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

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SC Court of Appeals

Appeal from Spartanburg County
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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

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.

# RECORD ON APPEAL

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP4203447

Barbara Owens et al
PLAINTIFF(S)

Fundamental Clinical And Operational Services, 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

This matter came before the Court on the defendants' motion to compel arbitration. After considering the arguments and reviewing the information on file, the Court asks plaintiff's counsel to prepare a formal order denying the motion finding no valid arbitration agreement to enforce, as the Admission Agreement is separate from the Arbitration Agreement. Additionally the documents were not signed by Ms. Owens and there has been no showing that Ms. McCraw had authority to bind Ms. Owens to the agreements. With no evidence present to suggest Ms. McCraw had authority, this Court declines to order discovery on this issue. The formal order, once signed and filed, will be the final order of this court.

**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 08/23/2019 .

Mary Jane Mccraw Personal Representative
Barbara Owens Estate

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**



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## 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.**

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Spartanburg Common Pleas

**Case Caption:** Barbara Owens , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc , defendant, et al

**Case Number:** 2018CP4203447

**Type:** Order/Electronic Form 4

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br>Plaintiff,<br><br>v.<br><br>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,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-03447<br><br>**ORDER DENYING DEFENDANT THI OF SOUTH CAROLINA AT SPARTANBURG, LLC D/B/A MAGNOLIA MANOR SPARTANBURG'S MOTION TO DISMISS, COMPEL ARBITRATION AND STAY COURT PROCEEDINGS** |

This matter came before the Court on Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor—Spartanburg's ("the Facility") Motion to Dismiss and Compel Arbitration. After reviewing the parties' submissions and arguments, the Court finds no valid arbitration contract between Ms. Owens and the Facility because: (1) the Admission Agreement and Arbitration Agreement are separate documents; (2) Ms. Owens did not sign the Arbitration Agreement and Mary Jane McCraw ("Daughter") lacked authority to act on Ms. Owens' behalf. Moreover, since there is no evidence to show Ms. Owens' daughter had authority, the Court declines to order discovery on the matter. Accordingly, the Facility's motion is **DENIED**.

## FACTUAL BACKGROUND

Daughter brought this civil action asserting survival and wrongful death claims and alleging corporate negligence and nursing home neglect resulting in Barbara Owens' ("Decedent") death. Plaintiff's Complaint names as defendants the Facility as well as Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the Facility),

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and Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the Facility), these latter entities being hereinafter referred to as the "Corporate Defendants." Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over the Facility directly affected the quality of care Ms. Owens received.

Daughter brings this action as the personal representative of Ms. Owens' estate. Ms. Owens was admitted to the Facility on July 23, 2015 under the terms of the Admission Agreement governing the care Ms. Owens would receive at the Facility as well as Ms. Owens' financial obligation to pay for those services. The admission contract contains a section titled "Entire Agreement"[1] provision indicating this contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility.

Daughter signed a contract entitled "Arbitration Agreement" on July 23, 2015 after Mrs. Owens was already admitted to the facility. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provides for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Owens care at the Facility. The Facility admits that agreeing to the Arbitration Agreement was not a prerequisite or condition to admission at the Facility.

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

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On March 1, 2018, Daughter initiated this lawsuit alleging Defendants failed to monitor and supervise Ms. Owens' safety and well-being while at the Facility. On November 12, 2018, the Facility filed a Motion to Dismiss, Compel Arbitration and Stay State Court Proceedings.

## LEGAL STANDARD

In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. 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). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., the Supreme Court stated:

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

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 ("The court shall make an order directing the parties to proceed to arbitration" but only "upon

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being satisfied that the making of the agreement...is not in issue").[2] The FAA looks to state law to decide the threshold questions of contract formation.[3] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[4] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[5]

## LEGAL ANALYSIS

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

### A. Daughter Had No Legal Authority.

The Facility concedes Ms. Owens did not sign the Arbitration Agreement but argues

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

[3] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

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

[5] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

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Daughter's signature as Ms. Owens' "representative" was sufficient to bind Ms. Owens and her estate to the Arbitration Agreement's terms. However, the Court finds Daughter lacked authority to enter an arbitration contract on Ms. Owens' behalf.

Defendant argues Daughter acted as Ms. Owens' agent when signing the Arbitration Agreement. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Moreover, the Facility has failed to provide any evidence beyond Daughter's signature to suggest she was Ms. Owens' agent. The fact that Daughter signed documents enabling Ms. Owens' admission to the Facility receipt of medical care in no way indicates Ms. Owens conferred authority on Daughter for purposes of a dispute resolution contract. The Court finds Ms. Owens never manifested any form of assent establishing Daughter as her agent.

For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, the Facility must show all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

Daughter was not Ms. Owens' power of attorney and the medical records suggest Ms. Owens was competent to sign contracts on her own behalf when she was admitted to the Facility. Additionally, the typical case where admission and arbitration contracts are presented simultaneously, Daughter signed the arbitration agreement *after* Ms. Owens was already admitted to the facility. Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

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

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

Coleman is directly on point here. In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed arbitration and admission contracts lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act (S.C. Code Ann. § 44-66-10 to -80) gave the sister authority to make 'healthcare decisions' on behalf of the resident, consent for medical treatment is not the same as binding an incompetent person to a contract concerning arbitration. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Coleman compels this Court to find Daughter had no legal authority to sign the Arbitration Agreement.

**B. Equitable estoppel does not apply.**

Defendants also argue Daughter is estopped from denying authority to bind Ms. Owens to arbitration because Daughter does not deny authority to admit Ms. Owens to the Facility. Similarly, the Facility argues Ms. Owens created an agency relationship to support arbitration because she "accepted" admission. Both arguments assume the admission contract and Arbitration Agreement should be interpreted as a single agreement. However, Coleman and its progeny rejected similar

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merger arguments. Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. The Court of Appeals has since applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 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) (refusing to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 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.

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

Like in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration

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Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title. The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger.

The Facility then argues Daughter should be estopped from denying the validity of the Arbitration Agreement because Ms. Owens accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the Arbitration Agreement. However, this argument also depends on Defendant's faulty merger argument. Since the admission contract and Arbitration Agreement identify themselves as distinct contracts, they do not merge. By their own terms, the Admission Agreement indicated an intent that the common law doctrine of merger not apply. The Admission Agreement's "Entire Agreement"[6] provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibited merging the two distinct agreements. Even if the "Entire Agreement" clause creates an ambiguity as to merger, any ambiguity must be construed against the Facility as the contracts' drafter. Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129 n. 4, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011). 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).

So long as the admission contract and Arbitration Agreement are separate documents, alleged misrepresentations made by a resident's family member when signing the contracts does

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

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not equitably estop the resident's estate from challenging the family member's authority to bind the resident (and the estate) to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and her misrepresentations have no bearing on claims against the home by the resident's estate even if the misrepresenting family member is also the estate's representative. 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").

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

The Facility does not attempt to apply these elements to this case. Instead, the Facility suggest an alternative equitable estoppel standard and relies on federal cases. Defendants contend their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. This argument is at odds with U.S. Supreme Court precedent. Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 173-74 (2019) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 (2009) ("Whether an

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arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law")). By looking past South Carolina contract law, the Facility stands in the untenable position of asking the Court to ignore the U.S. Supreme Court's interpretation of a federal statute.

Moreover, the Court finds the Facility cannot establish the elements required to prove equitable estoppel. There is no evidence Defendant lacked knowledge Daughter was not authorized to bind Ms. Owens to the Arbitration Agreement. Additionally, Daughter did not have power of attorney for Ms. Owens and the Facility did not produce evidence to suggest Daughter made any such represented to the Facility. The Facility cannot claim to have been misled and cannot rely on equitable estoppel if it, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001). Furthermore, the Facility had the ability to determine whether Daughter had authority to sign the Arbitration Agreement on Ms. Owens behalf. The Facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. The Facility is familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Daughter for power of attorney documentation. Therefore, Defendant cannot argue merger or estoppel and the Court denies Defendant's motion based on the same. The Facility could not prevail even if its equitable estoppel argument was governed by federal law. The Facility relies in part on International Paper Co. v. Schwabedissen Maschinen & Anlaeen GMBH, which held that a party may be estopped from denying arbitration when he has received a "direct benefit" from a contract containing an arbitration clause. 206 F.3d 411, 417-18 (4th Cir. 2000). The Facility then argues Ms. Owens' admission to the Facility was the required "direct benefit." In doing so, the

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

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals held in Thompson that any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman, 407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.[7] Since admission is unavailable as a "direct benefit" to support estoppel, the Facility would be required to point to some benefit Ms. Owens received from the Arbitration Agreement alone. However, Ms. Owens and her estate derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the Arbitration Agreement"). Even if they had, "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [Ms. Owens] waive [her] right to access the courts and [her] right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688. In sum, the Facility

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

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cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

Unmoored from the legal tests for equitable estoppel, the Facility then makes a broader argument that it would be "manifestly inequitable" for Ms. Owens' estate to pursue a tort claim based on the Admission Agreement while denying Daughter's authority to sign the Arbitration Agreement. This argument misunderstands the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, the Facility's argument does not accurately state the estate's claims. Ms. Owens' estate is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, the Court rejects the Facility's arguments that Daughter was Ms. Owens' agent or that Ms. Owens' estate is equitably estopped from opposing Daughter's purported authority to sign the Arbitration Agreement on Ms. Owens' behalf.

**C. The Facility's Request for Discovery is Denied.**

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The Facility argued in its filings and at the hearing that the Court should order or sanction limited discovery on factual issues bearing on the presentment and signing of the Arbitration Agreement The Court denies this request for two reasons. First, the Facility could have chosen to conduct discovery before it affirmatively brought this issue to the Court's attention by filing its motion. See 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). Second, the Court finds the discovery requested, including Daughter's deposition, would not affect the legal arguments concerning agency at issue in this motion. Citing long-standing South Carolina law, Hodge held this type of deposition was not required to rule on a family member's apparent authority to sign an arbitration contract because agency may not be formed by the purported agent's representations on their own. Id. at 577, 813 S.E.2d at 310 (quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

**CONCLUSION**

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or alternatively, to Compel Arbitration and Stay Proceedings, is **DENIED**.

IT IS SO ORDERED.

_____

Honorable J. Mark Hayes
Circuit Court Judge, Seventh Judicial Circuit

September ___, 2019

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Spartanburg Common Pleas

**Case Caption:** Barbara Owens , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc , defendant, et al

**Case Number:** 2018CP4203447

**Type:** Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP4203447

Barbara Owens et al
PLAINTIFF(S)

Fundamental Clinical And Operational Services, 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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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:

See additional order information below

**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 06/25/2020 .

Barbara Owens Estate

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**



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**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.**

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Thank you for the presentations and arguments.

After reviewing this Court's prior order, considering the arguments of counsel and reviewing the documents and submissions, plaintiff's counsel is asked to prepare a formal order denying the motion to alter or amend. The Court was informed that the parties has agreed upon some minor alteration to the prior order.

This Court remains concerned that this defendant has not agreed to the terms of a confidentiality order that will allow discovery to proceed. Assume for the sake of argument, this Court is wrong on the issue of compelling arbitration. At some point discovery will take place before the disputes between these parties will be resolved. Not discussing or agreeing to an order allowing discovery, even one that requires confidentiality , can reasonably be seen as an unjustified delay unless other explanation is offered.

This Court looks forward to receiving the formal order and looks forward to an update on the discovery order. Once the formal order is signed and filed it will be the final order of this Court on the present motion.

Thank you for your attention and cooperation.

Mark Hayes

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Spartanburg Common Pleas

**Case Caption:** Barbara Owens , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc , defendant, et al

**Case Number:** 2018CP4203447

**Type:** Order/Electronic Form 4

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

ELECTRONICALLY FILED - 2020 Jul 13 2:21 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG | ) | IN THE COURT OF COMMON PLEAS |
| Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiffs,<br><br>vs.<br><br>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,<br><br>Defendants. | ) | C. A No. 2018-CP-42-03447<br><br>**CONFIDENTIALITY ORDER** |

WHEREAS the parties hereto have been and may be requested to produce or disclose through discovery certain materials and information that they maintain contains privileged trade secrets, proprietary information, other confidential commercial information and/or financial or personal information and the parties agree to the following:

1. **Scope.** All confidential documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the bottom of the document in a manner

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which will not interfere with the legibility of the document and which will permit complete removal of the Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney[1] who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. Information or documents which are available in the public sector may not be designated as confidential.

4. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

5. **Protection of Confidential Material.**

a. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below (¶ 6.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation).

[1] The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the Bar of South Carolina.

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b. **Limited Third Party Disclosures.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;
(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;
(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;
(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit; and
(5) other attorneys involved in similar litigation against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by this Order (See attached).

c. **Control of Documents.** Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

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d. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies"), of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

6. **Filing of Confidential Materials.** In the event a party seeks to file any material that is subject to protection under this Order with the Court, that party shall take appropriate action to insure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential; (2) where appropriate (e.g. in relation to discovery and evidentiary motions), submitting the documents solely for in camera review; or (3) where the preceding measures are not adequate, seeking permission to file the document as to such other rule or procedure as may apply in the relevant jurisdiction. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to allow any document be filed under seal. The parties understand that documents may be filed under seal only with the permission of the Court after proper motion.

7. **Greater Protection of Specific Documents.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

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8. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;
(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 9.b. above; or
(3) the Court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

9. **Treatment on Conclusion of Litigation.**

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a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

b. **Return/Retention of CONFIDENTIAL Documents.** The Parties to this litigation may keep documents designated confidential at the conclusion of the litigation so long as the parties and their counsel agree to be bond by the terms of this Order until such time as the documents are returned or destroyed.

This provision does not apply to HIPAA sensitive documents. Any documents protected from future disclosure pursuant to HIPAA must be returned to the providing party within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal.

10. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

11. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection or otherwise until such time as a document-specific ruling shall have been made.

13. **Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; (2) their respective clients; and (3) any person referred in Paragraph 5 (b)(6).

14. **Production of Privileged or Otherwise Protected Documents or Materials.** The Parties agree that the inadvertent production of information subject to a privilege shall not constitute a waiver of the privilege.

**AND IT IS SO ORDERED!**

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Spartanburg Common Pleas

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|---|---|
| **Case Caption:** | Barbara Owens , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc , defendant, et al |
| **Case Number:** | 2018CP4203447 |
| **Type:** | Order/Other |

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br>Plaintiff,<br><br>v.<br><br>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,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-03447<br><br>**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER** |

This matter came before the Court on Defendants' Motion to Alter, Amend, and/or Reconsider the Order entered October 25, 2019. THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg filed their Motion to Dismiss, Compel Arbitration and Stay Court Proceedings on November 12, 2018. Fundamental Administrative Services, LLC filed their Motion to Stay on November 12, 2018. Fundamental Clinical and Operational Services, LLC filed their Motion to Stay on November 12, 2018. THI of South Carolina, LLC filed their Motion to Stay on November 12, 2018. The first hearing on all of Defendants' Motions was conducted on July 25, 2019. The Court issued a Form 4 Order denying all of Defendants' Motions and instructing Plaintiffs to draft a Proposed Order. On October 25, 2019 the Court issued its Formal Order denying all of Defendants' Motions. Defendants filed the Motion to Reconsider on November 4, 2019. A hearing was held on Defendants' Motion to Reconsider on January 6, 2020. On June 25, 2020, the Court issued a Form 4 Order denying Defendants' Motion to Reconsider in all but two respects—(1) removing and vacating any/all reference to "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings" ("HVH") in the Court's Prior Order filed

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October 25, 2019[1] and (2) confirming that the respective Motions to Stay are denied as moot in consequence of the Court's denial of the Motion to Compel Arbitration—and indicating this Formal Order was to follow.

Now, therefore, having listened to oral arguments from counsel and reviewed the parties' legal memoranda and exhibits, the Court hereby GRANTS in part (i.e., in the two (2) respects above referenced) and DENIES in part (i.e., in all other respects) the Motion to Reconsider and, in so doing, alters its Prior Order filed October 25, 2019, in the two (2) respects above referenced, replacing that Order with the Ruling below.

