Death

- ☐ Resident requests Facility immediately contact:

Debra Clyburn Wilson 803 316 3146
803 294 1077
 (Name and Two phone numbers).

- ☐ Arrangements have been made at _____

 (Name, Address and Phone Number of Funeral Home).

- ☐ Resident requests Facility contact the funeral home so that arrangements can be made.

PNEUMOCOCCAL/INFLUENZA IMMUNIZATION CONSENT**PNEUMOCOCCAL IMMUNIZATION****BENEFITS:**

Pneumococcal disease is a serious illness that causes much sickness and death. The pneumococcal vaccine protects against 23 types of pneumococcal disease. About 1 in 20 people who get pneumococcal pneumonia die. The vaccine begins to provide protection within 2-3 weeks. The pneumococcal vaccine is a very safe vaccine.

Side Effects/Risk Factors

- Soreness/redness of the arm
- Muscle aches
- Fever (low grade)
- Rash/hives (allergic reaction)

Pneumococcal vaccinations are contraindicated for people who have experienced a severe allergic reaction with previous vaccination.

A single dose of pneumococcal vaccine is recommended for most persons aged 65 or older. Some people might need a booster after 5-10 years, as deemed appropriate by the physician. Some people who were younger than 65 when they received the vaccine may need a second dose at age 65. The pneumococcal vaccine can be given at the same time as the influenza vaccine. If the date of the last vaccine is unknown, then it may be administered at the physician's discretion.

The Resident/Responsible Party has the right to refuse the vaccination.

☐ Accept ☐ Refuse Date of last known pneumococcal vaccination: 1 / 1

Debra Clyburn Wilson
Signature of Resident/Responsible Party

10 / 13 / 16
Date

INFLUENZA IMMUNIZATION**BENEFITS:**

The best single way to protect against the flu is to get vaccinated in the fall. Vaccination is recommended any time during the flu season (October-April) to prevent development of the flu. The vaccine begins to provide protection within 2 weeks.

Side Effects/Risk Factors

- Soreness/redness of the arm
- Muscle aches
- Fever (low grade)

Influenza vaccinations are contraindicated for people with a severe allergy to eggs, people that developed Guillain-Barre Syndrome within 6 weeks of getting the flu vaccination, or people that have had an allergic reaction to the flu vaccine in the past. People who have a moderate or severe illness with fever should wait until symptoms lessen. Coincidental respiratory disease unrelated to the flu vaccine may occur after vaccination.

The influenza vaccine is offered yearly, as deemed appropriate by the physician. If the date of the last vaccine is unknown, then it may be administered at the physician's discretion.

The Resident/Responsible Party has the right to refuse the vaccination.

☐ Accept ☐ Refuse Date of last known influenza vaccination: 1 / 1

Debra Clyburn Wilson
Signature of Resident/Responsible Party

10 / 13 / 16
Date

Debbie Mathis
Signature of Facility Representative

10 / 13 / 16
Date

(Source of Benefits/Risk Factors from Centers for Disease Control)

NAME-Last

First

Middle

Attending Physician

Record No.

Room/Bed

Clyburn Willie M.

Debra

201C

201C

PSSC409P (6/04) © BRIGGS, Des Moines, IA 50306 (800) 247-2343 PRINTED IN U.S.A.

PNEUMOCOCCAL/INFLUENZA IMMUNIZATION CONSENT

CLYBURN, W. 000011

Deposition of Debra Clyburn-Wilson

13:02:13

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IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
SUMTER COUNTY

DEPOSITION OF DEBRA CLYBURN-WILSON
DECEMBER 4, 2019

ANDRIETTA ATKINSON as POWER OF ATTORNEY FOR
WILLIE MAE CLYBURN,

Plaintiff,

vs. CASE NO. 2017-CP-43-01740

SSC SUMTER EAST OPERATING COMPANY, LLC, D/B/A
SUMTER EAST HEALTH AND REHABILITATION CENTER AND
PAUL GRANGER,

Defendants.

