THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2020-001107

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

v.

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

INITIAL BRIEF OF RESPONDENT

Gary W. Poliakoff
Raymond P. Mullman, Jr.
Poliakoff & Associates, PA
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

South Carolina

Court Rules

Secondary Sources

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether a nursing home resident or her estate are bound to an arbitration contract to which she did not assent and that is expressly independent of the contract required for her admission to the Facility.

2. Whether a nursing home resident can be equitably estopped from opposing an arbitration contract she did not sign, from which she derives no "direct benefit," and that does not form the basis of any of her legal claims.

3. Whether a nursing home can ask a court to authorize discovery the nursing home has the legal right to conduct without court permission or to preemptively rule that doing so will not waive the nursing home's perceived right to pursue arbitration later.

4. Whether a nursing home may immediately appeal an interlocutory discovery order regarding the confidentiality of documents that has not yet been implicated because the nursing home has not yet participated in discovery.

STATEMENT OF THE CASE

Mary Jane McCraw ("Daughter"), appointed as personal representative of the Estate of her mother Barbara Owens, initiated this action by filing a Notice of Intent to File Suit on March 1, 2018 and later filed a Summons and Complaint in the Spartanburg County Court of Common Pleas on October 14, 2018. (Compl. ¶ 1). The Complaint alleged wrongful death and survival claims against THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("the Facility") along with related entities the Complaint alleged to have operational or managerial control over the Facility. (Compl. ¶¶ 3-7). The Facility moved to compel arbitration and to stay court proceedings on November 12, 2018. (Facility Mot. to Dismiss, Compel Arb, and Stay). On the same day, motions to stay were filed by Defendants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC. On March 15, 2019, Respondent filed a motion for confidentiality and attached as an exhibit a proposed confidentiality order covering items Appellants may seek to protect from public disclosure. (Pla. Mot. for Confidentiality at 1-2 and Exh. A).

Following a hearing before the Honorable J. Mark Hayes, the circuit court entered an order denying the Facility's motion to compel arbitration. (Order, entered Oct. 25, 2019). Appellants filed a Rule 59(e), SCRCP motion on November 4, 2019. The circuit court held a hearing on this motion on January 6, 2020. During this hearing, the circuit court also heard arguments on Plaintiff's motion for confidentiality. While the parties agreed on the need for a confidentiality order, Appellants opposed some of the terms in Respondent's proposed order. (Hearing Tr. at 52). The circuit court instructed Appellants to submit their own proposal. (Hearing Tr. at 59, line 20 – 60, line 1). On June 25, 2020, the Court entered a Form 4 order authorizing slight alterations to

its original arbitration-related order[1] but reaffirming the substance of its earlier ruling. (Form 4 Order). Appellants filed a memorandum opposing Respondent's motion for confidentiality on July 8, 2020, attaching as an exhibit their proposed confidentiality order. (Defs.' Mem. in Opp., dated July 8, 2020 and Exhibit A). On July 13, 2020, the circuit court entered a formal order detailing its reasons for denying Appellants' motion to alter or amend judgment on arbitration. (Order, dated July 13, 2020). On that same date, the circuit court signed Respondent's proposed confidentiality order. (Confidentiality Order, entered July 13, 2020). Appellants served a notice of appeal on August 13, 2019.

STATEMENT OF THE FACTS

Ms. Owens was admitted to the Facility on July 23, 2015. (Compl. ¶ 45). While Ms. Owens was being settled into her room, Daughter was in a separate location at the Facility where she was presented with two adhesion contracts. The first was an "Admission Agreement" that governed the type of care Ms. Owens would receive at the Facility and Ms. Owens's financial obligation to pay for those services. (Admission Agreement). On the Admission Agreement's final page, labeled as "Page 12 of 12," there was an "Entire Agreement" provision indicating these 12 pages constituted "the entire agreement and understanding between the parties" concerning Ms. Owens's admission to the Facility. Daughter signed the Admission Agreement on the "Signature of Representative" line. The Facility did not ask Daughter for proof of authority to act on Ms. Owens's behalf, and Ms. Owens had not executed a power of attorney naming Daughter as her agent. (M. McCraw Aff. ¶ 3).

[1] The alterations included (1) removing references to an entity associated with Appellants who was not named as a defendant in Respondent's suit; and (2) making clear that the circuit court was denying as moot Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC's motions to stay. (Order, entered July 13, 2020, at 1).

On the same day, Ms. McCraw signed a contract called "Arbitration Agreement." This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate contract (labeled "Page 1 of 1") with its own signature blocks. (Arbitration Agreement). The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provided for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Owens's admission in the Facility. Id. Daughter signed the Arbitration Agreement on the line labeled "Resident/Representative Signature." Id. Magnolia Manor's counsel admitted to the circuit court Ms. McCraw agreeing to arbitrate was not a condition or prerequisite to his admission at the Facility.

When Ms. Owens was admitted to the Facility, Appellants undertook a duty to monitor the condition of her skin. (Compl. ¶ 50). However, for months, there is no evidence Appellants monitored Ms. Owens's skin as her care plan required. (Compl. ¶¶ 51-56). Due to Appellants' failures in these and many other areas[2], Ms. Owens suffered dehydration, malnutrition, a urinary tract infection with sepsis, and pressure injuries. (Compl. ¶ 49). Her condition continued to worsen leading to a hospitalization in November 2015 and Ms. Owens's wrongful death on December 7, 2015. (Compl. ¶¶ 60-67). At the time of her death, Ms. Owens suffered from a host of conditions including dehydration, malnutrition, a urinary tract infection, sepsis, and pneumonia. (Compl. ¶ 67).

Daughter initiated this action as the personal representative for Ms. Owens's estate. The Complaint alleges wrongful death and survival claims arising from Defendants' corporate negligence, professional malpractice, and custodial neglect including failure to adequately treat

[2] The Complaint further alleges Appellants improperly prescribed anti-anxiety medications, effectively using them on Ms. Owens as a chemical restraint. (Compl. ¶ 68)

Ms. Owens's skin condition causing his wrongful and premature death. The claims against Appellants Fundamental Administrative Services, LLC, Fundamental Clinical and Operational Services, LLC, and THI of South Carolina, LLC centered on activities related to their oversight of the Facility's operations. Respondent alleges these Appellants underfunded the Facility which negatively affected the Facility's staffing levels, the skilled nursing services the Facility offered, and resident outcomes.