For the foregoing reasons, the Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings is **DENIED**. The claims in this case are not subject to arbitration. Therefore, the respective Motions to Stay are **DENIED** as moot. Defendants should respond to Plaintiffs' discovery requests subject to the Confidentiality Order accompanying this Order.

## FACTUAL BACKGROUND

Daughter brought this tort action asserting survival and wrongful death claims and alleging corporate negligence and nursing home neglect resulting in Barbara Owens' ("Decedent") wrongful death. Plaintiff's Complaint names as defendants the Facility as well as, Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the Facility), and Fundamental Administrative Services, LLC (which Defendants assert provided

[1] The Prior Order referred to HVH as one of the "Corporate Defendants" named in this case. Among the grounds raised in the Motion to Reconsider is Defendants' contention that the reference to HVH is erroneous because HVH is not a party to this case. In response to the Motion to Reconsider, Plaintiff acknowledged that HVH is not a party to the case and expressed her agreement to do away with the Prior Order's mention of HVH.

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"administrative services" to the Facility), these latter entities being hereinafter referred to as the "Corporate Defendants." Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over the Facility directly affected the quality of care Ms. Owens received. The Complaint does not include a cause of action for breach of contract and the Claims are not premised on the Admission Agreement. The signing of the Arbitration Agreement was not a condition of admission. Ms. Owens was competent at the time of the admission but did not sign any of the paperwork. Her daughter, Mary McCraw, signed the admission paperwork even though she was not power of attorney and did not have any legal authority to do so. Daughter was appointed personal representative of Ms. Owens' estate on June 20, 2016.

Ms. Owens was admitted to the Facility on July 23, 2015 under the terms of the Admission Agreement governing the care Ms. Owens would receive at the Facility as well as Ms. Owens' financial obligation to pay for those services. The admission contract contains a section titled "Entire Agreement"[2] provision indicating this contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility.

Daughter signed a contract entitled "Arbitration Agreement" on July 23, 2015 after Mrs. Owens was already admitted to the facility. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provides for alternative dispute resolution for any claim a party may bring against another

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

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arising out of Ms. Owens care at the Facility. The Facility admits that agreeing to the Arbitration Agreement was not a prerequisite or condition to admission at the Facility.

On March 1, 2018, Daughter initiated this lawsuit alleging Defendants failed to monitor and supervise Ms. Owens' safety and well-being while at the Facility. On November 12, 2018, the Facility filed a Motion to Dismiss, Compel Arbitration and Stay State Court Proceedings. On October 25, 2019 the Court issued its Order Denying Defendants' Motions to Dismiss, Compel Arbitration, and Stay. Defendants' filed their Motion to Reconsider on November 4, 2019. A hearing on Defendants' Motion to Reconsider was held on January 6, 2020.

## LEGAL STANDARD

In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. 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). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., the Supreme Court stated:

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

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

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While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue").[3] The FAA looks to state law to decide the threshold questions of contract formation.[4] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[5] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[6]

## LEGAL ANALYSIS

The Facility's motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. The Court finds the Facility had no such contract with Ms. Owens. The "Arbitration Agreement" on which the Facility's motion relies is invalid because there can be no contract

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

[4] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

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

[6] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

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without the mutual assent of its proposed parties. Ms. Owens never assented to the Arbitration Agreement and did not empower Daughter or anyone else to assent on her behalf.

**A. Daughter Had No Legal Authority.**

The Facility concedes Ms. Owens did not sign the Arbitration Agreement but argues Daughter's signature as Ms. Owens' "representative" was sufficient to bind Ms. Owens and her estate to the Arbitration Agreement's terms. However, the Court finds Daughter lacked authority to enter an arbitration contract on Ms. Owens' behalf.

Defendant argues Daughter acted as Ms. Owens' agent when signing the Arbitration Agreement. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Moreover, the Facility has failed to provide any evidence beyond Daughter's signature to suggest she was Ms. Owens' agent. The fact that Daughter signed documents enabling Ms. Owens' admission to the Facility receipt of medical care in no way indicates Ms. Owens conferred authority on Daughter for purposes of a dispute resolution contract. The Court finds Ms. Owens never manifested any form of assent establishing Daughter as her agent.

For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, the Facility must show all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

Daughter was not Ms. Owens' power of attorney and the medical records suggest Ms. Owens was competent to sign contracts on her own behalf when she was admitted to the Facility.

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Additionally, the typical case where admission and arbitration contracts are presented simultaneously, Daughter signed the arbitration agreement *after* Ms. Owens was already admitted to the facility. Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

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

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

Coleman is directly on point here. In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed arbitration and admission contracts lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act (S.C. Code Ann. § 44-66-10 to -80) gave the sister authority to make 'healthcare decisions' on behalf of the resident, consent for medical treatment is not the same as binding an incompetent person to a contract concerning arbitration. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Coleman compels this Court to find Daughter had no legal authority to sign the Arbitration Agreement.

**B. Equitable estoppel does not apply.**

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Defendants also argue Daughter is estopped from denying authority to bind Ms. Owens to arbitration because Daughter does not deny authority to admit Ms. Owens to the Facility. Similarly, the Facility argues Ms. Owens created an agency relationship to support arbitration because she "accepted" admission. Both arguments require the admission contract and Arbitration Agreement to be interpreted as a single agreement. However, Coleman and its progeny rejected similar merger arguments. Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. The Court of Appeals has since applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 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) (refusing to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 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.

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement *or* in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge,

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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.

Like in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title. The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger.

The Facility then argues Daughter should be estopped from denying the validity of the Arbitration Agreement because Ms. Owens accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the Arbitration Agreement. However, this argument also depends on Defendant's faulty merger argument. Since the admission contract and Arbitration Agreement identify themselves as distinct contracts, they do not merge. The Admission Agreement's "Entire Agreement"[7] provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibited merging the two distinct agreements. By including this clause, the drafter indicated an intent that the common law doctrine of merger among the discrete documents cannot apply. Even if the "Entire Agreement" clause creates an ambiguity as to merger, any ambiguity must be construed against the Facility as the contracts' drafter. Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129 n. 4, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011). Since there was no merger here,

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

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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).

So long as the admission contract and Arbitration Agreement are separate documents, alleged misrepresentations made by a resident's family member when signing the contracts does not equitably estop the resident's estate from challenging the family member's authority to bind the resident (and the estate) to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and her misrepresentations have no bearing on claims against the home by the resident's estate even if the misrepresenting family member is also the estate's representative. 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").

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

The Facility does not attempt to apply these elements to this case. Instead, the Facility suggest an alternative equitable estoppel standard and relies on federal cases. Defendants contend

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their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. This argument is at odds with U.S. Supreme Court precedent. Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 173-74 (2019) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 (2009) ("Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law")). By looking past South Carolina contract law, the Facility stands in the untenable position of asking the Court to ignore the U.S. Supreme Court's interpretation of a federal statute.

Moreover, the Court finds the Facility cannot establish the elements required to prove equitable estoppel. There is no evidence Defendant lacked knowledge Daughter was not authorized to bind Ms. Owens to the Arbitration Agreement. Additionally, Daughter did not have power of attorney for Ms. Owens and the Facility did not produce evidence to suggest Daughter made any such represented to the Facility. The Facility cannot claim to have been misled and cannot rely on equitable estoppel if it, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001). Furthermore, the Facility had the ability to determine whether Daughter had authority to sign the Arbitration Agreement on Ms. Owens behalf. The Facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. The Facility is familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Daughter for power of attorney documentation. Further, equity does not favor Defendants under the circumstances in this case. Therefore, Defendant cannot argue merger or estoppel and the Court denies Defendant's motion based on the same.

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

Unmoored from the legal tests for equitable estoppel, the Facility then makes a broader argument that it would be "manifestly inequitable" for Ms. Owens' estate to pursue a tort claim based on the Admission Agreement while denying Daughter's authority to sign the Arbitration Agreement. This argument misunderstands the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, the Facility's

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argument does not accurately state the estate's claims. Ms. Owens' estate is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, the Court rejects the Facility's arguments that Daughter was Ms. Owens' agent or that Ms. Owens' estate is equitably estopped from opposing Daughter's purported authority to sign the Arbitration Agreement on Ms. Owens' behalf.

**C. The Facility's Request for Discovery is Denied.**

The Facility argued in its filings and at the hearing that the Court should order or sanction limited discovery on factual issues bearing on the presentment and signing of the Arbitration Agreement. The Court denies this request for two reasons. First, the Facility could have chosen to conduct discovery before it affirmatively brought this issue to the Court's attention by filing its motion. See 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). Second, the Court finds the discovery requested, including Daughter's deposition, would not affect the legal arguments concerning agency at issue in this motion. Citing long-standing South Carolina law, Hodge held this type of deposition was not required to rule on a family member's apparent authority to sign an arbitration contract because agency may not be formed by the purported agent's representations on their own. Id. at 577, 813 S.E.2d at 310 (quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

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## CONCLUSION

For the foregoing reasons, the Motion to Reconsider is GRANTED in part and DENIED in part, and the Motion to Dismiss and Compel Arbitration, or alternatively, to Compel Arbitration and Stay Proceedings is **DENIED** and the respective Motions to Stay are **DENIED** as moot.

IT IS SO ORDERED!

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Spartanburg Common Pleas

**Case Caption:** Barbara Owens , plaintiff, et al VS Fundamental Clinical And Operational Services, Llc , defendant, et al

**Case Number:** 2018CP4203447

**Type:** Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-<br><br>**SUMMONS**<br>(Wrongful Death/Survival Action) |

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

*s/ Gary W. Poliakoff*
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*And*

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Date: October 4, 2018

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiffs,<br><br>v.<br><br>Fundamental Clinical and Operational Services, LLC; Fundamental Administrative Services, LLC; THI od South Carolina, LLC; THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-<br><br>**COMPLAINT**<br>(Wrongful Death/Survival Action) |

The Plaintiffs, the Estate of Barbara Owens and Mary Jane McCraw, Individually and as Personal Representative of the Estate and on behalf of the statutory beneficiaries, do hereby respectfully allege as follows:

## PARTIES & JURISDICTION

1. That the Plaintiff, Mary Jane McCraw, is a citizen and resident of the County of Spartanburg, State of South Carolina, and was duly appointed as the Personal Representative of the Estate of Barbara Owens (Claimant #1), deceased, and as a representative for the statutory beneficiaries: Mary Jane McCraw, (Claimant #2), Roger Owens (Claimant # 3), and Kay Leatherwood (Claimant #4). Plaintiff brings this action on behalf of the Estate of Barbara Owens for damages recoverable pursuant to § 15-5-90, Code of Laws of South Carolina (1976) and for damages recoverable by the statutory

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beneficiaries of Barbara Owens pursuant to § 15-51-10, et seq, Code of Laws for South Carolina (1976, as amended).

2. That the Plaintiff, Barbara Owens, was a resident of THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Magnolia Manor-Spartanburg") during the relevant time period.

3. At all times relevant herein, Defendants were in a joint venture to manage, administer, and operate a skilled nursing facility as part of the "Fundamental family of companies."

4. Upon information and belief, the "Fundamental family of companies," through its individual actions and acts of their agents, and in concert with the other Defendants, owns and operates a national chain of for-profit nursing homes in at least 17 states, which includes Magnolia Manor-Spartanburg, and derives substantial revenue therefrom.

5. That through its individual actions and the acts of its agents, and in concert with the other Defendants, Fundamental Clinical and Operational Services, LLC (FCOS) and Fundamental Administrative Services, LLC (FAS) engaged in oversight, management, direction, and operation of nursing home facilities in Spartanburg County, South Carolina, including Magnolia Manor-Spartanburg deriving substantial revenue therefrom.

6. In addition to the direct liability of the Defendants as alleged elsewhere in this Complaint, Defendants are each vicariously liable and legally responsible for the harm to Plaintiffs as the Facility is a mere instrumentality, agency, conduit or adjunct of Defendants.

7. That Fundamental Clinical and Operational Services, LLC; and Fundamental Administrative Services, LLC were related parties formed to manage and operate the facilities on behalf of the owners, and act as the management company and Home Office

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pursuant to the federally required Cost Reports.

8. That Defendants, through its officers and agents, entered into a Revolving Credit Agreement ("Credit Agreement") with a lender to create a line of credit for the nursing homes to use for operating costs based on the revenue generated at the facility level.

9. The Credit Agreement was signed on behalf of the facility at the direction of Murray Forman.

10. The Credit Agreement also states that Defendants are jointly and severally liable for the debt.

11. That the Credit Agreement signed by officers and agents on behalf of Defendants to exert significant control by requiring each facility to maintain certain occupancy rates and profit margins thereby showing a joint venture among the Defendants.

12. That the Credit Agreement allowed Defendants to control how the facility's revenue was used, and stripped from the facility any right it may have had on its revenues, which by the means of the central cash management system was commingled with monies from other facilities in the national for-profit chain, and controlled exclusively at the corporate level.

13. That the Administrative Policies and Procedures of the billion dollar Fundamental chain found in the Resource Manual for New Management show that FAS and FCOS have significant control over the policies and procedures, budgets, staffing, training, and operation of the facility through agents, the Regional Director of Operations and/or Vice-President of Operations or similarly named titles and positions, who at all times relevant hereto was an employee of either FAS and FCOS.

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14. That Defendants are designated as "disregarded corporate entities" for income tax purposes.

15. That during the residency period of July 23, 2015 and December 5, 2015, Defendants applied for and used the trademark 'Fundamental' which was used on the "FundItc" website and on the policies and procedures of the facility including, but not limited to, the following policies:

a. Fundamental Fire and Disaster Plan;
b. Fundamental Resident Alarm System;
c. Fundamental Weight Management;
d. Fundamental Paid Time Off;
e. Fundamental Policy on Illegal Drugs and Abuse on Alcohol;
f. Fundamental Corporate Compliance;
g. Fundamental Employee Benefit Enrollment Plan;
h. Fundamental Time Clock and Meal Deduction;
i. Fundamental Direct Payroll Deposit.

16. That, upon information and belief, FCOS is a Delaware limited liability company operating on behalf of the owner as its agent within the State of South Carolina, but has no registered agent in the State of South Carolina

17. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FCOS engaged in the oversight, management, direction, and operation of the Defendants' facility in Spartanburg County, South Carolina, deriving substantial revenue therefrom.

18. That, upon information and belief, FAS is a Delaware limited liability company operating on behalf of the owner as its agent within the State of South Carolina, but has no registered agent in the State of South Carolina.

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19. At times relevant hereto, FAS is listed on the cost reports of the Defendants' facility as the Accounting Firm and as the Home Office pursuant to CMS regulations.

20. Upon information and belief, through its individual actions and the acts of its agents, and in concert with the other Defendants, FAS engaged in the oversight, management, direction, and operation of the Defendants' facility in Spartanburg, South Carolina, deriving substantial revenue therefrom.

21. That, upon information and belief, THI of South Carolina, LLC (hereinafter "THI-SC") is a Delaware corporation operating within the State of South Carolina, with a registered agent in the State of South Carolina. At all times relevant to this case, THI-SC was a shell company that allowed the real owner to operate a nursing home facility and did business in Spartanburg, South Carolina, deriving substantial revenue therefrom.

22. That, upon information and belief, Hunt Valley owns, operates, and controls the nursing home facility in question through its agents FCOS and FAS as part of a national for-profit chain as defined by CMS-15 §2150, and exerts control over the other Defendants including the acts and delicts by agents/subsidiaries relating to the operation of Magnolia Manor-Spartanburg.

23. Upon information and belief, all or most of the following factors exist between FCOS or FAS and the facility:

a. Common ownership;
b. Common directors or officers;
c. Financing of the subsidiary by the parent through loan agreements;
d. Gross inadequacy of capital for the subsidiaries;
e. Incorporation and/or organization of the subsidiaries by the parent;
f. Payment by the parent of the salaries and other expenses or losses of the subsidiaries;

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g. Lack of business dealings by the subsidiary except with the parent and lack of assets except those conveyed to it by parent;
h. Lack of independent action by the executives of the subsidiaries, who instead take their orders from the parent corporate in the latter's interest.