TIME: 1:00 PM

LOCATION: SMITH ROBINSON
SUMTER, SC

REPORTED BY: MACKENZIE ALLEN
CLARK & ASSOCIATES, INC.
CHARLESTON, SC 29415
843-762-6294
WWW.CLARK-ASSOCIATES.COM

**DEFENDANT'S
EXHIBIT**

Deposition of Debra Clyburn-Wilson

13:47:41 1 A. That at one time they wanted to send her
13:47:46 2 home. Well, in the beginning I think they were
13:47:49 3 saying something about the fourth floor -- the
13:47:56 4 fourth floor -- care on the fourth floor. And
13:47:58 5 the fact that they wanted her to go to -- have
13:48:04 6 some rehabilitation.

13:48:04 7 Q. Okay. And did she -- she did not go to
13:48:07 8 the fourth floor, did she?

13:48:10 9 A. No, ma'am. I'm sorry.

13:48:11 10 Q. Okay. So there was then a discussion
13:48:15 11 about either going home or to a skilled-nursing
13:48:18 12 facility. Were you a part of those decisions?

13:48:21 13 A. No, ma'am.

13:48:23 14 Q. Okay. Who was a part of those
13:48:26 15 decisions?

13:48:26 16 A. My mother.

13:48:27 17 Q. Okay. So your mother made decisions
13:48:33 18 about where she would go. Did your mother --
13:48:40 19 only your mother make the decision about where
13:48:43 20 she was going to go after the hospital?

13:48:45 21 A. My mother made the decision to go to
13:48:48 22 that facility.

13:48:49 23 Q. Did your mother ever indicate at that
13:48:52 24 time she wanted to go home?

13:48:55 25 A. The hospital recommended that she go to

Deposition of Debra Clyburn-Wilson

13:50:11 1 Q. Okay. And what else do you remember?

13:50:12 2 A. Going and collecting her stuff. And the
13:50:12 3 ambulance came to pick her up. And my brother
13:50:24 4 and I -- and she was placed in the back there.

13:50:26 5 Q. And did you sign any documents in
13:50:37 6 connection with her becoming a resident at Sumter
13:50:45 7 East?

13:50:47 8 A. I would remember she -- I remember she
13:50:58 9 told -- do I remember -- do I recall signing a
13:51:02 10 document? Could you repeat that question again?

13:51:04 11 Q. Well, what do you remember she told you?

13:51:08 12 MR. HUDSON: Object to the form.

13:51:10 13 Q. I think I had just heard you say "she
13:51:12 14 told me." Did your mother tell you about
13:51:19 15 documents that were in need of signature?

13:51:24 16 A. Not at that time. My brother was there
13:51:28 17 with me, William Clyburn. And we were just there
13:51:31 18 to make sure that she had gotten settled in.

13:51:33 19 Q. So who handled -- did your mother make
13:51:40 20 all the decisions on the consents -- and we can
13:51:42 21 go through those -- to be admitted to the
13:51:47 22 facility? Or did you participate in that
13:51:49 23 process?

13:51:49 24 A. My mother made all decisions.

13:51:51 25 Q. Okay. This is I think Exhibit 4.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	CASE NO. 2017-CP-43-1740
ANDRIETTA ATKINSON and	)	
DEBRA CLYBURN-WILSON,	)	
Individually and as Personal Representatives	)	
of the Estate of Willie Mae Clyburn,	)	
	)	
Plaintiffs,	)	MOTION TO ALTER, AMEND, AND/OR
	)	RECONSIDER ORDER DENYING
vs.	)	MOTION TO COMPEL ARBITRATION
	)	
SSC SUMTER EAST OPERATING	)	
COMPANY, LLC d/b/a Sumter East Health	)	
and Rehabilitation Center and Paul Granger,	)	
	)	
Defendants.	)	

TO: THE HONORABLE KRISTI F. CURTIS, Presiding Judge, and D. NATHAN HUGHEY, ESQUIRE, A. STUART HUDSON, ESQUIRE, and BRADLEY H. BANYAS, ESQUIRE, HUGHEY LAW FIRM, Attorneys for Plaintiffs

NOW COMES Defendant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center (the “Facility”), by and through its undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby moves this Honorable Court to alter, amend, and/or reconsider its Order Denying Motion to Compel Arbitration, filed June 25, 2020 (the “Subject Order”).