On November 12, 2018, the Facility chose to forego discovery and filed a motion to compel arbitration and petition to stay state court proceedings. Relying on the Arbitration Agreement that Ms. Owens did not sign, the Facility argues Respondent must arbitrate rather than litigate her claims. The circuit court denied the motion. (Order, dated Oct. 25, 2019). In a motion to reconsider, the Facility asked the circuit court to sanction arbitration-related discovery. (Defs.' Mot. to Alter or Amend J. at 10-11). Appellants' counsel acknowledged he did not need the court's permission to send discovery requests but argued he worried that conducting discovery could expose the Facility to claims that it waived its purported right to arbitrate. (Hearing Tr. at 26, lines 1-2). The circuit court denied this motion as well. (Order, dated July 13, 2020, at 13-14); see also Hearing Tr. at 35, lines 19-20 (circuit court dismissing Appellants discovery request because it was "ask[ing] me to give you permission to go do something you already have the ability to do").

STANDARD OF REVIEW

Appellate courts apply a *de novo* review to a circuit court's finding on whether a nonsignatory is bound to an arbitration contract. Wilson v. Willis, 426 S.C. 326, 335, 827 S.E.2d 167, 172 (2019) (citing Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) and Pearson v. Hilton Head Hosp., 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012)). However, under a *de novo* review, the circuit court's factual findings will not be reversed

so long as "any evidence reasonably supports those findings." Wilson, 426 S.C. at 335, 827 S.E.2d at 172. While the Federal Arbitration Act ("FAA") imposes a presumption favoring arbitration, the presumption does not apply to the "identity of the parties who may be bound to such an agreement." Id. at 337-38, 827 S.E.2d at 173. In fact, there is a presumption against arbitration when enforcement is sought against a non-signatory. Id.

ARGUMENT

Ms. Owens did not agree to arbitrate her legal claims against the Facility. The Facility never even asked her to. As the circuit court found (and the Facility did not challenge on appeal)[3], Ms. Owens had the capacity to consider and decide whether to enter contracts on her own when she became the Facility's resident. (Order at 5). Yet, the Facility chose to present the Arbitration Agreement to Daughter, and she had no authority to act on Ms. Owens's behalf. The circuit court correctly concluded the Arbitration Agreement is invalid because it lacks the core requirement of mutual assent to form a binding agreement. (Order at 4-6). The Facility's insistence that Daughter's signature means Ms. Owens's claims must be arbitrated is a serious distortion of contract law.

To challenge the circuit court's finding of no valid contract, the Facility relies on a series of unsupported assertions: (1) Daughter had some form of unspecified authority to sign a separate Admission Agreement for Ms. Owens; (2) the Arbitration Agreement and Admission Agreement are really a single contract; and (3) Respondent are somehow estopped from opposing arbitration based on Daughter's unauthorized signature. The Facility's arguments would be flawed even if the issues were novel. But, South Carolina's appellate courts have been here before and three times

[3] Any ruling not specifically challenged on appeal is the law of the case and must be affirmed. League v. S.C. Dep't of Health & Envtl. Control, 363 S.C. 67, 76, 610 S.E.2d 482, 487 (2005).

rejected the merger and estoppel theories the Facility needs to prevail. Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 755 S.E.2d 450 (2014); Thompson v. Pruitt Corp., 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016); Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

Recently, this Court rejected the Facility's estoppel argument for a *fourth* time, reinforcing that a nursing home resident is not equitably barred from suing the home for negligent care based on a family member's signature on an admission contract. Weaver v. Brookdale Senior Living, Inc., 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020). For the reasons discussed below, the Court should reject the Facility's attempts to distinguish this growing body of precedent and the multiple instances where the Facility implicitly asks the Court to overrule these cases. In the end, the Facility's pursuit of arbitration should fail for the same reason as the nursing homes in Coleman, Thompson, Hodge, and Weaver: Neither Ms. Owens nor anyone with legal authority to act on her behalf agreed to arbitration, and Respondent has taken no action that would prevent her from insisting on a judicial forum for their claims.

1. The Independently-Invalid Arbitration Agreement does not Merge with the Admission Agreement.

The Facility argues Respondent must arbitrate Ms. Owens's claims against the Facility, but there is no valid contract requiring her to do so. Ms. Owens never signed or otherwise assented to the Arbitration Agreement on which the Facility relies to support its motion. Daughter's signature on the Arbitration Agreement is ineffective because she did not have authority to bind Ms. Owens to a dispute resolution contract. Moreover, as the circuit court concluded, the fact that Ms. Owens lived at the Facility as a resident does not estop her or Respondents from contesting arbitration under South Carolina or federal equitable estoppel principles. (Order at 9-12).

This appeal centers on core components of contract formation. Since the Facility points only to the Arbitration Agreement as a basis for dismissing Respondent's claims, it cannot prevail without first establishing the Arbitration Agreement is a properly formed, binding contract. However, while the Facility offered the Arbitration Agreement as an alternative means for settling disputes, neither Ms. Owens nor anyone with legal authority accepted that offer. Moreover, as established in South Carolina precedent, any statutory authority Daughter may have had to admit Ms. Owens to the Facility does not confer authority to enter the Arbitration Agreement, a document the Facility drafted as a separate and distinct contract offered for a completely different purpose.

a. The Facility Cannot Show the Core Requirements to Form a Contract.

A contract is formed only when one party makes an offer, the other manifests acceptance, and the contract's promises are supported by valuable consideration. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Acceptance requires an "objective manifestation of . . . assent at the time the contract was made." Laser Supply & Services, Inc. v. Orchard Park Assoc., 382 S.C. 326, 334, 676 S.E.2d 139, 143-44 (Ct. App. 2009). The Arbitration Agreement was not signed by Ms. Owens or offered to her even though she had contractual capacity at the time of her admission. (Order at 5). The Facility argues Daughter's signature assented on Ms. Owens's behalf, but the Facility presents nothing to show Daughter had authority to contract for Ms. Owens. Instead, the Facility now seems to argue Daughter had some unspecified authority to enter Ms. Owens to the Facility and that authority either carries over to the Arbitration Agreement or equitably estops Respondent from opposing arbitration. The circuit court correctly refused both of these arguments because they have been rejected by South Carolina appellate courts four times in less than seven years.