24. That, upon information and belief, Defendants deliver nursing home care for a profit and executed the delivery of nursing home care to Plaintiff Barbara Owens during her residency at Magnolia Manor-Spartanburg.

25. That, upon information and belief, Defendants were involved in a joint venture to operate, administer, and manage nursing homes for profit including the Fundamental facility where Barbara Owens resided.

26. That, upon information and belief, Defendants were involved in controlling the revenue and the budget which affected the care, services, staffing, training, supervision, development and/or implementation of policies and procedures for the Fundamental facility.

27. These Defendants implemented a business plan for the Fundamental facility that sought to maximize profits at the expense of patient care.

28. Defendants controlled all aspects of the Fundamental facility, including but not limited to, receiving and controlling all revenues generated by Magnolia Manor-Spartanburg, preparing the budget, and establishing staffing levels.

29. In order to maximize profits, Defendants excessively and dangerously underfunded such that neither nursing staff in adequate numbers nor adequate training of such staff could be provided to protect the residents from foreseeable harm.

30. Despite the legal obligation that "A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable

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physical, mental, and psychosocial wellbeing of each resident" (42 CFR §483.75), Defendants withheld resources from the Fundamental facility to the physical, mental, and psychosocial detriment of its residents.

31. Funds which were required by law to be used for the protection of the residents were instead intentionally diverted to increase the profits of Defendants. In fact, Defendants saved significant dollars by understaffing registered nurses during the residency.

32. Defendants made matters worse by encouraging the admission of residents whose care needs were higher than average, which resulted in higher financial gain from those residents.

33. However, Defendants failed to provide the increased resources necessitated by admitting these high acuity residents, and did not adequately staff, or provide the necessary training to accommodate the level of care these residents required, particularly registered nurses, which put all residents of the Fundamental facility at even greater risk of harm.

34. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of Defendants including but not limited to, FCOS and FAS, acted on behalf of the corporate managers/owners.

35. That, upon information and belief, FAS and FCOS at all times relevant hereto totally dominated and controlled the other Defendants through loans, leases, and contracts.

36. Defendants were so organized and controlled, and their business conducted in such a manner that they were merely an agency, instrumentality, adjunct, and/or alter ego of Fundamental who is therefore liable and responsible for the acts and delicts of all Defendants.

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37. That the Defendants were liable and responsible for the acts and delicts of their employees, agents, and servants under the principle of respondeat superior.

38. That, upon information and belief, all Defendants or their agents have engaged in substantial business activities in South Carolina, including the management, operation, control and/or ownership of the Fundamental facility at various times, and derived substantial revenue from services provided in South Carolina.

39. That, upon information and belief, at all times relevant herein, agents, employees, servants, and apparent agents of FCOS, FAS, and Magnolia Manor-Spartanburg, acted on behalf of themselves and on behalf of the Fundamental chain.

40. That, upon information and belief, at all times relevant herein, FCOS, FAS, and Magnolia Manor-Spartanburg as well as their agents, employees, servants, and apparent agents owed a duty to Plaintiffs and were all jointly, directly, and vicariously liable for the care and treatment Barbara Owens received as a resident at the facility.

41. That, upon information and belief, at all times relevant herein, FCOS, FAS, and Magnolia Manor-Spartanburg are and have been operating as an amalgamation of interest creating a blurred corporate identity by sharing an internet website, officers, shareholders, and locations, policies and procedures, ownership, headquarters, in-house counsel, and by commingling funds and revenue.

42. That the Court has jurisdiction over the parties and subject matter.

43. That the acts and delicts referred to herein occurred at Defendants' facility in the County of Spartanburg, State of South Carolina.

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## GENERAL FACTUAL ALLEGATIONS APPLICABLE TO ALL CLAIMS

44. Relevant and consistent allegations contained in paragraphs 1-43 are incorporated by reference as if written verbatim herein.

45. On or about July 23, 2015, Barbara Owens was admitted to the skilled nursing facility with the understanding that she would be provided with the care that her health conditions reasonably required.

46. Barbara Owens did not sign the arbitration agreement upon admission.

47. No one with legal authority to bind Barbara Owens signed any arbitration agreement.

48. Barbara Owens did not provide a Power of Attorney to Mary Jane McCraw prior to the admission into the facility.

49. Magnolia Manor-Spartanburg failed to provide the proper care to Ms. Owens and deviated from the standard of care for prevention of dehydration, malnutrition, Urinary tract infection with sepsis and pain, and also from standard of best practice for skin and wound monitoring.

50. The initial care plan for Barbara Owens to prevent pressure ulcers and provide skin care included, "inspect skin per facility protocol".

51. However, in September, the skin was not inspected on the 20th, 21st, 22nd, 25th, and 26th.

52. However, in October, the skin was not inspected on the 11th, 17th, 18, 20th, 21st, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, and 31st.

53. However, in November, the skin was not inspected on the 3rd, 7th, 8th, 10th, and 13th through 27th.

54. However, in December, no skin inspections were documented on the 1st, 2nd, and 4th.

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55. Defendants' own documentation also shows that weekly Nursing skin audit documentation was only done on admission and one other date on July 28, 2015.

56. The nursing skin audit was not documented as done for 17 weeks while Ms. Owens was a resident.

57. Defendants' own documentation shows that Barbara Owens had unexplained episodes of nausea and vomiting on August 1, 5, 21, 27, 31 and September 11 and finally on November 23, 2015 at which time she was sent to the hospital.

58. Defendants failed to notify and communicate Barbara Owens' change of condition to the Physician prior to November 23, 2015 as required.

59. According to Defendants' own Nursing Policies and Procedures regarding physician notification and communication of changes of condition, the facility is required to documents all assessments and changes in condition:

> Notify the physician of the change in medical condition. (The physician notification grid may be used as a reference tool regarding acceptable notification timeframes.) The nurse will document all assessments and changes in the patient's/resident's condition in the medical record.

60. The Physician's note on November 23, 2015 at SRMC states, "admitted from Magnolia Manor for vomiting brown stringy sputum. PEG has brown drainage around tube. Diagnosis Clinical Sepsis."

61. Defendants accepted her back as a resident when she returned to the facility on November 27, 2015.

62. Per nursing documentation, on November 27, 2015 Barbara Owens complained of "belly pain". No proper assessment by a registered nurse was done. There is no documentation that the MD was notified.

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63. The next day, November 28, 2015, it is documented "when touched or moved, hollers in pain. Swelling in left and right lower extremities, dry mucous membranes." There is no documentation that the MD was notified.

64. Ms. Owens had vomiting again on November 29, 2015. Defendants' documentation states, "nausea and vomiting. Emesis had mucous and strings of Jevity feeding in it." There is no documentation that the MD was notified.

65. Defendants' documentation states that on December 5, 2015 the family found Ms. Owens to be lethargic with oxygen saturation at 69% and with "vomit all over her."

66. Defendants finally chose to transfer her to SRMC after the family demanded action.

67. Barbara Owens was sent to SRMC where she suffered and expired on December 7, 2015. The diagnoses included dehydration, Malnutrition, Urinary tract infection, Sepsis and pneumonia.

68. Defendants imprudently gave Barbara Owens both Depakote and Remeron for unfounded anxiety routinely every day. There is no documentation to indicate the need for these medications.

69. Defendants were providing these medications as a way to chemically restrain Barbara Owens.

70. Defendants knew or should have known that Remeron's side effects include: Decreased appetite, Dyspepsia, bitter taste, elevated triglycerides, vertigo, constipation, fatigue, insomnia, and increased cholesterol.

71. Defendants knew or should have known that Depakote's side effects include: Abdominal pain, nausea, anorexia, weight loss, skin rash and fever.

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72. That the Defendants, their subsidiaries, related entities, officers, agents, servants, and employees negligently and carelessly failed to properly manage, operate, and provide care to Barbara Owens, and maintain her safety and well-being.

73. That, upon information and belief, Plaintiff's health conditions were aggravated and exacerbated by the Defendants' repeated failure to properly supervise and monitor her medical conditions.

74. These deviations from the standard of care were the proximate causes of conscious pain and suffering, mental distress, medical bills, and loss of dignity.

75. Upon information and belief, Defendants failed to provide adequate and proper nursing services and custodial care to Barbara Owens, contributing to her suffering and injuries, and ultimately her premature, untimely, and wrongful death.

76. That while residing at Defendants' facility, Barbara Owens was damaged and injured, and eventually died as a result of neglect, negligence, recklessness, and violations of the standard of care for nursing and custodial care.

77. That during Barbara Owens' residency at Magnolia Manor-Spartanburg, the acts and delicts of Defendants caused, and were the proximate causes of Barbara Owens' conscious pain and suffering, mental distress, medical bills, disability, loss of dignity, and loss of quality of life and ultimately her premature, untimely, and wrongful death.

78. Pursuant to S.C. Code § 15-5-90, said causes of action survive the death of Barbara Owens and are properly brought by the Personal Representative on behalf of Barbara Owens' estate.

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79. That the Defendants held Magnolia Manor-Spartanburg out to the State of South Carolina, the South Carolina Department of Health and Environmental Control, the public at large, and to Barbara Owens and her family, specifically, as being:

a. skilled in the performance of nursing, rehabilitative, and other medical support services;
b. properly staffed, supervised and equipped to meet the total needs of its residents;
c. able to specifically meet the total nursing, personal care, medical, and physical therapy needs of its residents; and,
d. Licensed by the South Carolina Department of Health and Environmental Control and complying on a continual basis with all state and federal rules, regulations, and standards established for nursing homes in South Carolina.

80. That the Defendants held Magnolia Manor-Spartanburg out to the United States of America, the Centers for Medicare and Medicaid Services, the public at large, Barbara Owens and her loving and supportive family, specifically, as being a skilled nursing facility and as a nursing facility meeting the requirements of 42 CFR Part 483.

81. To protect nursing home residents like Plaintiff, the federal government mandates that if a nursing home voluntarily accepted Medicare or Medicaid funds, the nursing home would be required to follow strict mandates for patient safety, documentation, and costs and expenditures.

82. These mandates became known as the OBRA regulations at 42 CFR 483.1- et seq. For example, one of the regulations simply states, "skilled nursing facilities participating in Medicare must meet certain specified requirements." 42 C.F.R. 483.1.

83. OBRA regulations go to great lengths to ensure nursing home patients will be "in an environment that promotes maintenance or enhancement of each resident's quality of life." 42 C.F.R. 483.10.

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84. They state that each patient "must" receive, and the facility "must" provide the necessary care and services to "attain or maintain the highest practicable physical, mental, and psychosocial well-being." See e.g. 42 C.F.R. 483.24.

85. The regulations are designed to reduce or eliminate accidents, assure proper staffing and supervision, and establish and maintain a reasonable quality of life for each resident.

86. That the provisions of the Omnibus Reconciliation Act of 1987 ("OBRA") were applicable with regard to the administration and operation of the facility and the provision of care and services to Plaintiff throughout the residency.

87. Defendants were under an obligation to follow all rules and regulations of OBRA as well as all applicable state and federal laws, rules, regulations, and guidelines including S.C. Regulations 61-17, the Board of Nursing Advisory Opinions, the South Carolina Adult Protection Act, the South Carolina Nurse Practice Act, S.C. Code § 40-33-5 et. seq., and the South Carolina Long Term Health Care Administrators statute, S.C. Code 40-35-5 et seq.

88. Defendants were under an obligation to follow the provisions and standards of the Federal Nursing Home Act applicable to the administration and operation of the facility and the provision of services, care and treatment as well as all applicable state laws, rules, regulations, and guidelines including but not limited to The Adult Protection Act of South Carolina Code § 43-35-5, et. seq.; South Carolina Department of Health and Environmental Control regulations for Nursing Homes at Regulation 61-17, et. seq.; the South Carolina Nursing Practice Act; Board of Nursing Advisory Opinions; South Carolina Code of Laws Title 40 Chapter 35; and South Carolina Code of Regulations Chapter 93.

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89. The OBRA regulations require that each nursing home has sufficient staff to provide the necessary care and services. 42 C.F.R. 483.30.

90. Defendants specifically violated the applicable standard for the administration of a nursing home found at §483.75 which expressly states: "A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."

91. Defendants must submit "cost reports" to both state and federal agencies which include additional staffing information as well as the expenditures of the Defendants on staffing costs, facility costs, supplied, operating and management fees, etc submitted by Defendants to government agencies under penalty of perjury. 42 C.F.R. 413.24(f)(4)(iv).).

92. These regulations and reporting have a distinct purpose: "Collectively, these reports establish a basis for evaluation of the reasonableness of the rate paid to the nursing homes and determination of what constitutes an economically and efficiently operated facility." Nursing Home Cost Report Instruction Manual.

93. In particular, Defendants use their multiple limited liability company business structure as a means to evade the federal requirement that their nursing homes, including the subject Facility, be administered in a manner that enables them to use their resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. See 42 CFR § 483.75.

94. By siphoning profits to related entities in non-arms' length transactions, Defendants deny the Facility sufficient resources to care for its residents. Additionally, Defendants' use of "shell" limited liability companies and trusts serves to further the unjust practice of

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concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest, or concealment of personal business activities.

95. This is an integral part of Plaintiffs' corporate negligence claim which include allegations that Defendants siphoned profits away from resident care to related parties. This is a concept noted in the federal regulations and seen in nursing home operations across the country.

> . . .when services, facilities, or supplies are furnished to a provider by a "related organization," there is "a significant likelihood that charges incurred by providers . . . will be artificially inflated because of the absence of bona fide arms-length bargaining." *American Hosp. Management Corp. v. Harris*, 638 F.2d 1208, 1212 (9th Cir. 1981). . . "Reasonable costs" for such a provider are the actual costs incurred by the related supplier, rather than the amount the provider pays to it. 42 C.F.R. § 405.427(a) (1982).
>
> ***Biloxi Reg'l Med. Ctr. v. Bowen***, 266 U.S. App. D.C. 281, 835 F.2d 345, 349-50 (1987).

96. Part of determining an economically and efficiently operated facility includes disclosure of "related organizations." "Federal Regulations, 42 CFR 447.284, requires the nursing home to identify related organizations and to summarize costs incurred in transactions between the NH and such related organizations." ("A related organization is one in which there is a common ownership or controlling interest existing between the vendor and the NH.) Cost Report Manual.

97. Defendants are also required to report "related organizations" under 42 CFR §420.206.

98. The cost reports mentioned supra include information regarding transactions with what are referred to as "related parties". CMS considers a party to be "related" to a nursing facility when the nursing facility "to a significant extent is associated or affiliated with or … is controlled by the organization furnishing the services, facilities, or supplies." 42 C.F.R.

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§413.17(b)(1).

99. Federal law requires nursing facilities to disclose information on related parties that meet the following criteria:

a. anyone with direct or indirect ownership in the nursing facility of 5% or more;
b. officers, director, and partners;
c. managing employees; and
d. anyone who is an "additional disclosable party" which is defined as any person or entity who
   1) exercises operational, financial, or managerial control over the nursing facility or a part thereof, provides policies or procedures for any of the operations, or provides financial or case management services to the nursing facility;
   2) leases or subleases real property to the nursing facility, or owns a whole or part interest of 5% of more of the total property value of the nursing facility; or
   3) provides management services, administrative services, clinical consulting services, accounting services, or financial services to the nursing facility.
   (See 42 U.S.C. §1320a-3).

100. By definition, FCOS and FAS, are among a group of corporations that would be considered "related parties" in the Fundamental chain.