1. **Most respectfully, the Facility asks the Court to (re)consider and expressly rule on each and every distinct issue/argument raised in support of the Motion to Compel Arbitration¹, i.e., each and every distinct issue/argument set forth in the Motion to Compel Arbitration and Memo in Support², all of which are hereby incorporated herein by reference.**

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

2. **Subject to and without waiving or otherwise lessening the all-encompassing scope of its above request (No. 1), the Facility respectfully asks the Court to (re)consider and expressly rule on the following issues/arguments in support of the Motion to Compel Arbitration.**

- (a) That Ms. Clyburn-Wilson’s deposition testimony, together with the fact that she did indeed sign the paperwork for an on behalf of Ms. Clyburn, provides evidence to support a finding that Ms. Clyburn-Wilson was acting with Ms. Clyburn’s knowledge and approval and as directed to carry out Ms. Clyburn’s wishes when she signed paperwork for and on behalf of Ms. Clyburn in conjunction with her admission to the Facility, such paperwork including not only the Admission Agreement and but also the Arbitration Agreement. (See Memo in Support pp. 6–7; *id.* at Ex. 4.) This cuts against the Court’s rulings against the Facility as to the lack of a true agency (actual and/or apparent), agency by estoppel, and/or ratification. The cited deposition testimony from Ms. Clyburn-Wilson does not reflect Ms. Clyburn’s mere silent presence at the Facility, but rather that Ms. Clyburn was aware of and directing how her affairs were being handled, so as to provide an evidentiary basis to support the existence of a true agency, agency by estoppel, or ratification.

¹ The “Motion to Compel Arbitration” refers to SSC Sumter East Operating Company, LLC’s Motion to Dismiss and Compel Arbitration, filed February 27, 2020.

² The “Memo in Support” refers to SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center’s Memorandum in Support of Motion to Compel Arbitration, filed April 30, 2020.

- (b) That the deposition testimony from Ms. Clyburn-Wilson that Plaintiffs cite to the contrary (i.e., to the contrary of that of cited by the Facility in No. 2(a) above) consists solely of inadmissible testimony in response to improper leading questions by Plaintiffs' counsel. (See Memo in Support p. 7; Ex. C to Pls.' Mem. in Opp'n.) See Rule 611(c), SCRE.
- (c) That both state and federal policy favor arbitration. (See Memo in Support p. 9.)
- (d) That the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the “FAA”), governs the Arbitration Agreement and requires that the Arbitration Agreement be placed on equal footing with all other contracts. (See Memo in Support pp. 9–12.)
- (e) That the Arbitration Agreement is valid on its face. (See Memo in Support pp. 13–16.)
- (f) That Ms. Clyburn-Wilson had inherent agency authority. (See Memo in Supp. pp. 19–21.)
- (g) That *Coleman*, *Thompson*, and *Hodge* are distinguishable. (See Memo in Support pp. 29–32.)
- (h) That, alternatively (i.e., alternatively to the Facility's merger argument), the Arbitration Agreement is an amendment to the Admission Agreement. (See Memo in Support pp. 33–34.)
- (i) That, even if the Court is not inclined to grant the Motion to Compel Arbitration at present, the Facility should be permitted additional discovery into the facts bearing on arbitrability. (See Memo in Support pp. 38–39.)

3. The Subject Order does not seem to appreciate that South Carolina law recognizes numerous viable theories under which a nonsignatory can be bound to an arbitration agreement.

To be clear, South Carolina law recognizes numerous viable theories—not only absent an agency but also absent power of attorney or judicial or statutory authorization—under which a nonsignatory can be bound to an arbitration agreement. See *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (“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.”); *see also Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014) (acknowledging the possibility of enforcing an arbitration agreement against a nonsignatory via merger and equitable estoppel).

4. The Subject Order’s discussion of the South Carolina Adult Health Care Consent Act (“AHCCA”)³ is misplaced.

As explained in the Memo in Support, the Facility does not rely on the AHCCA as having granted Ms. Clyburn-Wilson authority to sign the Arbitration Agreement on behalf of Ms. Clyburn. (Memo in Support p. 23 n.5.)