South Carolina's Adult Health Care Consent Act ("the Act") empowers designated family members of some vulnerable adults to sign a contract admitting the vulnerable adult to a skilled nursing facility and agreeing to pay the fees imposed by that facility for its services. S.C. Code Ann. § 44-66-60(A); Coleman, 407 S.C. at 352, 755 S.E.2d at 453. But, since the Act is limited to "health care" decisions, it provides no authority for separate contracts like the Arbitration Agreement. Id. at 354, 755 S.E.2d at 454; Thompson, 416 S.C. at 51, 784 S.E.2d at 684 (Ct. App. 2016) (citing Coleman and agreeing an "Arbitration Agreement does not deal with healthcare decisions"). Additionally, a family member signing a nursing home admission contract pursuant to authority derived from the Act does not estop a later argument that the same family member lacked authority to sign a separate arbitration contract. Coleman, 407 S.C. at 354-56, 755 S.E.2d at 455; Thompson, 416 S.C. at 60, 784 S.E.2d at 688. The Act was never meant to affect anything other than "health care" decisions, and the Arbitration Agreement was not a health care decision because Ms. Owens could get all the health care services covered in the Admission Agreement without agreeing to arbitrate. Appellants' Br. at 15-16 (admitting Arbitration Agreement was unnecessary to gain admission to the Facility).

Coleman did acknowledge the possibility equitable estoppel could be invoked if the disputed arbitration language was actually or effectively part of the same admission contract. 407 S.C. at 355, 755 S.E.2d at 455. This narrow path to a successful estoppel argument requires several steps. Preliminarily, the Facility must establish the Act empowered Daughter to enter the Admission Agreement on Ms. Owens's behalf. See Hodge, 422 S.C. at 574, 813 S.E.2d at 308 (finding that there can be no estoppel argument where signatory family member lacked authority under Act to enter admission contract). Then, the Facility must link the admission and arbitration contracts by meeting multiple requirements to apply a common-law contract law interpretation

principle by which courts interpret multiple writings as a single contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. This "merger" principle cannot apply unless the writings in question were executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction." Id. (quoting Klutts Resort Realty, Inc. v. Down'Round Dev. Corp., 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977)). Even then, merger does not apply if there is "*anything* indicating a contrary intention." Id. (emphasis added). Thus, simultaneously executed writings relating to the same general subject matter will not be viewed as a single or merged agreement if either their language or the circumstances even hint that the parties actually intended the writings to be distinct, separate contracts. Three nursing homes have previously attempted but failed to meet these requirements, and South Carolina's appellate courts have never applied merger to nursing home admission and arbitration contracts. See generally Coleman, Thompson, and Hodge.

b. The Facility Cannot Show Daughter Had Authority under the Adult Health Care Consent Act.

The Facility cannot meet any of the requirements to support its equitable estoppel argument. First, the Facility cannot show Daughter had authority to enter the Admission Agreement. As Coleman and Thompson demonstrate, the Facility's merger and estoppel arguments could only be relevant to this appeal if Daguther had authority under the Act. Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (noting estoppel argument "is premised on [nursing home's] contention that, under state law, the admissions agreements and the [arbitration contract] merge"); Thompson, 416 S.C. at 49-50, 784 S.E.2d at 683 (finding merger argument depended on notion that family member who signed contract "was authorized to execute [admission contract] under the Act"). The Facility cannot meet its burden to show Daughter had authority under the Act to enter the Admission Agreement.

The Act only applies to decisions made on behalf of a person "unable to consent." S.C. Code Ann. § 44-66-30(A). A person is "unable to consent" only if she is unable to (1) appreciate the nature of her condition; (2) make a reasoned decision about a proposed plan of care; or (3) communicate her desires in an unambiguous manner. S.C. Code Ann. § 44-66-20(8). Ms. Owens did not meet these requirements when she was admitted to the Facility. As the circuit court found, Ms. Owens's medical records suggest she was competent to sign contracts for herself. (Order at 5). The Facility did not challenge this suggestion. See e.g. Defs.' Mot. to Alter or Amend at 8 (acknowledging and not contesting assertion that Ms. Owens was competent and had contractual capacity). Since the circuit court indicated Ms. Owens was competent at the time of her admission to the Facility, Ms. Owens was not "unable to consent" as required by the Act, Daughter lacked statutory authority to sign the Admission Agreement on Ms. Owens's behalf, and the Facility's merger and estoppel arguments fail at their initial hurdle.[4]

c. The Admission Agreement and Arbitration Agreements Serve Different Purposes.

Second, the Facility cannot show the Admission Agreement and Arbitration Agreement were executed for the same purpose. The Admission Agreement was formed because its "parties wish to admit [Mr. Strong] to" the Facility. (Admission Agreement at 1). That purpose is borne out in the Admission Agreement's twelve pages. The Facility agreed to "[f]urnish room, routine

[4] Without the authority granted by the Act, the Facility's only remaining argument to support Daughter's alleged authority to execute the Admission Agreement is a double-layer estoppel argument. In short, the Facility claims (1) Ms. Owens is equitably estopped from denying the Admission Agreement because she was in fact admitted; (2) the Admission Agreement and Arbitration Agreement merged; and (3) Ms. Owens was then estopped from denying the Arbitration Agreement because it was part of the Admission Agreement. Appellant's Br. at 14 n. 12. Here again, however, the Facility's estoppel argument as to the Admission Agreement has been rejected by this Court. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding it difficult to conclude a nursing home resident "benefited" from a nursing home admission marked by negligent care that caused her death).

meals, nursing care, personal care, or custodial care" (Admission Agreement at 2, § (A)(3)) to Ms. Owens who, in turn, agreed to "[p]ay all fees and charges" for those skilled nursing services. Id. at 3, § (B)(4). The Admission Agreement's provisions referred to Medicaid eligibility, bed hold policies, late fees for unpaid service charges, etc. The Arbitration Agreement covers a completely different issue. It is solely devoted to directing an alternative dispute resolution method and purporting to eliminate its parties' right to seek relief through the courts. (Arbitration Agreement). These two contracts cannot have the same purpose because, as the Facility admits, the Arbitration Agreement was not a pre-condition for admission. Appellants' Br. at 15-16.

d. The Terms and Context Show the Parties Intended the Admission Agreement and Arbitration Agreement to be Separate Contracts.

Third, even if Daughter did have authority under the Act to sign the Admission Agreement and even if the prerequisites to merger were present, the Facility's argument fails because the language and circumstances of the Admission Agreement and Arbitration Agreement show the parties intended they be construed as separate contracts. Coleman, Thompson, and Hodge are the key precedent here because they illustrate the type of contract language or structure showing parties do not intend multiple agreements to be interpreted as one. For example, an arbitration contract does not merge with an admission contract in which a nursing home and its resident chose to insert an "entire agreement" or integration provision (aka "merger clause") limiting its parameters and excluding other writings. Coleman, 407 S.C. at 355, 755 S.E.2d at 455. Coleman held one such provision proved "on its face" that merger does not apply. Id. Also, admission and arbitration contracts cannot merge if they contain inconsistent terms, especially provisions related to how each contract may be terminated. Id.; Thompson, 416 S.C. at 53, 784 S.E.2d at 685. Moreover, courts look at the way the contracts are structured, finding it is unlikely parties intended two contracts to be treated as one if they chose separate titles, required separate signatures, and

numbered each contract's pages differently. Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Finally, Hodge held a nursing home cannot argue for merger when it chose to separate arbitration and admission into two agreements while taking the position that agreeing to the former was not required to obtain the benefits of the latter. 422 S.C. at 562-63, 813 S.E.2d at 302.