PROVIDER NO. 42-5091 MAGNOLIA MANOR OF SPARTANBURG COMPU-MAX KPMG LLP RUN DATE: [01/30/2017 - 14:32]
PERIOD FROM 10/1/2015 TO 9/30/2016 IN LIEU OF FORM CMS-2540-10 VERSION: [2016.11-12/12/2016]

STATEMENT OF COSTS OF SERVICES FROM RELATED ORGANIZATIONS AND HOME OFFICE COSTS WORKSHEET A-8-1

PART I. COSTS INCURRED AND ADJUSTMENTS REQUIRED AS RESULT OF TRANSACTIONS WITH RELATED ORGANIZATIONS OR CLAIMED HOME OFFICE COSTS:

| LINE NO. | | COST CENTER | EXPENSE ITEMS | AMOUNT ALLOWABLE IN COST | AMOUNT INCLUDED IN WKST A COL 6 | ADJUSTMENTS (COL 4 - 5) | |
|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | |
| 1 | 1 | CAP REL COSTS - BLDGS & FIXTURES | RELATED PARTY CAPITAL COST | 18484 | | 18484 | 1 |
| 2 | 4 | ADMINISTRATIVE & GENERAL | RELATED PARTY ADMIN & GEN | 203471 | 230497 | -27026 | 2 |
| 3 | 5 | NURSING ADMINISTRATION | RELATED PARTY CLINICAL | 47301 | | 47301 | 3 |
| 4 | 8 | EMPLOYEE BENEFITS | MOBILE DON | 1949 | 2652 | -703 | 4 |
| 5 | 5 | NURSING ADMINISTRATION | MOBILE DON | 11717 | 15228 | -3511 | 5 |
| 6 | 4 | ADMINISTRATIVE & GENERAL | CEO ALLOCATION | 89201 | 85163 | 4038 | 6 |
| 7 | 1 | CAP REL COSTS - BLDGS & FIXTURES | CEO ALLOCATION | 370 | | 370 | 7 |
| 8 | 8 | EMPLOYEE BENEFITS | CEO ALLOCATION | | 7002 | -7002 | 8 |
| 10 | | TOTALS | | 417587 | 390936 | 26951 | 10 |

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PROVIDER NO. 42-5091 MAGNOLIA MANOR OF SPARTANBURG COMPU-MAN KPMG LLP RUN DATE: [01/30/2017 - 14:02]
PERIOD FROM 10/1/2015 TO 9/30/2016 IN LIEU OF FORM CMS-2540-10 VERSION: [2016.11-13/12/2016]

STATEMENT OF COSTS OF SERVICES FROM RELATED ORGANIZATIONS WORKSHEET A-8-1
(CONTINUED)

PART II. INTERRELATIONSHIP TO RELATED ORGANIZATION(S) AND/OR HOME OFFICE:

THE SECRETARY, BY VIRTUE OF AUTHORITY GRANTED UNDER SECTION 1814(B)(1) OF THE SOCIAL SECURITY ACT, REQUIRES THE PROVIDER TO FURNISH THE INFORMATION REQUESTED UNDER PART C OF THIS WORKSHEET.

THE INFORMATION WILL BE USED BY THE HEALTH CARE FINANCING ADMINISTRATION AND ITS INTERMEDIARIES IN DETERMINING THAT THE COSTS APPLICABLE TO SERVICES, FACILITIES AND SUPPLIES FURNISHED BY ORGANIZATIONS RELATED TO YOU BY COMMON OWNERSHIP OR CONTROL, REPRESENT REASONABLE COSTS AS DETERMINED UNDER SECTION 1861 OF THE SOCIAL SECURITY ACT. IF YOU DO NOT PROVIDE ALL OR ANY PART OF THE REQUESTED INFORMATION, THE COST REPORT IS CONSIDERED INCOMPLETE AND NOT ACCEPTABLE FOR PURPOSES OF CLAIMING REIMBURSEMENT UNDER TITLE XVIII.

| | SYMBOL (1) | NAME | PERCENTAGE OF OWNERSHIP | RELATED ORGANIZATION(S) NAME | PERCENTAGE OF OWNERSHIP | TYPE OF BUSINESS |
|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 |
| 1 | A | HUNT VALLEY HOLDINGS LLC | 100.00 | FAS, LLC & FCOS, LLC | | SUPPORT SERVICES |
| 2 | A | CENTRAL BILLING OFFICE | 100.00 | FAS, LLC & FCOS, LLC | | SUPPORT SERVICES |
| 3 | A | MOBILE DON | 100.00 | FCOS, LLC | | SUPPORT SERVICES |

(1) USE THE FOLLOWING SYMBOLS TO INDICATE THE INTERRELATIONSHIP TO RELATED ORGANIZATIONS:
A. INDIVIDUAL HAS FINANCIAL INTEREST (STOCKHOLDER, PARTNER, ETC.) IN BOTH RELATED ORGANIZATION AND IN PROVIDER.
B. CORPORATION, PARTNERSHIP OR OTHER ORGANIZATION HAS FINANCIAL INTEREST IN PROVIDER.
C. PROVIDER HAS FINANCIAL INTEREST IN CORPORATION, PARTNERSHIP, OR OTHER ORGANIZATION.
D. DIRECTOR, OFFICER, ADMINISTRATOR, OR KEY PERSON OF PROVIDER, OR RELATIVE OF SUCH PERSON HAS FINANCIAL INTEREST IN RELATED ORGANIZATION.
E. INDIVIDUAL IS DIRECTOR, OFFICER, ADMINISTRATOR, OR OTHER KEY PERSON OF PROVIDER AND RELATED ORGANIZATION.
F. DIRECTOR, OFFICER, ADMINISTRATOR, OR KEY PERSON OF RELATED ORGANIZATION, OR RELATIVE OF SUCH PERSON HAS FINANCIAL INTEREST IN PROVIDER.
G. OTHER (FINANCIAL OR NON-FINANCIAL) SPECIFY:

101. "Cost Reports" submitted by or on behalf of Magnolia Manor-Spartanburg show overpayments to related parties by Defendants in 2015.

102. Plaintiffs allege that while holding Magnolia Manor-Spartanburg out to Barbara and other members of the public as providing excellent care, Defendants and their related parties extracted considerable profits through the management and operation of Magnolia Manor-Spartanburg by overpaying Defendants herein and other related parties from funds which should have been utilized instead to hire, train, and retain a sufficient number of qualified staff to meet the needs of all of their residents including Barbara Owens.

103. Plaintiffs allege that these overpayments to related parties left the facility with insufficient cash to provide sufficient and qualified staff to meet the individual needs of the residents in their facility during Plaintiff's period of residency therein.

104. Plaintiffs allege that throughout 2015, Defendants, through their operational, budgetary, consultation, and managerial decisions and actions, provided grossly inadequate

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capitalization as measured by the nature and magnitude of the corporate undertaking of ensuring that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with each residents' comprehensive assessments and plans of care including those of Barbara Owens.

105. In other words, Defendants' actions in 2015 resulted in an underfunded nursing home during Plaintiff's residency.

106. Plaintiffs allege that this underfunding and corresponding understaffing, although profitable for Defendants and their related parties, directly resulted in their failure to provide the necessary and basic services to Barbara Owens that she needed in order to prevent injury and maintain her health, safety, and well-being.

107. Because of their joint venture, Defendants had a joint obligation to sufficiently fund Magnolia Manor-Spartanburg to ensure that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with their residents' comprehensive assessments and plans of care.

108. This joint obligation required Defendants to sufficiently fund Magnolia Manor-Spartanburg so that there would be enough staff and resources in order to meet the needs of their residents.

109. Magnolia Manor-Spartanburg was totally dependent on Defendants' generosity in their decision-making process as to whether they would allow them to keep the money they were earning.

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110. The cost reports provide information about the number of patients, acuity or illness levels of patients, and the staffing of the facility to meet the patients' needs. Additionally, there are reporting mandates to the entity for information such as staffing and expenditures. 42 CFR 413.20 (Cost reports are required from providers on an annual basis. . .) and 42 CFR 413.24 (Providers must submit adequate cost data).

111. Not only do the cost reports contain information on expenditure, they must contain information about the facility's residents, in particular their acuity levels as determined by the RUG scores. CMS 2540 Cost Report Instruction Manual.

112. The term used by caregivers and health science literature to describe the intensity of nursing care required by a resident is "acuity level".

113. Acuity levels are reflected in the resident's 'Resource Utilization Group" classification or "RUGs". RUGs are mutually exclusive categories that reflect the amount of resources that will be needed in order to meet the needs of a particular resident in nursing facilities. They are assigned to residents based on data derived from an assessment tool referred to as a "Minimum Data Set" (MDS").

114. The Centers for Medicare and Medicaid Services ("CMS") is the federal agency that is tasked with regulating all nursing facilities in this country.

115. Through the years, CMS has sponsored multiple studies to determine the amount of time that RNs, LPNs, and CNAs in nursing facility spend providing direct care to residents as well as other elements of resident care.

116. Because of these studies, CMS is able to set a number of hours of direct care that they expect to be provided to residents by RNs, LPNs, and CNAs based on the nursing facility's

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total acuity level. This expectation is expressed in terms of "hours per patient day" or "HPPD".

117. According to the CMS Technical User Guide for Design for Nursing Home Compare Five-Star Quality Rating System, there is considerable evidence of a relationship between nursing home staffing levels and resident outcomes.

118. The CMS Nursing Home Compare program serves to provide consumers of long-term care services "easily accessible, readily understandable" information about nursing facilities. 42 CFR § 1395i-3(i)(1)(A). The information that must be made available includes specific staffing information – which is reported by the facilities themselves.

119. This information on "Nursing Home Compare" is compiled into what is commonly called a "Star Rating." A portion of the CMS Star rating formulation includes a calculation of the differential between reported and expected staffing levels for a facility.

120. Medicare/CMS clearly states on their website and in their manuals to providers, including Defendants, that part of the reason for their star rating system is that there "is evidence of a relationship between nursing home staffing levels, staffing stability, and resident outcomes.

121. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at a substantially higher risk of quality problems." Nursing Home Compare Five Year Report. The staffing rating is a combination of RN and total nurse staffing.

122. Staffing is the biggest issue in the star rating system as CMS has noted that "staffing has the lowest proportion of any domain receiving five stars."

123. CMS gives a Star rating based in large part on RN staffing provided by the facility:

Table 5
Staffing Points and Rating (updated February 2015)

| RN rating and hours | | Total nurse staffing rating and hours (RN, LPN and nurse aide) | | | | |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| | | <3.262 | 3.262 – 3.660 | 3.661 – 4.172 | 4.173 – 4.417 | ≥4.418 |
| 1 | <0.283 | ★ | ★ | ★★ | ★★ | ★★★ |
| 2 | 0.283 – 0.378 | ★ | ★★ | ★★★ | ★★★ | ★★★ |
| 3 | 0.379 – 0.512 | ★★ | ★★★ | ★★★ | ★★★★ | ★★★★ |
| 4 | 0.513 – 0.709 | ★★ | ★★★ | ★★★★ | ★★★★ | ★★★★ |
| 5 | ≥0.710 | ★★★ | ★★★ | ★★★★ | ★★★★ | ★★★★★ |

Note: Adjusted staffing values are rounded to three decimal places before the cut points are applied.

124. The CMS Staffing Study found a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems. See Kramer AM, Fish R. "The Relationship Between Nurse Staffing Levels and the Quality of Nursing Home Care." Chapter 2 in Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes: Phase II Final Report. Abt Associates, Inc., Winter 2001.

125. Using the information contained in the MDSs of every resident in a nursing facility, CMS is able to determine an HPPD that is expected for each nursing facility in the country.

126. This is referred to as the "expected HPPD" and can be found on the CMS.gov website. They are also able to adjust the HPPD per facility on a quarterly basis based on the updated MDSs that are provided to them.

127. The long-term care industry typically measures nursing department staffing in "hours per patient day", often cryptically referred to as "HPPD" or "PPD".





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128. Expected hours are calculated by summing the nursing times in minutes (from the CMS Time Study found in Appendix Table A1) connected to each RUG category across all residents in the category and across all categories. The total minutes are then divided by the number of residents included in the calculations. The number of minutes per resident is converted to hours by dividing by 60. The result is the "expected" number of hours per resident day for each nursing category.

129. 70% of RUG reimbursement rate is attributable to the labor requirements associated with the RUG score.

130. Defendants knew or should have known that CMS publishes quarterly the facility's expected HPPD for direct care caregivers at CMS.gov.

131. The CMS "expected" staffing associated with the monthly or quarterly reports and the CMS "estimated" staffing associated with RUG scores are notice of potential under-staffing and knowledge of the dangers associated therewith.

132. The government has recognized the "considerable evidence of a relationship between nursing home staffing levels and resident outcomes." (CMS Design for Nursing Home Compare Five-Star Quality Rating System: Technical Users' Guide). A government staffing study found "a clear association between nurse staffing ratios and nursing home quality of care, identifying specific ratios of staff to residents below which residents are at substantially higher risk of quality problems."

133. In conjunction with these facts, Medicare has promulgated staffing 'expectations' based on the number and acuity of patients as reported by nursing homes. These expected staffing numbers drive higher quality of care and also serve as a basis for how much nursing homes

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are paid.

134. The staffing data is in the public domain via the CMS website and provides notice to nursing homes of CMS' expectations and estimated staffing requirements based on the facilities' average RUG-scores.

135. That labor is the biggest component of the nursing home budget.

136. That nursing labor is the biggest component of the labor budget.

137. That RNs are the highest paid employees among the nursing staff.

138. That experienced, more senior, RNs cost more on an hourly basis than less experienced, less senior RNs.

139. An MDS is prepared for each resident of a nursing facility regardless of who is paying for their stay in the nursing facility.

140. MDSs are required to be prepared when a resident initially arrives at the facility and periodically thereafter depending on the course of the resident's medical profession.

141. At a minimum, an MDS is to be prepared for every resident in a nursing facility on a quarterly basis.

142. The completion of an MDS by a nursing facility is a part of the federally mandated process for clinical assessments of all residents in nursing facilities. MDSs need to be as detailed and comprehensive as possible so that they reflect all of the needs of each of the residents in the nursing facility. When done properly, an MDS provides a comprehensive assessment of each resident's functional capabilities and helps the staff of a nursing facility identify all of the health problems of each of their residents.

143. The information contained in an MDS is used to slot the resident into a RUG.

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144. RUGs are organized in a hierarchy from residents who will need the greatest amount of resources to residents who will need the least amount of resources during their stay at the nursing facility.

145. Residents who will need the greatest amount of resources are assigned to higher groups in the RUG hierarchy.

146. RUGs also determine the level of compensation a nursing facility will receive in order to provide the level of care necessary for each of their residents.

147. Residents in higher RUGs place higher demands for care and services on the nursing facility and its staff.

148. Providing care to residents in higher RUGs requires more staff and is, therefore, reimbursed at a higher level.

149. The RUG assigned to a resident can be found in section Z of each resident's MDS.

150. The only way to determine the total acuity level and corresponding RUG of each of the residents at Magnolia Manor-Spartanburg on any given day is by examining section Z of ***every*** MDS in effect on that day.

151. Nursing facilities are required to submit an annual "Medicare Cost Report" to CMS known as "CMS Form 2540-10". The cost report is a financial report that identifies the cost and charges related to healthcare treatment activities in a particular nursing facility.

152. Included in the costs are extensive details as to how much money the nursing facility spent on RNs, LPNs, and CNAs during that year based on payroll records. The cost report also reports the resident census, hours paid, and the hourly rate that the nursing facility paid each category of direct caregivers during that year. By dividing the paid hours by the

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resident census it is possible to determine how many hours the nursing facility paid for each category of direct caregivers per resident, per day for the time period covered by that particular cost report. This number is referred to as the "reported HPPD".

153. The reported HPPD is actually an inflated number due to the fact that hours paid includes sick pay and vacation pay. By removing the sick pay and vacation pay from the hours paid the resulting HPPD would be closer to the actual HPPD provided by caregivers to residents in nursing facilities.

154. The actual HPPD for any given nursing facility can be determined by examining the data that nursing facilities use to track the number of hours their employees work. This information is easily accessed through reports that are commonly referred to as "Time Detail Reports", "Punch Detail Data Reports", or some other similarly named report depending on the time-keeping system used by the particular nursing facility. This information can reveal the actual HPPD for any period of time including a year, a quarter, a month, or even a day.