5. The Subject Order violates the FAA’s mandate that arbitration agreements be placed on equal footing with all other contracts when it charges the Facility with a heightened duty to determine the existence or scope of Ms. Clyburn-Wilson’s authority to sign the Arbitration Agreement for Ms. Clyburn and/or absolves Ms. Clyburn-Wilson of the legal consequences of her act of signing the Arbitration Agreement and/or of her reciprocal duty of good faith and fair dealing⁴

The Arbitration Agreement itself reflects (by virtue of her signature upon it) Ms. Clyburn-Wilson’s express representation that she had all due authority to sign it for her mother, Ms. Clyburn. There is no question raised here as to Ms. Clyburn-Wilson’s competency. She is thus “presumed to have read, understood, and assented to [the] terms” of the Arbitration Agreement,⁵ including, of course, the terms whereby she represented himself to the Facility as having authority to act on her mother’s behalf. Moreover, there is an implied covenant of good faith and fair dealing in every contract,⁶ and Ms. Clyburn-Wilson is no less bound by this covenant than the Facility. To require anything more from the Facility as a contracting party just because the contract in issue

³ (Subject Order pp. 5–6.)

⁴ (See Subject Order pp. 4–5, 11.)

⁵ *Gibson v. Epting*, 426 S.C. 346, 352, 827 S.E.2d 178, 181 (Ct. App. 2019) (“[O]ne who has signed a contract is presumed to have read, understood, and assented to its terms.”).

⁶ *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995).

is an arbitration agreement would violate the FAA's requirement that arbitration agreements be placed on equal footing with other contracts. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

6. **Most respectfully, the merger/equitable estoppel analysis in the Subject Order is erroneous, to include the Subject Order's use of the wrong test for equitable estoppel.**

Re: Merger

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

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

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

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

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

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

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

Here, the Court has erred in rejecting the Facility's merger argument, failing to recognize material distinctions between the facts of the instant case and those that controlled (and/or were not addressed in) *Coleman*, as well as in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), which relied on *Coleman*.

Respectfully, the Court's finding against merger relies on speculation, not evidence from which a reliable conclusion can reasonably be drawn regarding the contracting parties' intent. Cf. *The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct. App. 2005) ("[V]erdicts may not be permitted to rest upon surmise, conjecture, or speculation."). Indeed, it does not even make sense that the parties would have intended the Admission Agreement and the Arbitration Agreement to be separate contracts.

While it is true that the Arbitration Agreement is not necessary to the Admission Agreement, the converse is not true; the Admission Agreement is indeed necessary to the Arbitration Agreement. So yes, the Admission Agreement *could* have stood on its own, without the Arbitration Agreement ever having been executed, in which case no question of merger would have even arisen to begin with; but that is not what happened. The Arbitration Agreement was in fact executed, and it was executed under the unique circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction.

Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the Arbitration Agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitration Agreement's) sole reason for being. The fact that the Arbitration Agreement was not required for admission does not mean that it was not intended to be part of the admissions materials

intended to be construed together. To say that the Arbitration Agreement is not essential to admission is not the same as saying it was not part of the admissions paperwork once it was in fact voluntarily agreed to and signed in conjunction with Ms. Clyburn's admission. In other words, it did not have to be agreed to, in which case it would not have been included in the admissions paperwork, or anywhere else, as it simply would not have existed. But it was agreed to, as part and parcel of the admissions paperwork, Ms. Clyburn's admission to the Facility being the express—and only—reason why the parties chose to enter into the arbitration agreement to begin with.

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

And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that merger is the default position, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all of these align—same time, same

parties, same purpose, same transaction—our courts *will* consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence “indicating [(i.e., affirmatively showing)] a contrary intention.” To allow the merger presumption to be upset, as, respectfully, the Court has done here, based on evidence that does not even go so far as to clearly indicate a contrary intention, but at most *might* (or might not) reflect a contrary intention, is to allow the exception to devour the rule.

Re: Equitable Estoppel

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court’s decision in *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). The *Wilson* Court favorably discussed the framework of the so-called direct benefits test—which test the Court of Appeals had applied in the decision then before the *Wilson* Court on writ of certiorari, which followed the Court of Appeals’ earlier decision in *Pearson v. Hilton Head Hospital*, 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012), and under which the Facility contends Plaintiffs are estopped from refusing to comply with the Arbitration Agreement here, where Ms. Clyburn received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the Arbitration Agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner’s alternative argument based on the application of the state’s “traditional” six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., “[t]he traditional test referenced by [the] [p]etitioners,” “has been analyzed most-often in *non*-arbitration cases”) (emphasis added). In other

words, contrary to the Court's analysis in the Subject Order, *Wilson* supports the use of the direct benefits test to answer the question of equitable estoppel in an arbitration case like this, not the six-factor test identified in the Subject Order. (Subject Order p. 10.)