The Facility preemptively dismisses all of these factors, arguing none of them suggest the parties intended the Admission Agreement and Arbitration Agreement stand on their own. Appellant's Br. at 14-20. However, by rejecting or discounting these factors, the Facility is arguing against well-established, recent precedent (Coleman, Thompson, and Hodge) without offering the Court any reason why it should so dramatically and quickly reverse course. All four of these factors apply to the Admission Agreement and Arbitration Agreement and provide extensive evidence to support the circuit court's finding that the contracts do not merge.

i. The Admission Agreement's "Entire Agreement" Provision

The Admission Agreement concludes with an "Entire Agreement" provision identifying the contract's limited scope. (Admission Agreement at 12). Specifically, this provision states "this Agreement represents the entire agreement and understanding between the parties . . . ." "Agreement" is capitalized because it is a defined term, which the Admission Agreement's opening line limits to "This Admission Agreement." (Admission Agreement at 1). Thus, the Admission Agreement's "Entire Agreement" provision is similar to the admission contracts in Coleman, Thompson, and Hodge and is just as probative against merger as those in earlier cases. It specifically limits the contract's interpretation to the "Agreement" and then defines that term narrowly in a way that does not include the Arbitration Agreement or any other writing. Coleman,

407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685.[5] In this sense, the "Entire Agreement" provision is consistent with the fundamental purpose an integration provision serves in a contract. See Palmetto State Sav. Bank of S.C. v. Barr, 293 S.C. 252, 253-54, 359 S.E.2d 531, 532 (Ct. App. 1987) (finding purpose of integration provision is to create "implication the whole intentions of the parties has been expressed" in the writing containing the clause); Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (citing Armour Fertilizer Works v. Hyman, 120 S.C. 375, 113 S.E. 330 (1922) (the terms of a completely integrated contract "cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing")).

ii. Inconsistent Termination Provisions

Two contracts executed at the same time do not merge if they contain inconsistent terms. The parties likely did not intend for the two be read as one if they chose to, for example, apply different substantive law to the two agreements. Hodge, 422 S.C. at 562, 813 S.E.2d at 302. Coleman, Thompson, and Hodge made special note of inconsistent provisions in admission and arbitration contracts regarding when each contract may be cancelled at the resident's urging. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 551, 813 S.E.2d at 296. In each instance, the arbitration contract allowed the resident to disclaim or revoke its provisions within thirty days but the admission contract did not include a similar right. Id. Here, the Arbitration Agreement does not have a disclaimer provision, and the

[5] While the "Entire Agreement" provision does incorporate "Admissions materials," that term is left undefined and cannot reasonably be interpreted to include the separate Arbitration Agreement since, as the Facility acknowledges, a potential resident was not required to sign the Arbitration Agreement to obtain admission.

Facility positions this fact as its primary argument for distinguishing Coleman, Thompson, and Hodge. Appellants' Br. at 14-15.

However, the contracts' termination provisions are just as inconsistent here as in those cases. The Arbitration Agreement states that its effect on disputes between the parties would survive even if both the Admission Agreement and Arbitration Agreement are cancelled. (Arbitration Agreement). As structured by the Facility, there does not seem to be any means by which a resident could unilaterally cancel the Arbitration Agreement. The Admission Agreement is very different in that it allows a resident to unilaterally terminate that contract "at any time." (Admission Agreement at 6, § IV, ¶ 1). Thus, while the Facility is correct the Arbitration Agreement is technically different than Coleman and progeny because it lacks a disclaimer provision, that distinction makes no difference because the Arbitration Agreement and Admission Agreement still have inconsistent termination provisions that rebut any argument the parties intended these two separate contracts merge into one.

iii. Contract Formatting and Structure

Thompson and Hodge prove it is not just specific contract language that shows a nursing home and its resident did not intend for admission and arbitration contracts to merge. Intent can be derived from the way a contract is formatted or structured. Rather than adding an arbitration provision to the admission contract or attaching that language as an exhibit, the nursing home in Thompson chose to place it in an entirely separate document with its own, distinct "Arbitration Agreement" label. 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1. That choice was in itself further proof of "the parties' intent for [the arbitration contract] to stand by itself as an independent contract." Id. The Facility did the same here, and the Arbitration Agreement announces itself as a distinctive contract from its very title. Hodge also noted the importance of formatting choices a

nursing home makes when constructing its admission and arbitration contracts. 422 S.C. at 562, 813 S.E.2d at 302. An arbitration contract looks more and more like its own independent document if entering it requires a separate signature than the admission contract and the documents have separate pagination. Id. Here, the Arbitration Agreement required separate signatures. Plus, the Admission Agreement ran from page 1 to 12 while the Arbitration Agreement was on its own separate single page.

iv. Admission is not Dependent on Arbitration Agreement

The Facility's merger argument is also rebutted by its admissions. The purported interaction between two separate contracts can be judged not only by their language but also by how their parties treat each contract. An arbitration contract is far less likely to merge with an admission contract if the nursing home admits arbitration is not required for admission. The Facility argues the fact that admission does not depend on consent to arbitrate somehow supports merger. Appellants' Br. at 15-16. But, in Hodge, this Court cited as further evidence against merger an arbitration contract provision stating that arbitration was not a precondition to a resident's acceptance into the nursing home. 422 S.C. at 562-63, 813 S.E.2d at 302; see also Arredondo v. SNH SE Ashley River Tenant, LLC, Op. No. 28011 (S.C. Sup. Ct. filed March 10, 2021) (Shearouse Adv. Sh. No. 8 at 40, 49-50) (finding that, since arbitration was optional, it was not a health care decision or "necessary" to such decisions and the son's power-of-attorney-based authority did not extend to arbitration matters). Similarly, the Facility does not treat the Admission Agreement and Arbitration Agreement as if they are interdependent or even as related to the same purpose. Appellants admit in their brief that executing the Arbitration Agreement was not mandatory and not a precondition to admission. Appellants' Br. at 15.