155. Defendants are required to report their staffing levels for RNs, LPNs and aides, the combination of which is commonly called "direct-care providers."

156. The understaffing was particularly egregious as to RN staffing levels. Specifically, Defendants were expected to provide at a minimum an approximate average of 59 minutes of RN direct care based upon the reported resident acuity.

157. Instead Defendants self-reported providing an average of merely 17 minutes during 2015.

158. Indeed, CMS rated Defendants' Facility as being "Below Average" as to this particularly important RN staffing ratio.

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159. This flagrant understaffing is of particular import, as it is indisputable that highly trained RNs are required to perform comprehensive assessments, to create patient care plans, and to provide a greater level of care to patients in need.

160. By failing to provide adequate RN and other staffing, Defendants saved millions of dollars, and put their residents, including Barbara Owens, at greater risk.

161. Indeed, Barbara's death is directly attributable to a lack of assessment and care planning because of the lack of RN staffing.

162. According to CMS expectations, in 2016 Defendants failed to provide the level of staffing necessary to meet the needs of their residents including Barbara Owens. The following chart reflects the difference between CMS' expected level of staffing and the reported level of staffing provided by Defendants expressed in HPPD during the residency for the facility:

| **Third and Fourth Quarter 2015 RN, LPN & CNA Time** | | | | |
|---|---|---|---|---|
| **Reported Hours Per Resident Per Day** | | | | |
| **Aides** | **LPNs** | | **RNs** | **Total Nursing** |
| 2.1225 | .78813 | | .2775 | 1.06563 |
| **2 hours 7 minutes** | **47 minutes** | | **17 minutes** | **1 hour 4 minutes** |
| **Expected Hours Per Resident Per Day** | | | | |
| **Aides** | **LPNs** | | **RNs** | **Total Nursing** |
| 2.51062 | .60011 | | .98738 | 1.58749 |
| **2 hours 31 minutes** | **36 minutes** | | **59 minutes** | **1 hour 35 minutes** |
| **Difference in RN Nursing Time – Reported and Expected** | | | | |
| Data Set—2015 | Reported Time | Expected Time | Difference | % Below/Above Expected |
| Third and Fourth Quarters | 17 minutes | 59 mutes | 42 minutes | 33% |

163. This chart shows that the staffing at the facility was about 30% below what CMS expected based on the acuity of the residents who resided therein during the residency. If sick time and vacation time were removed from the "hours paid" in each of these categories of

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caregivers the actual level of understaffing would turn out to be greater than these numbers indicate. Additionally, whenever more accurate staffing information is made available to Plaintiffs, by way of employee time cards, the percentage of understaffing will likely increase significantly.

164. Based on the CMS cost reports, the facility's understaffing allowed them to profit from the short-staffing.

165. The lack of RN staffing leads to lack of assessments or allowing unqualified LPNs to assess which is outside their scope of practice in violation of the Board of Nursing's Advisory Opinions.

166. According to the South Carolina Board of Nursing Advisory Opinion #21 which constitutes competent and safe nursing practice, the State Board of Nursing for South Carolina has determined that it is NOT within the role and scope of practice for the licensed practical nurse (LPN) to perform physical assessments. It is within the role of the LPN to assist with the collection of patient health data to be used for the complete physical assessment. However, the analysis and synthesis of clinical information and the formulation of problem statements and/or nursing diagnoses requires the knowledge base and skills that are within the scope of practice of the registered nurse (RN) and may NOT be delegated to the LPN.

167. According to the South Carolina Board of Nursing Advisory Opinion #46 which constitutes competent and safe nursing practice, the Board of Nursing for South Carolina recognizes that it is NOT within the role and scope of the licensed practical nurse (LPN) to evaluate and/or stage vascular, diabetic/neuropathic or pressure ulcers. However, the LPN may collect and document health data related to vascular, diabetic /neuropathic and/or pressure

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ulcer(s) in order to assist the RN with decisions regarding wound classification/stage and continued management.

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

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

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

170. Defendants knew or should have known that a number of studies have found that for-

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profit ownership is related to poorer quality of care than nonprofit ownership (Hillmer et al. 2005; Comondore et al. 2009).

171. Defendants knew or should have known that there is evidence that nursing home chains, defined as companies that own or operate two or more facilities, also have lower staffing, poor resident outcomes, and more deficiencies (violations of regulations) (Cohen and Spector 1996; Grabowski 2001a, b; Harrington et al. 2001; Banaszak- Holl et al. 2002; O'Neill et al. 2003; Harrington, Mullan, and Carrillo 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).

172. Defendants knew or should have known that the US GAO (2009a) found that the most poorly performing nursing homes in the United States tended to be owned by for-profit chains.

173. Defendants knew or should have known that studies have found that poor nursing home quality is directly related to inadequate staffing levels (Harrington et al. 2000; US Centers for Medicare and Medicaid Services [CMS] 2001; Schnelle et al. 2004; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).

174. Defendants knew or should have known that nurse staffing levels have been documented to have a positive impact on both the process and the outcomes of nursing home care, such as fewer pressure ulcers, improved functional status, better mortality rates, and fewer deficiencies for poor quality (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Castle and Engberg 2007, 2008; Castle 2008).

175. Defendants knew or should have known that a systemic review of 87 research articles and

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reports from 1975 to 2003 found that high total staffing levels, especially licensed staff, were associated with higher quality of care (Bostick et al. 2006).

176. Defendants knew or should have known that the Relationship of Nursing Home Staffing to Quality of Care at HSR: Health Services Research 39:2 (April 2004) study is supported by other correlational data documenting a relationship between staffing (particularly RNs) and a variety of outcomes, including: lower death rates, higher rates of discharges to home, improved functional outcomes fewer pressure ulcers, fewer urinary tract infections, lower urinary catheter use, and less antibiotic use (Linn, Gurel, and Linn 1977; Nyman 1988; Munroe 1990; Cherry 1991; Spector and Takada 1991; Aaronson, Zinn, and Rosko 1994; Bliesmer et al. 1998; Harrington et al. 2000; U.S. Department of Health and Human Services 2000b).

177. Defendants knew or should have known that inadequate staffing has been associated with inadequate feeding assistance during meals, poor skin care, lower activity participation, and less toileting assistance (Spector and Takada 1991; Kayser-Jones 1996, 1997; Kayser-Jones and Schell 1997).

178. Defendants knew or should have known that lower staffing levels, especially RN staffing, translate into lower labor costs, which appears to be a management strategy by the top 10 chains as well as other for- profit facilities to reduce costs. Nurse Staffing and Deficiencies in the Largest For-Profit Nursing Home Chains and Chains Owned by Private Equity Companies. DOI: 10.1111/j.1475-6773.2011.01311.x

179. Defendants knew or should have known that low staffing levels are a major concern because low staffing, especially RN staffing, have been associated with more federal

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deficiencies and poorer resident outcomes as noted in previous studies (Cohen and Spector 1996; Harrington et al. 2000; Grabowski 2001a, b; US CMS 2001; Schnelle et al. 2004; Zhang and Grabowski 2004; Bostick et al. 2006; Castle and Engberg 2007, 2008; Castle 2008; Kim, Harrington, and Greene 2009a; Kim et al. 2009b).

180. Defendants knew or should have known that a clear link has been demonstrated between lower nurse staffing levels in nursing homes and adverse patient outcomes.

181. Defendants knew or should have known that numerous studies have shown positive relationships between staffing levels for different types of staff (RN, LPN, nursing assistant) and a range of quality measures (e.g. number of deficiencies, functional improvement, pressure ulcer rates, and discharged home). See Feuerberg M, Reilly K, Kramer AM, Kane RA. "Review of selected research on nursing home staffing and resident outcomes. Chapter 6 in Appropriateness of Minimum Nurse Staffing Ratios in Nursing Homes." Health Care Financing Administration, 2000; Bliesmer MM, Smayling M, Kane RL, Shannon I. The relationship between nursing staffing levels and nursing home outcomes. J Aging Health 1998; 10(3):351-371; Cohen JW, Spector WD. The effect of Medicaid reimbursement on quality of care in nursing homes. J Health Econ 1996; 15:23-48; Harrington C, Zimmerman D, Karon S, Robinson J, Bjorkling F. Nursing home staffing and its relationship to deficiencies. (This research was funded by the Health Care Financing Administration and the Agency for Health Policy & Research). 1999; and Spector WD, Takada HA. Characteristics of nursing homes that affect resident outcomes. J Aging Health 1991; 3(4):427-454.

182. Defendants knew or should have known that more RN direct care time per resident per day

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(examined in 10-minute increments up to 30 to 40 minutes per resident per day) was associated with fewer pressure ulcers, hospitalizations, and UTIs; less weight loss, catheterization, and deterioration in the ability to perform ADLs; and greater use of oral standard medical nutritional supplements.

183. Defendants knew or should have known that more certified nursing assistants and licensed practical nurse time was associated with fewer pressure ulcers, negative outcomes, and nutritional deficits.

184. Defendants knew or should have known that pressure ulcers are wounds caused by excessive and prolonged pressure on skin.

185. Defendants knew or should have known that the vast majority of pressure ulcers are avoidable or preventable with appropriate care.

186. Stage 1 ulcers are persistent redness of the skin over a pressure point; stage 2 involves a break in the skin; stage 3 is defined by penetration of the wound below the skin; and stage 4 is damage to underlying muscle and/or bone.

187. Defendants knew or should have known that prevention of pressure ulcers requires mobilizing patients to relieve pressure or off-loading at least every 2 hours and keeping skin clean and dry - both are labor-intensive in immobilized residents.

188. Defendants knew or should have known that when staffing is inadequate and supervision is poor, residents with dysphagia, severe cognitive and functional impairment requiring assistance at mealtime are at great risk for dehydration.

189. Defendants knew or should have known adequate fluid intake can be achieved by simple interventions such as offering residents preferred liquids systematically and by having an

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adequate number of supervised staff help them to drink while properly positioned.

190. Because of their joint venture, Defendants have a joint obligation to sufficiently staff the facility to ensure that each of their residents received the necessary care and services in order for them to attain or maintain the highest practicable physical, mental, and psychosocial well-being, consistent with the resident's comprehensive assessment and plan of care.

191. This joint obligation required Defendants to base the number of Registered Nurses (RNs), Licensed Practical Nurses (LPNs), and Certified Nurse Aides (CNAs) to be provided at Magnolia Manor-Spartanburg not only upon the number of residents residing in their facility (commonly referred to as "resident census") but also on the intensity of nursing care or acuity required by their residents' needs.

192. Plaintiffs allege that Defendants jointly exercised control over the operation and management of Magnolia Manor-Spartanburg prior to and during Barbara Owens' period of residency therein, including but not limited to, the creation, setting, funding and/or implementation of budgets; the monitoring of resident acuity levels; the monitoring of staffing levels; control over resident admissions and discharges; and control over the number of hours of direct care provided to the residents by RNs, LPNs, and CNAs.

193. Plaintiffs allege that each of these managerial and operational functions had a direct impact on the amount and quality of care delivered to Barbara Owens while she resided at Magnolia Manor-Spartanburg and were taken in furtherance of operational and managerial objectives.

194. Plaintiffs allege that Defendants engaged in a systematic process of understaffing Magnolia Manor-Spartanburg making it impossible for the staff to meet the individual needs of their

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residents during Barbara Owens' period of residency therein.

195. Plaintiffs allege that this understaffing, although quite profitable for Defendants, directly resulted in their failure to provide the necessary and basic services Barbara Owens needed in order to prevent her health from declining and to maintain her health, safety, and well-being.

196. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(6) "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health or safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services. Neglect may be repeated conduct or a single incident which has produced or can be proven to result in serious physical or psychological harm or substantial risk of death. Noncompliance with regulatory standards alone does not constitute neglect.

197. Neglect includes the inability of a vulnerable adult, in the absence of a caretaker, to provide for Barbara Owens' own health or safety which produces or could reasonably be expected to produce serious physical or psychological harm or substantial risk of death.

198. According to the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11), a "Vulnerable adult" means a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for her own care or protection. This includes a person who is impaired in the ability to adequately provide for the person's own care or protection because of the infirmities of aging including, but not limited to, organic brain damage, advanced age, and physical, mental, or emotional dysfunction. A resident of a facility is a vulnerable adult.

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199. Plaintiff Barbara Owens was a resident of Defendant facility and was therefore a vulnerable adult under the South Carolina Omnibus Adult Protection Act in S.C. Code Section 43-35-10(11).

200. According to the Federal Nursing Home Act at 42 CFR 483.35, the facility must have sufficient nursing staff with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §483.70(e).

201. Federal Regulation for nursing homes 483.25(j) (F327) states: "The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health."

202. Federal Regulation for nursing homes 483.25 (g) (F322) states: "A resident who is fed by enteral means receives the appropriate treatment and services to restore, if possible, oral eating skills and to prevent complications of enteral feeding including but not limited to aspiration pneumonia, diarrhea, chronic vomiting, dehydration, metabolic abnormalities..."

203. Federal Regulation for nursing homes 483.25 (d) (F315) states: "Based on the resident's comprehensive assessment, the facility must ensure that -

> (1) A resident who enters the facility without an indwelling catheter is not catheterized unless the resident's clinical condition demonstrates that catheterization was necessary; and
> (2) A resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible.

204. The federal requirement for staffing is that the nursing home must provide sufficient

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staffing to meet all of the needs of all of the residents at all times. 42 CFR 483.30(a).

205. Providing adequate and appropriate staffing, resources and financial solvency to a facility is crucial to meeting the needs of the residents.

206. The regulations are exact in what information must be provided:

> (i) **Staffing data for each facility (including resident census data and data on the hours of care provided per resident per day) based on data submitted under section 1128I(g) [42 USCS § 1320a-7j(g)],** including information on staffing turnover and tenure, in a format that is clearly understandable to consumers of long-term care services and allows such consumers to compare differences in staffing between facilities and State and national averages for the facilities. Such format shall include--
>
> (I) concise explanations of how to interpret the data (such as a plain English explanation of data reflecting "nursing home staff hours per resident day");
>
> (II) **differences in types of staff (such as training associated with different categories of staff);**
>
> (III) **the relationship between nurse staffing levels and quality of care**; and
>
> (IV) an explanation that appropriate staffing levels vary based on patient case mix.
>
> 42 USCS § 1395i-3.

207. S.C. Regulation 61-17 Section 603(A) states that the facility must meet the following standard: "There shall be direct care staff adequate in number and skill in the facility at all times to provide nursing and related care and services to attain or maintain the highest practicable physical, mental, and psychosocial health and safety of each resident, as determined by resident assessments and ICPs.[care plans]"

208. S.C. Regulation 61-17 Section 605(A) states that the facility must meet the following standard: "An adequate number of licensed nurses shall be on duty to meet the total nursing needs of residents. Licensed nursing staff shall be assigned to duties consistent with their scope of practice as determined through their licensure and educational preparation.

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209. S.C. Regulation 61-17 Section 605(B) states that the facility must meet the following standard for unlicensed Nursing Staff: "The required number of nurse aides and other unlicensed nursing staff shall be determined by the number of residents assigned to beds at the facility. Additional staff members shall be provided if the minimum staff requirements are inadequate to provide appropriate care and services to the residents of a facility."

210. S.C. Regulation 61-17 Section 601(E) states that the facility must meet the following standard regarding staffing information: "Time schedules shall be maintained indicating the numbers and classification of all staff, including relief staff, who work on each shift of duty. The time schedules shall reflect all changes so as to indicate who actually worked."

211. S.C. Regulation 61-17 Section 803(B) states that the facility must meet the following standard regarding the resident's Individual Care Plan (ICP): The ICP shall describe:

> 1. The needs of the resident, including the services that are to be furnished, *i.e.*, what assistance, how much, who will provide the assistance, how often, and when;
> 2. Advance directives and healthcare power-of-attorney, as applicable;
> 3. Recreational and social activities that are suitable, desirable, and important to the resident;
> 4. Dietary needs and preferences of resident as approved by a physician;
> 5. Discharge planning, to include assessing continuing care needs and developing a plan designed to assure the resident's needs will be met after discharge or transfer.