Properly viewing the Admission Agreement and the Arbitration Agreement as merged, Ms. Clyburn (who was, according to Ms. Clyburn-Wilson herself, competent and possessed contractual capacity at all relevant times) received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and treatment she received therein. Not even Plaintiffs themselves allege that every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility) was deficient.

Respectfully, the Court should have found that the Arbitration Agreement merged with the Admission Agreement (the validity of which Plaintiffs do not challenge) and that Plaintiffs are estopped to deny the Arbitration Agreement's enforceability, Ms. Clyburn having effectively embraced the contract with the Facility for the purpose of her admission and receipt of the benefits thereof only to later, via her estate, attempt to repudiate the Arbitration Agreement with which her Admission Agreement merged.

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of the Motion to Compel Arbitration, all of which the Facility incorporates by reference herein and asks the Court to (re)consider and expressly rule upon), the Facility asks that the Court alter, amend, and/or reconsider the Subject Order in favor of an order granting the Motion to Compel Arbitration.

PLEASE NOTE: the Facility reserves all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

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*Attorneys for SSC Sumter East Operating
Company, LLC d/b/a Sumter East Health and
Rehabilitation Center*

Charleston, South Carolina

July 6, 2020

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

Appeal from Sumter County
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-43-01740

Andrietta Atkinson and Debra Clyburn-Wilson,
individually and as Personal Representatives
of the Estate of Willie Mae Clyburn,

Respondents,

v.

SSC Sumter East Operating Company, LLC
d/b/a Sumter East Health and Rehabilitation Center
and Paul Granger,

Defendants.

Of whom SSC Sumter East Operating Company, LLC
d/b/a Sumter East Health and Rehabilitation Center is

Appellant.

NOTICE OF APPEAL

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(843) 881-8644

Attorneys for Respondents

Defendant SSC Sumter East Operating Company, LLC d/b/a Sumter East Health and Rehabilitation Center ("Appellant"), hereby appeals the following orders of the Honorable Kristi F. Curtis, Circuit Court Judge:

- Order Denying Motion to Compel Arbitration, filed June 25, 2020; and
- Form 4 Order filed July 14, 2020, denying motion to alter, amend, and/or reconsider.

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

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Stephen L. Brown (SC Bar No. 66468)

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

Russell G. Hines (SC Bar No. 72100)

Kate C. Mettler (SC Bar No. 103762)

Alexandra J. Ginsberg (SC Bar No. 102251)

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P.O. Box 993 (29402)

(843) 720-5488

Attorneys for Appellant

Charleston, South Carolina

Dated: 8/13/20

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

Appeal from Sumter County
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-43-01740

Andrietta Atkinson and Debra Clyburn-Wilson,
individually and as Personal Representatives
of the Estate of Willie Mae Clyburn,

Respondents,

v.

SSC Sumter East Operating Company, LLC
d/b/a Sumter East Health and Rehabilitation Center
and Paul Granger,

Defendants.

Of whom SSC Sumter East Operating Company, LLC
d/b/a Sumter East Health and Rehabilitation Center is

Appellant.

PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
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Attorneys for Appellant

I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Appellant, hereby certify that Appellant's **NOTICE OF APPEAL** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on August 13, 2020, properly posted for delivery to the following addressees:

D. Nathan Hughey, Esquire
A. Stuart Hudson, Esquire
Bradley H. Banyas, Esquire
Hughey Law Firm, LLC
P.O. Box 348
Mt. Pleasant, SC 29465

Attorneys for Respondents

I also certify that a copy of this **NOTICE OF APPEAL** is this day, August 13, 2020, being E-Filed with the lower court (which will also, i.e., in addition to service by mail, effect service of the notice electronically on all counsel of record).

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: 

Russell G. Hines (SC Bar No. 72100)

Attorneys for Appellant

Charleston, South Carolina

Dated: 8/13/20

Certificate of Counsel

The undersigned counsel for Appellant certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

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Feb 18 2021
SC Court of Appeals

Respectfully submitted,
CLEMENT RIVERS, LLP

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Attorneys for Appellant

Charleston, South Carolina

Dated: 2/17/21