In sum, the Arbitration Agreement and Admission Agreement have the same four indicators South Carolina courts have cited in the past to find simultaneously-executed contracts were not intended to merge into one. Moreover, contrary to the Facility's arguments, any uncertainty about these four indicators must be resolved in Respondent's favor, not to her detriment. The Facility argues merger is the default position and must be applied absent an affirmative showing of contrary intent. Appellants' Br. at 19. But, that argument overlooks two key holdings from Coleman. First, to the extent merger is a presumption, it is an easily rebuttable one because "***anything*** indicating a contrary intention" means a court will not apply merger. 407 S.C. at 355, 755 S.E.2d at 455 (quoting Klutts, 268 S.C. at 88, 232 S.E.2d at 24) (emphasis added). Thus, the Facility's task on appeal is not to successfully oppose one of the four indicators discussed above but to prove all four are absent here. Second, since the Facility drafted these form contracts of adhesion, any ambiguities must be construed against it. The Facility argues that applying the ambiguity rule here "makes no sense" (Appellants' Br. at 19), but does not acknowledge the Facility's argument effectively asks the Court to reverse its own ruling on the issue and to overrule Supreme Court precedent. Coleman applied the "presumption against drafter" rule to a nursing home's quibbles over the effect of an "entire agreement" clause, and Thompson used it to reject a nursing home's argument that an arbitration contract was incorporated into an admission contract. Coleman, 407 S.C. at 355, 755 S.E.2d at 455; Thompson, 416 S.C. at 53-54; 784 S.E.2d at 685.

Accordingly, the Facility's merger argument is flawed not only in the specific ways described above but also in its very conception of when and how the merger doctrine operates. The circuit court properly applied extensive South Carolina law in this field and rejected the Facility's contention that the Arbitration Agreement and Admission Agreement merged.

2. Respondents are not Equitably Estopped from Opposing Arbitration.

Ms. Owens did not sign the Arbitration Agreement or authorize anyone to sign for her. Yet, the Facility argues South Carolina Supreme Court precedent suggests Respondent is equitably estopped from opposing arbitration. Appellants' Br. at 21 (citing Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)). However, the Facility does not cite or attempt to apply the elements of equitable estoppel imposed by South Carolina law.[6] Plus, Wilson actually refused to compel arbitration against a non-signatory, holding there is a presumption *against* forcing someone to arbitrate based on a contract she did not sign. 426 S.C. at 338, 827 S.E.2d at 173. Wilson even went on record to say equitable estoppel is rarely appropriate to force arbitration. Id. at 345, 827 S.E.2d at 177 (finding equitable estoppel "should be used sparingly"). Finally, as this Court recently reaffirmed in Weaver, the Facility cannot meet the "direct benefits" test considered in Wilson because Ms. Owens's claims in no sense rely on the Arbitration Agreement's terms, and the Facility's argument to the contrary expressly links its estoppel claim to its fatally flawed merger argument.

[6] As Wilson recognized, whether a non-signatory may be bound to an arbitration contract is a state law issue. 426 S.C. at 348, 827 S.E.2d at 174 (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 n. 5 (2009)). Under South Carolina law, equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Wilson did not dismiss or eliminate this test for equitable estoppel but only found its application was an issue that had not been preserved for appellate review. 426 S.C. at 341 n. 9, 827 S.E.2d at 175 n. 9. The Facility argues Wilson concluded this test only applies to "non-arbitration cases." Appellant's Br. at 12 (citing Wilson, 426 S.C. at 340 n. 9, 827 S.E.2d at 175 n. 9). However, that could not have been Wilson's meaning because applying different rules to arbitration and non-arbitration contracts would violate the U.S. Supreme Court's equal-treatment principle. See Prima Paint Corp. v. Flood Conklin Mfg. Co., 388 U.S. 395, 404 n. 12 (1967) (finding intent of FAA was "to make arbitration agreements as enforceable as other contracts, but not more so").

The Facility wholly omits the fact that the "direct benefits estoppel" discussed in Wilson could only apply if Respondent has "consistently maintained that other provisions of the same contract should be enforced to benefit" her. 426 S.C. at 340, 827 S.E.2d at 175 (quoting Pearson, 400 S.C. at 290, 733 S.E.2d at 601). In other words, the Facility's burden is to show (1) Ms. Owens's claims arise from the purportedly merged Admission Agreement-Arbitration Agreement; (2) Ms. Owens/Respondent have "exploited" other parts of the contract by reaping its benefits; and (3) Ms. Owens's claims rely solely on the contract terms to impose liability. Weaver, 431 S.C. at 230, 847 S.E.2d at 272 (citing Wilson, 426 S.C. at 340-44, 827 S.E.2d at 175-77). The Facility makes no attempt to meet this burden and cannot do so. Ms. Owens's claims do not cite or rely on the Arbitration Agreement. Instead, the Facility argues Ms. Owens's alleged direct benefit was admission itself and the nursing home services she received while a Facility resident. Appellants' Br. at 13-14.

But, this argument has two key flaws. First, the Facility expressly links its estoppel claim to a merger argument it cannot prove. Hearing Tr. at 10, lines 12-21 (Appellants' counsel arguing that "If you merge the admission agreement with the arbitration agreement," then court should "find[] equitable estoppel" applies). As discussed in Argument 1 above, there is no merger here because (1) the Facility cannot show Daughter had statutory authority to enter the Admission Agreement; (2) the contracts were created for different purposes; and (3) there are many indications from the contracts' language they were not intended to be construed as one. Second, Ms. Owens has not obtained a "direct benefit" from the Admission Agreement as that term is used for estoppel purposes. The complaint does not allege a breach of contract claim based on the Admission Agreement or otherwise rely on that contract to assert liability against the Facility. The mere fact that Ms. Owens's relationship with the Facility underlying the claims was memorialized

in the Admission Agreement is not sufficient for the Facility to invoke estoppel. Wilson, 426 S.C. at 343, 827 S.E.2d at 176 ("direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen 'but for' a contract's existence").

Weaver applied this principle to reject the argument that a nursing home resident receives the required "direct benefit" through her admission or "exploits" either the admission or arbitration contracts by suing for poor nursing home care. 431 S.C. at 232-33, 847 S.E.2d at 273-74. In Weaver, a granddaughter brought wrongful death and survival claims based on a nursing home's failure to supervise a resident who wandered away from the home and was killed by a wild animal. Id. at 271. Equitable estoppel did not apply because the granddaughter's claims "rely on general tort duties . . . not any provision of the residency agreement." Id. at 232, 847 S.E.2d at 273. Weaver did not create new law; it followed Hodge's lead in holding that a nursing home resident or her family members do not "exploit" an admission contract by alleging common law negligence claims. Id. (citing Hodge, 422 S.C. at 563, 813 S.E.2d at 302).