212. S.C. Regulation 61-17 Section 601(H) states that the facility must meet the following standard regarding third party providers: "When a facility engages a source other than the facility to provide services normally provided by the facility, *e.g.*, staffing, training, recreation, meal service, social services, professional consultant, maintenance, transportation, there shall be a written agreement with the source that describes how and when the services are to be provided, the exact services to be provided, and the requirement

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that these services are to be provided by qualified individuals. The source shall comply with this regulation in regard to resident care, treatment, services, and rights.

213. S.C. Regulation 61-17 Section 805(B) states that the facility must meet the following standard regarding the resident's Electronic Resident Records: "A facility that maintains electronic records shall:

1. Retain the hard copy originals of any materials that cannot be electronically stored;
2. Employ an off-site backup storage system as protection in the event that the on-site system is damaged or destroyed;
3. Use an imaging mechanism that is able to copy documents with signatures;
4. Assure that records, once put in electronic form, are unalterable.

214. S.C. Regulation 61-17 Section 805(C) states that the facility must meet the following standard regarding the resident's **Electronic Resident Records:** "Electronic signatures may be used any place in the resident or outpatient record that requires a signature, provided signature identification can be verified and an electronic signature may be legally used. Electronic authorization shall be limited to a unique identifier (confidential code) used only by the individual making the entry to preclude the improper or unauthorized use of any electronic signature.

215. The facility as a health care provider maintains electronic records which requires the facility to maintain an audit trail. See the requirements of 45 CFR §164.312.

216. The audit trail is a document that shows the sequence of events related to the use of and access to an individual patient's electronic health records (EHR). For instance, the audit trail will reveal who accessed a particular patient's records, when, and where the health care provider accessed the record.

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217. The audit trail shows what the provider did with the records—e.g., simply reviewed them, prepared a note, or edited a note. Each time a patient's EHR is opened, regardless of the reason, the audit trail documents this detail.

218. The audit trail cannot be erased and all events related to the access of a patient's EHR are permanently documented in the audit trail.

219. 45 C.F.R. § 164.306(a)(1) commands the facility . . . to "[e]nsure the confidentiality, integrity, and availability of all electronic protected health information [that it] creates, receives, maintains, or transmits."

220. 45 C.F.R. § 164.304 provides that "availability" in this context means "that data or information is accessible and useable upon demand by an authorized person."

221. 45 C.F.R. § 164.308(a)(7)(ii) provides that a facility . . . must "[e]stablish and implement procedures to create and maintain retrievable exact copies of electronic protected health information."

222. 45 C.F.R. § 164.312(b) provides that a facility . . . must "[i]mplement hardware, software, and/or procedural mechanisms that record and examine activity in information systems that contain or use electronic protected health information."

223. 45 C.F.R. § 170.210(b) requires that "[t]he date, time, patient identification, user identification . . . must be recorded when electronic health information is created, modified, accessed, or deleted; and an indication of which action(s) occurred and by whom must be recorded."

224. 21 C.F.R. § 11.10(e) provides that a facility shall employ procedures and controls including the "[u]se of secure, computer generated, time-stamped audit trails to independently record

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the date and time of operator entries and actions that create, modify, or delete electronic records" and that "[s]uch audit trail documentation shall be retained for a period at least as long as that required for the subject electronic records . . . ."

225. 21 C.F.R. § 11.10(k)(2) states that a facility shall employ appropriate controls over systems documentation including "[r]evision and change control procedures to maintain an audit trail that documents time-sequenced development and modification of systems documentation."

226. 42 U.S.C. §1320d-2(d)(2) provides that a facility . . . "shall maintain reasonable and appropriate administrative, technical, and physical safeguards —(A) to ensure the integrity and confidentiality of the [health] information; (B) to protect against any reasonably anticipated—(I) threats or hazards to the integrity of the information; and (ii) unauthorized uses or disclosures of the information . . . ."

227. 42 U.S.C. § 1320d(6) [provides that] "individually identifiable health information" is defined to include "any information . . . created or received by a health care provider . . . [that] relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and . . . identifies the individual; or . . . can be used to identify the individual."

228. S.C. Regulation 61-17 Section 607(A) states that the facility must meet the following standard regarding training: "Staff members shall be provided the necessary training to perform the duties for which they are responsible."

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229. S.C. Regulation 61-17 Section 607(B) states that the facility must meet the following standard regarding training: "Before performing any duties, all newly-hired staff members shall be oriented to the facility organization and physical plant, specific duties and responsibilities of staff members, and residents' needs. All staff members shall be instructed in the provisions of S.C. Code Section 43-35-5 et seq., "Omnibus Adult Protection Act" and S.C. Code Section 44-81-10 et seq., "Bill of Rights for Residents of Long-Term Care Facilities" as well as other rights and assurances as required in this regulation.

230. S.C. Regulation 61-17 Section 607(C) states that the facility must meet the following standard regarding training: "All staff shall be provided in-service training programs that identify training needs related to problems, needs, care of residents and infection control and are sufficient to assure staff's continuing competency. Training for the tasks each staff member performs shall be conducted in order to provide the care, treatment, procedures, and/or services delineated in Section 1000."

231. S.C. Regulation 61-17 Section 601(D) states that the facility must meet the following standard regarding employee information: "There shall be accurate current information maintained regarding all staff members of the facility that shall include:

1. Name, address and telephone number;
2. Date of hire;
3. Past employment, experience, and education;
4. Professional licensure or registration number or certificate or letter of completion;
5. Position in the facility and job description;
6. Documentation of orientation to the facility, including residents' rights, regulation compliance, policies and procedures, job duties, in-service training and on-going education;
7. Health status, health assessment, and tuberculin testing results;

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8. Evidence that a criminal record check has been completed;
9. For former staff members, the date of separation;
10. Date of initial resident contact may be maintained by the facility.

232. According to §483.20 applicable to nursing homes, a Resident Assessment requires the facility to provide with ongoing assessment information necessary to develop a care plan, to provide the appropriate care and services for each resident, and to modify the care plan and care/services based on the resident's status. The facility is expected to use resident observation and communication as the primary source of information when completing the RAI. In addition to direct observation and communication with the resident, the facility should use a variety of other sources, including communication with licensed and non-licensed staff members on all shifts and may include discussions with the resident's physician, family members, or outside consultants and review of the resident's record.

233. According to CMS' Long-Term Care Facility Resident Assessment Instrument 3.0 User's Manual Section 2.4, the Federal regulatory requirement at 42 CFR 483.20(d) requires nursing homes to maintain all resident assessments completed within the previous 15 months in the resident's active clinical record.

234. According to §483.20(k) applicable to nursing homes related to Comprehensive Care Plans:

(1) The facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet a resident's medical, nursing, and mental and psychosocial needs that are identified in the comprehensive assessment. The care plan must describe the following:

(i) The services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under §483.25; and

(ii) Any services that would otherwise be required under §483.25 but are not provided due to the resident's exercise of rights under §483.10, including the right to refuse treatment under §483.10(b)(4).

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235. Defendants' facility had a duty to properly assess, care plan, and attempt interventions to prevent avoidable injuries, infections, nutritional deficits, pressure ulcers, and other preventable injuries.

236. According to §483.25 related to Quality of Care requires the facility to provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

237. S.C. Regulation 61-17 Section 701(A) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall maintain a record of each accident and incident, including each serious accident and incident as defined in Section 701.B, involving residents or staff members or volunteers, occurring in the facility or on the facility grounds. A facility's record of each accident and incident shall be reviewed, investigated if necessary, evaluated in accordance with facility policies and procedures, and retained by the facility for six (6) years after the resident stops receiving services.

238. S.C. Regulation 61-17 Section 701(E) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall retain a copy of every serious accident and incident with all of the information provided to the Department and the names, injuries, and treatments associated with each resident, staff, and/or visitor involved. A facility shall retain all serious accident and incident records for six (6) years after the resident stops receiving services."

239. S.C. Regulation 61-17 Section 801(B) states that the facility must meet the following standard regarding documentation in the resident record: "Contents of the resident record

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may be stored in separate files, in separate areas within the facility, and the record shall include the following information:

1. Medical history and physical examination;
2. Consent form for treatment signed by the resident or legal representative;
3. Care and services agreement;
4. Healthcare directives and special information, *e.g.*, advance directive information, do-not-resuscitate (DNR) orders, allergies;
5. **Incidents involving the resident**;
6. Medical treatment;
7. Orders, including telephone and standing orders, for all medication, care, services, therapy, procedures, and diet from physicians or other legally authorized healthcare providers, which shall be completed prior to, or at the time of admission, and subsequently, as warranted;
8. Individual Care Plan;
9. Provisions for routine and emergency medical care, to include the name and telephone number of the resident's physician;
10. **Assessments and progress notes**, *e.g.*, dietary, activity, therapy;
11. Record of administration of each dose of medication;
12. Record of the use of restraints, if applicable, including time, type, reason and authority for applying;
13. **Treatment, procedure, wound care report (dictated or written into the record after treatment, procedure, or wound care) to include at least**:

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

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m. Date and circumstances of death, as applicable.

240. The federal regulation at §483.75(l) related to documentation in the clinical records requires: (1) The facility must maintain clinical records on each resident in accordance with accepted professional standards and practices that are--

(i) Complete;
(ii) Accurately documented;
(iii) Readily accessible; and
(iv) Systematically organized.

241. Defendants' facility had a duty to document the respective interventions, treatments, and assessments adequately in the nurses' notes.

242. S.C. Regulation 61-17 Section 701(D) states that the facility must meet the following standard regarding accidents and incidents: "A facility shall submit a written report of its investigation of every serious accident and incident to the Department within five (5) days of the serious accident or incident. A facility's written report to the Department shall provide at a minimum:

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

243. S.C. Regulation 61-17 Section 701(B) states that the facility must meet the following

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standard regarding accidents and incidents: "A facility shall report every serious accident and incident that results in resident's death or significant loss of function or damage to a body structure, not related to the natural course of a resident's illness or underlying condition or normal course of treatment, and resulting from an accident or incident occurring to resident within the facility or on the facility grounds. Serious accidents and incidents requiring reporting include, but are not limited to:

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

244. S.C. Regulation 61-17 Section 500(A) states that the facility must meet the following standard: "There shall be written policies and procedures addressing the manner in which the requirements of this regulation shall be met. The written policies and procedures shall accurately reflect actual facility practice regarding care, treatment, procedures, services, record keeping and reporting, admission and transfer, physician services, nursing services, social services, resident rights and assurances, medication management, pharmaceutical services, meal service operations, emergency procedures, fire prevention, maintenance, housekeeping and infection control, the operation of the facility, and other special care and procedures as identified in this section. The policies and procedures shall address the provision of any special care offered by the facility that would include how the facility shall meet the specialized needs of the affected residents such as Alzheimer's disease

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and/or related dementia, physically or developmentally disabled, in accordance with any laws that pertain to that service offered, for example, Alzheimer's Special Care Disclosure Act."

245. S.C. Regulation 61-17 Section 500(C) states that the facility must meet the following standard: "All policies and procedures shall:

1. Establish a time period for review of policies and procedures in writing and such reviews shall be documented;
2. Be revised as appropriate in order to reflect actual facility practice; and
3. Be accessible to staff, printed or electronically, at all times."

246. The facility Administrator shall be licensed as a nursing home Administrator in accordance with S.C. Code Section 40-35-30. In addition, all other applicable provisions of S.C. Code Title 40, Chapter 35, shall be followed.

247. S.C. Regulations applicable to nursing homes found in 61-17 Section 602 requires that "each facility shall have a full-time licensed Administrator".

248. S.C. Code Section 40-35-110 states that "Misconduct" includes the following:

(1) acting in a manner inconsistent with the health or safety of the patients of the nursing home or community residential care facility;
(2) failing to ensure that the nursing home or community residential care facility in which he is an administrator complies with the provisions of law and regulations of the licensing or supervising authority or agency, whether federal, state, or local, having jurisdiction over the operation and licensing of the nursing home or community residential care facility;
(3) intentional or knowing, direct or indirect, violation of or the aiding and abetting in the violation of this chapter or a regulation promulgated under this chapter;
(4) failing to operate a nursing home or community residential care facility in a manner that ensures the safety, health, and welfare of the patients;
(5) use of a false, fraudulent, or forged statement in the practice of nursing home administration or community residential care facility administration.

249. The federal regulation at §483.25(l) states that: "Each resident's drug regimen must be free from unnecessary drugs."

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250. An unnecessary drug is any drug when used:

(i) In excessive dose (including duplicate therapy); or
(ii) For excessive duration; or
(iii) Without adequate monitoring; or
(iv) Without adequate indications for its use; or
(v) In the presence of adverse consequences which indicate the dose should be reduced or discontinued; or
(vi) Any combinations of the reasons above.

251. Based on a comprehensive assessment of a resident, the facility must ensure that:

(i) Residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and
(ii) Residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue these drugs.

252. The intent of requirement 483.25(l) is that each resident's entire drug/medication regimen be managed and monitored to achieve the following goals:

- The medication regimen helps promote or maintain the resident's highest practicable mental, physical, and psychosocial well-being, as identified by the resident and/or representative(s) in collaboration with the attending physician and facility staff;
- Each resident receives only those medications, in doses and for the duration clinically indicated to treat the resident's assessed condition(s);
- Non-pharmacological interventions (such as behavioral interventions) are considered and used when indicated, instead of, or in addition to, medication;
- Clinically significant adverse consequences are minimized; and
- The potential contribution of the medication regimen to an unanticipated decline or newly emerging or worsening symptom is recognized and evaluated, and the regimen is modified when appropriate.

253. Based on a resident's comprehensive assessment, the facility must ensure that a resident--

§483.25(i)(1) Maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless the resident's clinical condition demonstrates that this is not possible; and
§483.25(i)(2) Receives a therapeutic diet when there is a nutritional problem.

254. The intent of this requirement is that the resident maintains, to the extent possible,

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acceptable parameters of nutritional status and that the facility:

a. Provides nutritional care and services to each resident, consistent with the resident's comprehensive assessment;
b. Recognizes, evaluates, and addresses the needs of every resident, including but not limited to, the resident at risk or already experiencing impaired nutrition; and
c. Provides a therapeutic diet that takes into account the resident's clinical condition, and preferences, when there is a nutritional indication.

255. The federal regulation at §483.25(j) requires that: "The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health.

256. The intent of this regulation is to assure that the resident receives sufficient amount of fluids based on individual needs to prevent dehydration.

257. "Sufficient fluid" means the amount of fluid needed to prevent dehydration (output of fluids far exceeds fluid intake) and maintain health. The amount needed is specific for each resident, and fluctuates as the resident's condition fluctuates (e.g., increase fluids if resident has fever or diarrhea).

258. The federal regulation at §483.75(j) requires that: "The facility must provide or obtain laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services."

259. The intent of this regulation is to assure that laboratory services are accurate and timely so that the utility of laboratory testing for diagnosis, treatment, prevention or assessment is maximized. The facility is responsible for quality and timely laboratory services whether or not services are provided by the facility or an outside agency.

260. The federal regulation at §483.75(j) requires that: "The facility must ensure that

> (1) The medical care of each resident is supervised by a physician; and
> (2) Another physician supervises the medical care of residents when their attending physician is unavailable."

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261. The intent of this regulation is to ensure the medical supervision of the care of nursing home residents by a personal physician.

262. The federal regulation at §483.75(k) requires that: "The facility must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services."

263. That while at the Fundamental facility, Barbara Owens suffered from preventable injuries that caused mental anguish, pain and suffering, including one that resulted in her wrongful death.

264. That while at the Fundamental facility, Barbara Owens became septic requiring hospitalizations.

265. That complications from the sepsis led to her untimely and wrongful death.

266. That the facility failed to monitor Barbara Owens for changes in condition.

267. Defendants' facility had a duty to ensure that proper preventative measures were in place to keep the resident safe and free from avoidable and preventable infections and pressure injuries.

268. Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Barbara Owens.