Thompson also rejected a nursing home's attempt to use direct benefits estoppel to compel a non-signatory nursing home resident to arbitrate. Thompson, 416 S.C. at 58-59, 784 S.E.2d at 687-88; After surveying state and Fourth Circuit precedent, Thompson rejected this form of estoppel because it generally requires proof of some benefit to the party opposing estoppel in "*the contract that includes the arbitration provision*." 416 S.C. at 59, 784 S.E.2d at 688 (emphasis added). The Facility, therefore, cannot build an estoppel argument by citing benefits Ms. Owens supposedly gained in the Admission Agreement. Thompson also rejected any effort to argue Ms. Owens gained a "direct benefit" from the Arbitration Agreement. Id. at 60, 784 S.E.2d at 688 ("any possible benefit emanating from the [Arbitration Agreement alone is offset by the [Arbitration Agreement's] requirement that Ms. Owens waive her right of access to the courts . . .").

In sum, the circuit court correctly rejected the Facility's equitable estoppel argument because the Facility has not cited or applied the proper elements, cannot show Ms. Owens obtained any "direct benefit," and bases its estoppel claim on a flawed merger argument. As it did in Thompson, Hodge, and Weaver, this Court should reject this equitable estoppel argument.

3. The Facility was not Denied the Opportunity to Conduct Discovery and May Not ask the Courts to Preemptively Rule on Waiver.

Appellants' brief suggests the circuit court unreasonably tied the Facility's hands in discovery and prevented it from accessing essential information to support arbitration. (Appellants' Br. at 24-27).[7] That argument could wield a measure of intuitive heft except that the Facility's right to conduct discovery was never threatened and is not really what it seeks here. Instead, what the Facility's counsel asked of the circuit court was a prophylactic assurance that choosing to engage in discovery would not lead Respondent to argue, or the circuit court to find, the Facility waived its right to pursue arbitration. That request was both unreasonable and unconstitutional.

As the circuit court noted, neither the procedural rules nor its opponent's conduct prevented the Facility from serving discovery requests. (Hearing Tr. at 25). In fact, Magnolia Manor had the right to serve written discovery requests and to notice depositions from the moment Respondent filed her Complaint with the Spartanburg County Clerk of Court. Rule 30(a)(1), SCRCP (permitting depositions "[a]fter commencement of an action"); Rule 33(a), SCRCP (same for serving interrogatories); Rule 34(b), SCRCP (same for serving requests for production); see also

[7] Regardless of the justiciability issues and substantive flaws discussed below, the Court should dismiss Issue No. 2 for lack of appellate jurisdiction. Discovery orders are interlocutory and not otherwise immediately appealable because they do not involve the merits of an action or affect a substantive right. Grosshuesch v. Cramer, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008); Rule 201(a), SCACR (limiting appeals to a final judgments and appealable orders).

Rule 3(a), SCRCP (stating that a civil action is "commenced" when the complaint is filed if later served within the statute of limitations). The rules specifically provide that a party need not seek a court's permission before serving discovery requests. Rule 33(a), SCRCP; Rule 34(b), SCRCP. Plus, it is not as if the Facility tried and failed or was somehow thwarted in seeking information from Respondent. The record contains no discovery requests Respondent ignored and no subpoenas to which she objected. The Facility lacks the information it claims now to need only because the Facility never asked for it.

With limited exceptions, the Facility does not contest that it was fully within its power to obtain information from the Facility or others before moving to compel arbitration. (Hearing Tr. at 26, lines 1-4). Instead, the Facility's concern relates to the possible consequences of pursuing discovery. South Carolina law holds that a party may waive any right it may have to pursue arbitration if it first chooses to litigate in a way that would render a shift to arbitration prejudicial to its opponent. Johnson v. Heritage Healthcare of Estill, LLC, 416 S.C. 508, 513, 788 S.E.2d 216, 218 (2016); Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 388, 759 S.E.2d 727, 736 (2014). The point at which a party delves too deeply into litigation to assert a right to arbitrate varies because the analysis is heavily fact driven. Johnson, 416 S.C. at 513, 788 S.E.2d at 219 (citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999)). In any given case, a party seeking arbitration faces uncertainty in knowing when it is vulnerable to a waiver argument, and the opposing party is uncertain when it may become necessary to assert one.

What the Facility now calls its request for discovery was actually its improper effort to eliminate its uncertainty at Respondent's expense. The Facility explicitly sought assurances from the circuit court that choosing to conduct discovery would not expose it to a waiver argument.

Hearing Tr. at 29, lines 1-9 (noting the Facility's "fear of a waiver" and "asking the Court to help with that"). The Facility's request of the circuit court presented a fundamental problem because what it called a request for discovery did not present an issue any court could resolve in its favor. No South Carolina court can address the merits of a party's argument unless it presents a justiciable claim. Lennon v. S.C. Coastal Council, 330 S.C. 414, 417-18, 498 S.E.2d 906, 908 (Ct. App. 1998). South Carolina courts cite the "case or controversy" requirement in the U.S. Constitution's Article III and apply federal standards for identifying a justiciable controversy under South Carolina law. Id.; Waters v. S.C. Land Resources Conservation Comm'n, 321 S.C. 219, 227-28, 467 S.E.2d 913, 917-18 (1996). A claim is justiciable only if it presents a "real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute." Sloan v. Greenville Cnty., 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (quoting Pee Dee Elec. Coop., Inc. v. Carolina Power Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)). Justiciability specifically considers a party's standing as well as the suitability of the dispute for judicial resolution. Courts may not address claims that are unripe, moot, or seek only an advisory opinion. Jowers v. S.C. Dep't of Health & Envtl. Control, 423 S.C. 343, 815 S.E.2d 446 (2018).

Here, the Facility lacked standing to assert a discovery argument that was both unripe and sought an advisory opinion. The Facility argues it was denied its "request for limited discovery." Appellants' Br. at 24. The Facility lacks standing to assert this claim. Under South Carolina law, standing may be acquired by statute, using the "public importance" exception, or by satisfying the requirements of "constitutional standing" derived from federal constitutional principles. ATC South, Inc. v. Charleston Cnty., 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Only constitutional standing could apply here, and the Facility cannot meet those requirements for its discovery-based

argument. Constitutional standing demands a concrete and particularized "injury-in-fact," a causal connection between the injury and the conduct complained of, and a finding that the injury will likely be redressed by a ruling in the injured party's favor. Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The Facility has not suffered any concrete and particularized injury. As discussed above, the South Carolina Rules of Civil Procedure authorized the precise action—serving discovery requests—the Facility claims it was denied. Rules 30(a)(1), 33(a), and 34(b), SCRCP. The Facility cannot claim to be injured by its own decision to forego a right the law unconditionally provided.

The Facility also cannot meet the remaining constitutional standing requirements. There is no causal connection between the Facility's proposed injury (i.e. a lack of discovery) and either Respondent's conduct or the circuit court's order. Neither denied the Facility the right to conduct discovery before filing its motion to compel arbitration. Nor can the Facility meet constitutional standing's redressability requirement. Given the procedural rules' repeated statements that discovery requests may be made "without leave of court,"[8] it is not at all clear it would ever be appropriate for a party in the Facility's position to ask a circuit court to grant a "request" to conduct discovery.

When the true nature of the Facility's request is revealed, other justiciability issues arise. In one telling exchange with the circuit court, the Facility's counsel admitted it was his fear of the potential consequences, not any conduct by Respondent or any ruling by the circuit court, that kept the Facility from exercising its discovery rights. Hearing Tr. at 29, lines 1-9. Nothing in the Facility's request was about getting discovery it was allegedly denied; it was all about making the Facility more comfortable in opposing any argument of waiver. Thus, it appears the Facility was

[8] Rule 33(a), SCRCP; Rule 34(b), SCRCP.

asking the circuit court to find any discovery it chose to perform would, as a matter of law, not subject it to waiver argument.

This was a proposed ruling the circuit court could not issue. While waiver could become an issue later in this litigation, it was not ripe for adjudication before the Facility sent its first discovery request. A claim is not ripe if it is "contingent, hypothetical, or abstract." Jowers, 423 S.C. at 353-54, 815 S.E.2d at 451 (quoting Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty., 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006)). Before a potential waiver dispute could ripen, the Facility would have to conduct whatever discovery it planned, file a later motion to compel arbitration, and then Respondent could raise a waiver argument citing prejudice the Facility's discovery course caused her. Without those progressions in the litigation, the circuit court could have no basis to rule on the future viability of Respondent's potential waiver argument. Alternatively, the Facility's discovery argument may have been an attempt to get some guidance from the circuit court on just how far it could go in discovery before seriously risking waiver. That is also a non-justiciable issue. A party seeking an advisory opinion asks a court to go beyond its jurisdiction. Booth v. Grissom, 265 S.C. 190, 217 S.E.2d 223 (1975); see also Sangamo v. Weston, Inc. v. Nat'l Surety Corp., 307 S.C. 143, 414 S.E.2d 127, 130 (1992) ("This court will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract"); Dodge v. Dodge, 332 S.C. 401, 420, 505 S.E.2d 344, 354 (Ct. App. 1998) ("State appellate courts will not issue advisory opinions on questions for which no meaningful relief can be granted"). In other words, the waiver issue was not only unripe, the Facility erred in asking the circuit court to rule on it because parties may not "fish in judicial ponds for legal advice." City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957).

Beyond the justiciability flaws, the Facility's discovery argument is incorrect on the merits. Part of the discovery the Facility seeks is Daughter's deposition. However, that deposition could not support any argument that Daughter acted as Ms. Owens's apparent agent argument because that legal doctrine focuses on Ms. Owens's representations. Frasier, 323 S.C. at 245, 473 S.E.2d at 868. Hodge addressed a similar argument, affirming a circuit court's refusal to compel a deposition that would add nothing probative to the agency analysis. 422 S.C. at 578, 813 S.E.2d at 310.[9] Moreover, Magnolia Manor must show a clear abuse of discretion to reverse the circuit court's discovery ruling. Id. at 576, 813 S.E.2d at 309 (quoting Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 536 787 S.E.2d 485, 495 (2016)). As the circuit court found, the Facility had the opportunity and incentive to determine who had authority to sign key documents before accepting Ms. Owens for admission. Hearing Tr. at 29, lines 13-23. Moreover, the circuit court recognized, as discussed above, the Facility was simply "ask[ing] [the circuit court] to give you permission to go do something you already have the ability to do." Hearing Tr. at 25, lines 19-22. The circuit court's findings were all supported by the facts and the law, the circuit court acted within its discretion in denying the Facility's request.

4. Appellants' Challenge to the Confidentiality Order is Not Properly Before the Court, and the Circuit Court Properly Exercised its Discretion in Limiting the Scope of Information Appellants May Unilateral Designate as Confidential.

The confidentiality order entered by the circuit court is a discovery matter that may not be challenged on appeal prior to a final judgment. "When directed solely at discovery materials, protective orders are not subject to the high level of scrutiny required by the Constitution to justify

[9] Moreover, Appellants' counsel acknowledged there was no support for the recognized theories for binding Ms. Owens to a contract Daughter signed. Hearing Tr. at 15, lines 4-6 ("we don't have . . . actual true agency. We don't have actual or apparent authority. We don't have a power of attorney").

prior restraints; rather, courts have broad discretion at the discovery stage to decide when a protective order is appropriate and what degree of protection is required." Manual for Complex Litigation, at 11.432, p. 66 (4th ed. 2004) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36-37 (1984)). The issue is not ripe for adjudication. No Confidential document was designated or produced by Defendants.

Even if the Court reaches the merits, Appellants' challenge to the order's scope should be rejected because the circuit court was reasonably concerned about Appellants over-designating items as "confidential." Finally, Appellants' concerns about the order's "sharing provision" should not be addressed because the parties have agreed that confidential materials will not be disseminated beyond Respondents' counsel.

a. The Confidentiality Order is a Discovery Matter that is Not Immediately Appealable.

As Appellants acknowledge in their brief, the Confidentiality Order is a discovery order. Appellants Br. at 7. Discovery rulings are interlocutory orders not subject to immediate appeal. Grosshuesch, 377 S.C. at 30, 659 S.E.2d at 122. Moreover, since Appellants have not yet responded to any of Respondent's discovery requests, any dispute over the Confidentiality Order's scope and operation in this case is not yet ripe and should be addressed by the circuit court in the first instance. See e.g. MDK, Inc. v. Mike's Train House, Inc., 27 F.3d 116, 122 n. 4 (4th Cir. 1994) ("A merits review of this discovery issue, when it is uncertain what documents will be turned over and what protection those documents will be afforded under the confidentiality order, would also go against the long-settled practice that courts of appeal will not pass upon 'hypothetical' cases").

b. The Confidentiality Order's Scope Properly Balances the Parties' Concerns Over How Many Materials may be Protected.