269. That at all times relevant hereto, Defendants were required to exercise due care in the supervision and care of their residents to prevent the occurrence of new adverse health conditions and to prevent currently existing adverse health conditions from deteriorating.

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270. That the facility must develop a comprehensive care plan for each resident that includes measurable objectives and timetables to meet the resident's medical nursing, nutritional, mental, and psychological needs as identified in the comprehensive assessment.

271. That the facility must have sufficient nursing staff to provide nursing and related services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident, as determined by resident assessments and individual plans of care.

272. That the nursing home had a duty to ensure that Barbara Owens received necessary treatment and services to promote healing and prevent infection from progressing to sepsis.

273. That treatment and prevention of infection in the nursing home should be part of an interdisciplinary approach.

274. That several types of personnel have essential roles in the assessment, care planning, prevention, and treatment of infection.

275. That evaluation, multi-disciplinary documentation of treatment, and detailed individual care plans must be developed and implemented.

276. That the acts and delicts of Defendants caused, and were the proximate causes of Plaintiff's injuries, infection, sepsis, loss of dignity, hospitalization, conscious pain and suffering, mental distress, medical bills and disability to the Barbara Owens.

277. That the Plaintiffs institute this action in order to recover for Barbara's injuries and wrongful death, and for damages to the statutory heirs of Barbara Owens, deceased, pursuant to and under the authority of S.C. Code § 15-51-10.

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278. Pursuant to S.C. Code § 15-51-20, the wrongful death beneficiaries and claimants as defined by S.C. Code § 15-31-26(2) are Barbara Owens' children: Mary Jane McCraw (Claimant #2), Roger Owens (Claimant #3), and Kay Leatherwood (Claimant #4).

279. As a result of the death of Barbara Owens, the wrongful death beneficiaries have suffered grief and sorrow, mental shock and suffering, wounded feelings, loss of companionship, and deprivation of the use and comfort of the Barbara's society. These damages were the proximate result of the acts and delicts of Defendants.

280. That the Defendants were jointly, directly, and vicariously liable and responsible for the acts and delicts of their employees, agents, and servants.

281. That the Defendants hold themselves out as specialists in the field of adult - geriatric care with the expertise necessary to maintain the health, safety, and highest practicable quality of life of persons unable to adequately care for themselves.

282. That the Defendants were under a duty to provide reasonable, appropriate and adequate care to Barbara Owens pursuant to state and federal laws, rules, regulations, guidelines, and existing industry standards.

a. Defendants failed to provide the highest practicable level of care, training, competency. (42 CFR § 483.75)
b. Defendants repeatedly failed to maintain nursing and other staffing at levels necessary to meet the needs of Barbara Owens. 42 CFR §§ 483.30 and 483.25)
c. Defendants failed to provide proper and timely assessments. 42 CFR §§ 483.35 and 483.25)
d. Defendants repeatedly failed to follow proper skilled nursing care standards to maximize the health, safety, and well-being of Barbara Owens.
e. Defendants repeatedly failed to ensure that Barbara Owens was safe, free from abuse, neglect, and accorded the dignity and respect owed.

283. Defendants failed to follow, implement, and adhere to all physician's orders.

284. Defendants failed to establish and implement a resident care plan for Barbara Owens based upon her needs.

285. That at all times pertinent hereto, Barbara Owens resided at the above-named facility and as such was under the exclusive control and care of Defendants and their employees, agents, officers, and servants while a resident.

286. That the Defendants, their officers, agents, servants, and employees negligently and carelessly failed to provide care and treatment to Barbara Owens.

287. That, upon information and belief, at all times during Barbara Owens' residency, the facility was understaffed, suffered a high turnover rate, and failed to properly screen, train, supervise, and discipline their staff, and failed to put them in suitable positions for their skills, experience, and competence.

288. That, upon information and belief, Defendants FCOS and FAS, were involved in the budget and staffing decisions of the facility, and were more concerned about profits and siphoning funds to the Fundamental chain than creating a budget that provided quality care to the residents.

289. That, upon information and belief, at all times during Barbara Owens' residency, the facility was underfunded, under-supplied, and under-equipped to care for residents, and was forced to operate on a budget that did not allow for the best care of the residents, including

290. That, upon information and belief, Defendants were jointly, directly, and vicariously liable and also liable as alter ego defendants in creating the budget for the facility and siphoning money away from the facility to related entities with common ownership to the Defendants.





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## ALLEGATIONS REGARDING DEFENDANTS' JOINT VENTURE

291. Relevant and consistent allegations contained in paragraphs 1-290 are incorporated by reference as if written verbatim herein.

292. Plaintiffs allege that Defendants were engaged in a joint venture in the operation of Magnolia Manor-Spartanburg.

293. Defendants' joint venture in the operation of Magnolia Manor-Spartanburg included:

a. an agreement, express or implied, among the members of the group;
b. a common purpose to be carried out by the group;
c. a community of pecuniary interest in that purpose, among the members; and
d. an equal right to a voice in the direction of the enterprise, which give an equal right of control.

294. Because of the joint venture, Defendants owed a joint duty to Barbara Owens to provide the same level of care and treatment as any other reasonable, prudent, similar business that owns, operate, manages, and/or controls a nursing facility would have provided under the same or similar circumstances taking into consideration Barbara Owens' known medical condition.

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

295. Relevant and consistent allegations contained in paragraphs 1-294 are incorporated by reference as if written verbatim herein.

296. That Defendants had a duty of due care to their patients and residents, to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.

297. The Defendants by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless and grossly negligent and deviated from the expected

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standards of skill, care, and learning in their treatment of Barbara Owens. More particularly the Defendants were negligent in the following particulars:

a. failing to properly supervise as required, and as promised to the family upon admission;
b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Barbara Owens, which was required by law and which was necessary for Barbara Owens' health and safety;
c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Barbara Owens;
d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Barbara Owens;
e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
f. failing to hire a sufficient number of trained and competent staff;
g. failing to follow the licensing and regulatory rules of the State of South Carolina;
h. failing to develop and follow an appropriate Plan of Care;
i. failing to properly train employees to deal with residents who were unable to care for themselves;
j. failing to follow physicians' orders;
k. failing to prevent infection from developing and/or failing to provide necessary and proper treatment of the infection;
l. failing to properly monitor Barbara Owens;
m. failing to appropriately assess Barbara Owens' condition;
n. failing to provide timely emergency services to Barbara Owens;
o. failing to update the written plan of care to include necessary interventions;
p. failing to include necessary interventions to monitor for signs and/or symptoms of infection in the written plan of care;
q. failing to monitor and assess Barbara Owens adequately for change sin condition including vomiting, pain and discomfort;
r. failing to treat Barbara Owens with dignity and respect;
s. failing to exercise due care; and
t. by other negligent acts and/or omissions yet to be determined or defined.

298. That the Defendants independently and through their agents, servants, and employees demonstrated conscious and intentional disregard of and indifference to the rights and safety of Barbara Owens and other residents at the Fundamental facility as demonstrated by:

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a. Their business practice of attempting to care for residents with an inadequate number of trained staff, which their officers and managers knew or should have known was reasonably likely to result in injury to Barbara Owens and their other patients; and

b. Their business practice of failing to supervise and train their staff in order to ensure that their policies and procedures were known to and adhered to by licensed staff, and that licensed staff practiced within their scopes of practice.

299. That as a result, Barbara Owens experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills and wrongful death. As a further result, Barbara Owens' wrongful death beneficiaries suffered the damages and injuries stated herein above.

300. That the aforesaid acts and delicts were the sole and proximate cause of Barbara Owens' damages, injuries and death, and were the sole and proximate cause of the damage and injuries sustained by the wrongful death beneficiaries.

**SECOND CAUSE OF ACTION**
**(Corporate Negligence)**

301. Relevant and consistent allegations contained in paragraphs 1-300 are incorporated by reference as if written verbatim herein.

302. That Defendants had a duty of due care to residents; to discover, warn and/or prevent risks; to take reasonable safety precautions; to eliminate unreasonable risks; and to provide proper protection from harm.

303. That the Fundamental facility was negligently managed by Defendants FCOS and FAS who were working together to manage and operate the facility for the sole benefit of the Fundamental chain.

304. That the facility was negligently administrated in violation of 42 C.F.R. 483.75 by Defendants FCOS and FAS who were working together to govern, administer, control,

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manage and operate the facility on behalf of and for the sole benefit of the Fundamental chain.

305. That the Defendants, by and through their agents, servants, and employees, were negligent, willful, wanton, reckless, careless, and grossly negligent and deviated from the expected standards of skill, care, and learning in their treatment of Barbara Owens. More specifically, the Defendants were negligent in the following particulars:

a. failing to properly supervise as required, and as promised to the Plaintiffs upon admission;
b. failing to provide the care, supervision and monitoring of patients, residents, and in particular Barbara Owens, which was required by law and which was necessary for Barbara Owens' health and safety;
c. failing to hire, train, and supervise personnel to properly prevent injuries to residents and, in particular, Barbara Owens;
d. failing to provide sufficient numbers of qualified personnel including nurses, nurse assistants, medication aides, and/or orderlies to meet the total needs of Barbara Owens;
e. failing to abide by applicable federal and state laws governing long term care facilities and nursing care;
f. failing to hire a sufficient number of trained and competent staff;
g. failing to follow the licensing and regulatory rules of the State of South Carolina;
h. failing to develop and follow an appropriate Plan of Care;
i. failing to properly train employees to deal with residents who were unable to care for themselves;
j. failing to follow physicians' orders;
k. failing to properly monitor Barbara Owens;
l. failing to appropriately assess Barbara Owens' condition;
m. failing to include necessary interventions to monitor for signs and/or symptoms of infection in the written plan of care;
n. failing to keep Barbara Owens' chart free of fraudulent documentation;
o. failing to treat Barbara Owens with dignity and respect;
p. failing to exercise due care; and
q. by other negligent acts and/or omissions yet to be determined or defined.

306. That as a result, Barbara Owens experienced prolonged conscious pain and suffering, mental anguish and incurred substantial medical bills and death. As a further result, Barbara

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Owens' wrongful death beneficiaries suffered the damages and injuries stated herein above.

307. That the aforesaid acts and delicts were the sole and proximate cause of Barbara Owens' injuries and wrongful death.

**THIRD CAUSE OF ACTION**
**(Joint Venture)**

308. Relevant and consistent allegations contained in paragraphs 1-307 are incorporated by reference as if written verbatim herein.

309. That a joint venture is an association of two or more individuals engaged in a solitary business enterprise for profit without actual partnership or incorporation.

310. That the elements of joint venture in the State of South Carolina are:

a. an agreement;
b. a joint interest in a common business;
c. an understanding that profits and losses will be shared, and;
d. a right to joint control.

311. That a joint venture exists when there is:

a. contribution of resources by both parties;
b. joint proprietorship and control over the subject matter of the property engaged in the venture;
c. sharing of profits by express or implied agreement, and;
d. an express or implied contract showing joint venture.

312. That Defendants were involved in a joint venture in the administration, management, and operation of the nursing home facility.

**FOURTH CAUSE OF ACTION**
**(Alter Ego/Piercing the Corporate Veil)**

313. Relevant and consistent allegations contained in paragraphs 1-312 are incorporated by reference as if written verbatim herein.

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314. That, upon information and belief, Magnolia Manor-Spartanburg was dominated and controlled by Defendants FCOS and FAS as agents of the Fundamental chain before, during, and after Barbara Owens' residency.

315. Defendants and its related entities, agents, and managers siphoned profits from the nursing home chain through self-dealing between the entities, excessively compensated themselves and other executives, and participated in other methods of divesting the licensee entities of needed capital and assets, while allowing the chain to suffer financial losses and provide uniformly poor care across the country as a result of inadequate capitalization and consequently inadequate supplies, resulting in untold numbers of unnecessary injuries, death and suffering, including that of Barbara Owens at Magnolia Manor-Spartanburg.

**FIFTH CAUSE OF ACTION**
**(Amalgamation of Interests)**

316. Relevant and consistent allegations contained in paragraphs 1-315 are incorporated by reference as if written verbatim herein.

317. That Defendants are and have been operating as an amalgamation of interest creating a blurred corporate identity through an integrated enterprise and/or joint venture.

318. That Defendants share a common internet website and intranet site; common headquarters; common policies and procedures; and common in-house counsel.

319. That Defendants Hunt Valley, FCOS, and FAS share a common location at The Highlands, Ridgebrook Road, Sparks, MD 21152.

320. That Defendants participate in the commingling of funds and revenue and file one tax return for all Fundamental entities.

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## SIXTH CAUSE OF ACTION
## (Neglect of a Vulnerable Adult)

321. Relevant and consistent allegations contained in paragraphs 1-320 are incorporated by reference as if written verbatim herein.

322. That, according to the South Carolina Adult Protection Act, at all times relevant hereto Plaintiff was considered a vulnerable adult.

323. That, according to the South Carolina Adult Protection Act, "Neglect" means the failure or omission of a caregiver to provide the care, goods, or services necessary to maintain the health and safety of a vulnerable adult including, but not limited to, food, clothing, medicine, shelter, supervision, and medical services and the failure or omission has caused, or presents a substantial risk of causing, physical or mental injury to the vulnerable adult.

324. That Defendants failed to provide care to Barbara Owens in the form of treatment and services to prevent sepsis and other avoidable injuries which led to hospitalizations and wrongful death.

325. That Defendants failed to provide care and medical services to Barbara Owens by refusing or failing to transfer her to the hospital in a timely manner after an obvious change of condition.

326. That Barbara Owens trusted in, confided in and relied upon Defendants to use their expertise and discretion for Plaintiff's care.

327. That Defendants accepted Barbara Owens' trust and reliance and so became responsible for Barbara Owens' health while residing at the nursing home facility.

328. That as a result of aforementioned reliance and trust upon Defendants, Barbara Owens' physical, mental and emotional health was placed in the hands of Defendants.

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329. That Defendants received compensation for the care and treatment they were responsible for providing to Barbara Owens during her residency but did not provide that care and treatment.

**SEVENTH CAUSE OF ACTION**
**(Wrongful Death)**

330. Relevant and consistent allegations contained in paragraphs 1-329 are incorporated by reference as if written verbatim herein.

331. That as a direct and proximate result of Defendants' negligent, willful, wanton, reckless, careless and grossly negligent conduct, by and through their agents, servants, and employees, Barbara was severely injured.

332. That the injuries so inflicted on Barbara were the cause of Barbara's wrongful death on December 7, 2015.

333. That the sole and proximate cause of all the harms, losses, injuries and death suffered by Barbara Owens and by the wrongful death beneficiaries was the combined and concurrent acts and delicts of all the Defendants and their agents acting in a joint venture and integrated enterprise.

WHEREFORE, Plaintiffs pray for judgment against the Defendants for actual and punitive damages in the sums deemed appropriate by the jury, for the costs of the action, and for such other and further relief as this Court may deem just and proper.

*s/ Gary W. Poliakoff*
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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG | ) | IN THE COURT OF COMMON PLEAS<br><br>SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES,<br><br>PLAINTIFFS,<br><br>vs.<br><br>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,<br><br>DEFENDANTS. | ) | CASE NO. 2018-CP-42-03447<br><br>**FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S ANSWER TO THE COMPLAINT** |

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

The Defendant, Fundamental Administrative Services, LLC, hereinafter referred to as "this Defendant", *subject to and without waiving any right to compel this matter to arbitration,* hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

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

2. This Defendant is without sufficient knowledge or information to respond to the allegations in Paragraphs 1 or 2 of Plaintiff's Complaint and therefore denies the same and

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demands strict proof thereof. To the extent the allegations in the above Paragraphs call for damages recoverable against this Defendant, they are denied.

3. This Defendant denies the allegations set forth in Paragraphs 3, 4, and 5 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions or are directed at parties other than this Defendant, no response is required.

4. This Defendant denies the allegations set forth in Paragraph 6 of Plaintiff's Complaint.

5. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions or are directed at parties other than this Defendant, no response is required.