Should the Court reach the merits of Appellants' arguments, the circuit court should be affirmed because it acted within its discretion in entering the Confidentiality Order. Appellants' first two objections to the order challenge the scope of materials that may be designated as confidential. Appellants Br. at 29-31. During the hearing, the parties disputed the proper scope with Appellants expressing a need to protect broad swaths of Appellants' corporate data and Respondent's counsel expressing his concerns that the "confidential" designation would be applied too broadly. Courts routinely face this sort of scope dispute when crafting a confidentiality order. The key to resolving the dispute is to properly balance the parties' and the public interests. Because while corporate litigants have an interest in protecting trade secrets and some other internal documents, there is also a "robust presumption that any documents utilized in judicial proceedings are subject to publication." Minter v. Wells Fargo Bank, NA, Civil Action No. WMN-07-3442, 2010 WL 5418910, at * 2 (D. Md. Dec. 23, 2010); see also Glenmede Trust Co. v. Thompson, 56 F.3d 476, 485 (3d Cir. 1995) ("Federal courts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information"). Instead of an order that creates a document-by-document review process for determining confidentiality, the circuit court opted for an order that empowered Appellants in the first instance to unilaterally designate items for protection. This form of confidentiality order—known as a "blanket" order—is common but courts wil grant them "less deference" than narrowly tailored orders when scope disputes arise. Schaefer v. Family Med. Ctrs. of S.C., LLC, Civil Action No. 3:18-cv-02775-MBS, 2019 WL 2135675, at * 13 (D.S.C. May 16, 2019) (citing SmithKline Beecham Corp. v. Synthon Pharms., Ltd., 210 F.R.D. 163, 167 (M.D.N.C. 2002)). Scope limitations are especially important in "blanket" confidentiality orders because the privilege to self-designate confidential materials

can easily be misconstrued as granting unfettered authority. Minter, 2010 WL 5418910, at * 2 (finding that not even the broadest confidentiality order "give[s] the parties carte blanche to freely stamp documents as 'confidential' . . .").

For example, according to the Third Circuit, "[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head." Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 166 (3d Cir. 1993). The definition of "confidential" materials stated in the Confidentiality Order properly addresses these concerns. For similar reasons, the Court should reject Appellants' objection to the Confidentiality Order's demand that Appellants make a showing of "economic harm" before self-designating materials as confidential. Courts consistently hold that a confidentiality order must require a party to offer good cause before labeling materials as confidential. Closed Joint Stock Co. v. Actava TV, Inc., No. 15-CV-8681, 2016 WL 1364942, at * 3 (S.D.N.Y. Mar. 28, 2016). "Good cause" for designating any item as confidential generally means that the designating party "would be harmed by its disclosure." Id. (citing 8A Charles Allan Wright, Arthur Miller, and Richard L. Marcus, *Federal Practice and Procedure*, § 2043 (3d ed. 2010)). The potential harm must be real, clearly defined, specific, and serious. Closed Joint Stock Co., 2016 WL 1364942 at * 3 (citing John Wiley & Sons, Inc. v. Book Dog Books, LLC, 298 F.R.D. 184, 186-87 (S.D.N.Y. 2014)). The circuit court expressed concerns on this issue during the hearing. (Hearing Tr. at 59, lines 1-5). The "economic harm" requirement addresses these concerns and is well supported by other courts considering other scope disputes. See also Ouellette v. Gaudette, Civil Action No. 2:16-CV-53-DBH, 2016 WL 7263044, at * 2 (D. Me. Dec. 14, 2016) (quoting 8A Charles Allan Wright and Arthur Miller, *Federal Practice and Procedure*, § 2043 (3d ed. 2004) ("The showing of good cause for the

confidentiality designation 'should be made with appropriate specifics'"). Accordingly, the circuit court's ruling was proper and well within the scope of its discretion in administering discovery.

c. Respondent has Acknowledged the Confidentiality Agreement's "Sharing Provision" is Limited to Respondent's Counsel.

Finally, Appellants argue the Court should reverse the circuit court's Confidentiality Order because it authorizes more third-party disclosures than Appellants would like. While there are substantial flaws in Appellants arguments on sharing provisions, this case is not an appropriate vehicle for the Court to address the broader issue. During the circuit court hearing, Respondent agreed she not seeking to share materials governed by the Confidentiality Order with anyone other than co-counsel:

THE COURT:	I mean, you don't have any – as you stated, you have other cases involving these types of facilities, so you don't have any objections to what generally [Appellants] asked for confidentiality on, from not sharing it with third parties.
RESPONDENT'S COUNSEL:	Yeah, no problem with that. I mean, I think they overly designate things, but we don't really mind, as long as I can share it with myself and my co-counsel.

(Hearing Tr. 46, lines 17-25). As Respondent's counsel explained, sharing the designated materials among all of Respondent's attorneys is essential to their collaborative efforts to represent their client effectively. (Hearing Tr. 46, line 25 – 47, line 5). In light of Respondent's acknowledgement during the hearing, Appellants' concerns over third-party disclosures of materials designated as confidential is not implicated here. While there are genuine reasons why a "sharing provision" may be appropriate in many cases, this is not the case to address the issue.

In sum, the Confidentiality Order selected by the circuit court is a discovery ruling that is not immediately appealable. Moreover, since Appellants have yet to participate in discovery, there

is no active dispute over the Confidentiality Order's scope or other provisions for the Court to address. Accordingly, this portion of the appeal should be dismissed. Alternatively, Appellants' err in challenging the Confidentiality Order's scope since the circuit court properly exercised its discretion by adopting a definition of "confidential" designed to prevent unilateral, over-designation of confidential materials.

CONCLUSION

Based on the arguments stated above, Respondents respectfully request the Court affirm the circuit court's order denying the Facility's motion to compel arbitration. Ms. Owens never agreed to the Arbitration Agreement, and Daughter lacked legal authority to bind her to arbitration. Additionally, the Facility's equitable estoppel argument fails under South Carolina and federal law since Ms. Owens did not exploit or otherwise derive any "direct benefit" from the Arbitration Agreement.

Respectfully submitted,

/s/ Jordan C. Calloway
Gary W. Poliakoff
Raymond P. Mullman, Jr.
Poliakoff & Associates, PA
215 Magnolia Street
Spartanburg, SC 29306
(864) 582-5472

Jordan C. Calloway
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
(803) 327-7800
jcalloway@mcgowanhood.com

Attorneys for Respondents

Rock Hill, SC
March 29, 2020