6. This Defendant denies the allegations set forth in Paragraph 8, 9, 10, 11, and 12 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant denies any allegations inconsistent with those contents or intended to allege liability or damages against this Defendant. To the extent the allegations in the above Paragraphs are not directed at this Defendant, no response is required.

7. This Defendant denies the allegations set forth in Paragraphs 13 and 14 of Plaintiff's Complaint as stated and demands strict proof thereof.

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8. This Defendant denies the allegations set forth in Paragraph 15 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant denies any allegations intended to allege liability or damages against this Defendant.

9. The allegations set forth in Paragraphs 16 and 17 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

10. Responding to the allegations set forth in Paragraph 18 of Plaintiff's Complaint, this Defendant admits it is a Delaware limited liability company with no registered agent in South Carolina, but denies the remaining allegations set forth in the above Paragraph.

11. Responding to the allegations set forth in Paragraph 19 of Plaintiff's Complaint, this Defendant craves reference to the alleged report cited by Plaintiff for its contents. This Defendant denies any allegations inconsistent with those contents or intended to allege liability or damages against this Defendant.

12. This Defendant denies the allegations set forth in Paragraph 20 of Plaintiff's Complaint as stated and demands strict proof thereof.

13. The allegations set forth in Paragraphs 21 and 22 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

14. This Defendant denies the allegations set forth in Paragraph 23 of Plaintiff's Complaint as stated and demands strict proof thereof.

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15. This Defendant denies the allegations set forth in Paragraph 24 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

16. This Defendant denies the allegations set forth in Paragraph 25 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

17. This Defendant denies the allegations set forth in Paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions, no response is required.

18. This Defendant denies the allegations set forth in Paragraphs 38 and 39 of Plaintiff's Complaint as stated and demands strict proof thereof.

19. This Defendant denies the allegations set forth in Paragraphs 40 and 41 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all

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allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

20. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of Plaintiff's Complaint and demand strict proof thereof.

21. Responding to Paragraph 44 of Plaintiff's Complaint, this Defendant reasserts it responses to the above as if stated again verbatim.

22. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

23. This Defendant denies the allegations set forth in Paragraph 55 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

24. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 56 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

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25. This Defendant denies the allegations set forth in Paragraphs 57, 58, and 59 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

26. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 60 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

27. This Defendant denies the allegations set forth in Paragraph 61 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

28. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 62 and 63 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

29. This Defendant denies the allegations set forth in Paragraphs 64, 65, and 66 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This

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Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

30. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 67 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

31. This Defendant denies the allegations set forth in Paragraphs 68, 69, 70, 71, 72, 73, 74, 75, 76, and 77 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

32. The allegations set forth in Paragraph 78 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

33. This Defendant denies the allegations set forth in Paragraphs 79 and 80 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

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34. The allegations set forth in Paragraphs 81, 82, 83, 84, 85, and 86 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

35. This Defendant denies the allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

36. The allegations set forth in Paragraph 89 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

37. This Defendant denies the allegations set forth in Paragraphs 90 and 91 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

38. The allegations set forth in Paragraph 92 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

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39. This Defendant denies the allegations set forth in Paragraphs 93, 94, and 95 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

40. The allegations set forth in Paragraph 96 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

41. This Defendant denies the allegations set forth in Paragraph 97 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

42. The allegations set forth in Paragraphs 98, 99, 100, and 101 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

43. This Defendant denies the allegations set forth in Paragraphs 102, 103, 104, 105, 106, 107, 108, and 109 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

44. The allegations set forth in Paragraphs 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, and 129 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

45. This Defendant denies the allegations set forth in Paragraph 130 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or

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relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

46. The allegations set forth in Paragraphs 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, and 154 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

47. This Defendant denies the allegations set forth in Paragraphs 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, and 165 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

48. The allegations set forth in Paragraphs 166, 167, 168, and 169 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

49. This Defendant denies the allegations set forth in Paragraphs 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, and 185 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

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50. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 186 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

51. This Defendant denies the allegations set forth in Paragraphs 187, 188, 189, 190, 191, 192, 193, 194, and 195 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

52. The allegations set forth in Paragraphs 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, and 234 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

53. This Defendant denies the allegations set forth in Paragraph 235 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

54. The allegations set forth in Paragraphs 236, 237, 238, 239, and 240 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

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55. This Defendant denies the allegations set forth in Paragraph 241 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations call for legal conclusions, no response is required.

56. The allegations set forth in Paragraphs 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, and 262 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

57. This Defendant denies the allegations set forth in Paragraphs 263 and 264 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

58. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 265 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

59. This Defendant denies the allegations set forth in Paragraphs 266, 267, 268, and 269 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction-

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or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

60. The allegations set forth in Paragraphs 270, 271, 272, and 273 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

61. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 274 and 275 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

62. This Defendant denies the allegations set forth in Paragraph 276 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

63. The allegations set forth in Paragraphs 277 and 278 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required. To the extent those allegations allege multiple claimants, they are denied.

64. This Defendant denies the allegations set forth in Paragraphs 279, 280, 281, 282, 283, 284, 285, 286, and 287 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility

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and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

65. This Defendant denies the allegations set forth in Paragraph 288 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

66. This Defendant denies the allegations set forth in Paragraphs 289 and 290 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

67. Responding to Paragraph 291 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

68. This Defendant denies the allegations set forth in Paragraphs 292, 293, and 294 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

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69. Responding to Paragraph 295 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

70. This Defendant denies the allegations set forth in Paragraphs 296, 297, 298, 299, and 300 of Plaintiff's Complaint.

71. Responding to Paragraph 301 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

72. This Defendant denies the allegations set forth in Paragraphs 302, 303, 304, 305, 306, and 307 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

73. Responding to Paragraph 308 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

74. The allegations set forth in Paragraphs 309, 310, and 311 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

75. This Defendant denies the allegations set forth in Paragraph 312 of Plaintiff's Complaint and demands strict proof thereof.

76. Responding to Paragraph 313 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

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77. This Defendant denies the allegations set forth in Paragraphs 314 and 315 of Plaintiff's Complaint and demands strict proof thereof.

78. Responding to Paragraph 316 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

79. This Defendant denies the allegations set forth in Paragraph 317 of Plaintiff's Complaint and demands strict proof thereof.

80. This Defendant denies the allegations set forth in Paragraphs 318, 319, and 320 of Plaintiff's Complaint as stated and demands strict proof thereof.

81. Responding to Paragraph 321 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

82. The allegations set forth in Paragraph 322 and 323 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

83. This Defendant denies the allegations set forth in Paragraphs 324, 325, 326, 327, 328, and 329 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

84. Responding to Paragraph 330 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

85. This Defendant denies the allegations set forth in Paragraphs 331, 332, and 333 of Plaintiff's Complaint and demand strict proof thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the

costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
*Attorneys for the Defendant*
*Fundamental Administrative Services, LLC*

Charleston, South Carolina

Dated: November 12, 2018



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| STATE OF SOUTH CAROLINA ) | IN THE COURT OF COMMON PLEAS |
| ) | |
| COUNTY OF SPARTANBURG ) | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, ) | |
| vs. ) | |
| 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, ) | **THI OF SOUTH CAROLINA, LLC'S ANSWER TO THE COMPLAINT** |
| DEFENDANTS. ) | |

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

The Defendant, THI of South Carolina, LLC, hereinafter referred to as "this Defendant", *subject to and without waiving any right to compel this matter to arbitration*, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

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

2. This Defendant is without sufficient knowledge or information to respond to the allegations in Paragraphs 1 or 2 of Plaintiff's Complaint and therefore denies the same and

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demands strict proof thereof. To the extent the allegations in the above Paragraphs call for damages recoverable against this Defendant, they are denied.

3. This Defendant denies the allegations set forth in Paragraphs 3 and 4 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions or are directed at parties other than this Defendant, no response is required.

4. The allegations set forth in Paragraph 5 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

5. This Defendant denies the allegations set forth in Paragraph 6 of Plaintiff's Complaint.

6. The allegations set forth in Paragraph 7 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

7. This Defendant denies the allegations set forth in Paragraphs 8, 9, 10, 11, and 12 of Plaintiff's Complaint as stated and demands strict proof thereof. Further responding, this Defendant would crave reference to the alleged agreement cited by Plaintiff for its contents to the extent it exists. This Defendant denies any allegations inconsistent with those contents or

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intended to allege liability or damages against this Defendant. To the extent the allegations in the above Paragraphs are not directed at this Defendant, no response is required.

8. The allegations set forth in Paragraph 13 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

9. This Defendant denies the allegations set forth in Paragraph 14 of Plaintiff's Complaint as stated and demands strict proof thereof.

10. This Defendant denies the allegations set forth in Paragraph 15 of Plaintiff's Complaint as stated and demands strict proof thereof. Further responding, this Defendant would crave reference to the alleged trademark and website cited by Plaintiff for its contents. This Defendant denies any allegations intended to allege liability or damages against this Defendant.

11. The allegations set forth in Paragraphs 16, 17, 18, 19, and 20 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

12. Responding to the allegations set forth in Paragraph 21 of Plaintiff's Complaint, this Defendant affirmative states that it is a Delaware limited liability company with a registered agent in South Carolina, but denies the remaining allegations set forth in the above Paragraph.

13. The allegations set forth in Paragraphs 22 and 23 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

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14. This Defendant denies the allegations set forth in Paragraph 24 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

15. This Defendant denies the allegations set forth in Paragraph 25 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

16. This Defendant denies the allegations set forth in Paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions, no response is required.

17. This Defendant denies the allegations set forth in Paragraphs 38 and 39 of Plaintiff's Complaint as stated and demands strict proof thereof.

18. This Defendant denies the allegations set forth in Paragraphs 40 and 41 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies

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any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

19. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of Plaintiff's Complaint and demand strict proof thereof.

20. Responding to Paragraph 44 of Plaintiff's Complaint, this Defendant reasserts it responses to the above as if stated again verbatim.

21. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

22. This Defendant denies the allegations set forth in Paragraph 55 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

23. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 56 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

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24. This Defendant denies the allegations set forth in Paragraphs 57, 58, and 59 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

25. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 60 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

26. This Defendant denies the allegations set forth in Paragraph 61 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

27. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 62 and 63 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

28. This Defendant denies the allegations set forth in Paragraphs 64, 65, and 66 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This

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Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

29. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 67 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

30. This Defendant denies the allegations set forth in Paragraphs 68, 69, 70, 71, 72, 73, 74, 75, 76, and 77 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

31. The allegations set forth in Paragraph 78 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

32. This Defendant denies the allegations set forth in Paragraphs 79 and 80 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

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33. The allegations set forth in Paragraphs 81, 82, 83, 84, 85, and 86 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

34. This Defendant denies the allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

35. The allegations set forth in Paragraph 89 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

36. This Defendant denies the allegations set forth in Paragraphs 90 and 91 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

37. The allegations set forth in Paragraph 92 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

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38. This Defendant denies the allegations set forth in Paragraphs 93, 94, and 95 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

39. The allegations set forth in Paragraph 96 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

40. This Defendant denies the allegations set forth in Paragraph 97 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

41. The allegations set forth in Paragraphs 98, 99, 100, and 101 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

42. This Defendant denies the allegations set forth in Paragraphs 102, 103, 104, 105, 106, 107, 108, and 109 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

43. The allegations set forth in Paragraphs 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, and 129 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

44. This Defendant denies the allegations set forth in Paragraph 130 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or

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relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

45. The allegations set forth in Paragraphs 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, and 154 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

46. This Defendant denies the allegations set forth in Paragraphs 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, and 165 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

47. The allegations set forth in Paragraphs 166, 167, 168, and 169 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

48. This Defendant denies the allegations set forth in Paragraphs 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, and 185 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

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49. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 186 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

50. This Defendant denies the allegations set forth in Paragraphs 187, 188, 189, 190, 191, 192, 193, 194, and 195 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

51. The allegations set forth in Paragraphs 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, and 234 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

52. This Defendant denies the allegations set forth in Paragraph 235 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

53. The allegations set forth in Paragraphs 236, 237, 238, 239, and 240 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

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54. This Defendant denies the allegations set forth in Paragraph 241 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations call for legal conclusions, no response is required.

55. The allegations set forth in Paragraphs 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, and 262 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

56. This Defendant denies the allegations set forth in Paragraphs 263 and 264 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

57. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 265 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

58. This Defendant denies the allegations set forth in Paragraphs 266, 267, 268, and 269 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction

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or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

59. The allegations set forth in Paragraphs 270, 271, 272, and 273 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

60. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 274 and 275 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

61. This Defendant denies the allegations set forth in Paragraph 276 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

62. The allegations set forth in Paragraphs 277 and 278 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required. To the extent those allegations allege multiple claimants, they are denied.

63. This Defendant denies the allegations set forth in Paragraphs 279, 280, 281, 282, 283, 284, 285, 286, and 287 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility

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and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

64. This Defendant denies the allegations set forth in Paragraph 288 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

65. This Defendant denies the allegations set forth in Paragraphs 289 and 290 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

66. Responding to Paragraph 291 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

67. This Defendant denies the allegations set forth in Paragraphs 292, 293, and 294 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

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68. Responding to Paragraph 295 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

69. This Defendant denies the allegations set forth in Paragraphs 296, 297, 298, 299, and 300 of Plaintiff's Complaint.

70. Responding to Paragraph 301 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

71. This Defendant denies the allegations set forth in Paragraphs 302, 303, 304, 305, 306, and 307 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

72. Responding to Paragraph 308 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

73. The allegations set forth in Paragraphs 309, 310, and 311 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

74. This Defendant denies the allegations set forth in Paragraph 312 of Plaintiff's Complaint and demands strict proof thereof.

75. Responding to Paragraph 313 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

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76. This Defendant denies the allegations set forth in Paragraphs 314 and 315 of Plaintiff's Complaint and demands strict proof thereof.

77. Responding to Paragraph 316 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

78. This Defendant denies the allegations set forth in Paragraph 317 of Plaintiff's Complaint and demands strict proof thereof.

79. This Defendant denies the allegations set forth in Paragraphs 318, 319, and 320 of Plaintiff's Complaint as stated and demands strict proof thereof.

80. Responding to Paragraph 321 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

81. The allegations set forth in Paragraphs 322 and 323 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

82. This Defendant denies the allegations set forth in Paragraphs 324, 325, 326, 327, 328, and 329 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

83. Responding to Paragraph 330 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

84. This Defendant denies the allegations set forth in Paragraphs 331, 332, and 333 of Plaintiff's Complaint and demand strict proof thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, having fully answered the Plaintiff's Complaint, this Defendant prays the Court issue an order dismissing this case with prejudice, or in the alternative, staying this matter until the validity of the arbitration agreement is judicially resolved, and that it be awarded the

costs and reasonable fees associated with this matter, and such other relief as this Court may deem just and proper.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant
THI of South Carolina, LLC

Charleston, South Carolina

Dated: November 12, 2018

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | |
| 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, | ) | **FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S ANSWER TO THE COMPLAINT** |
| DEFENDANTS. | ) | |

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

The Defendant, Fundamental Clinical and Operational Services, LLC, hereinafter referred to as "this Defendant", *subject to and without waiving any right to compel this matter to arbitration*, hereby responds to the allegations set forth in Plaintiff's Complaint as follows:

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

2. This Defendant is without sufficient knowledge or information to respond to the allegations in Paragraphs 1 or 2 of Plaintiff's Complaint and therefore denies the same and

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demands strict proof thereof. To the extent the allegations in the above Paragraphs call for damages recoverable against this Defendant, they are denied.

3. This Defendant denies the allegations set forth in Paragraphs 3, 4, and 5 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions or are directed at parties other than this Defendant, no response is required.

4. This Defendant denies the allegations set forth in Paragraph 6 of Plaintiff's Complaint.

5. This Defendant denies the allegations set forth in Paragraph 7 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions or are directed at parties other than this Defendant, no response is required.

6. This Defendant denies the allegations set forth in Paragraphs 8, 9, 10, 11, and 12 of Plaintiff's Complaint as stated and demands strict proof thereof.. This Defendant denies any allegations inconsistent with those contents or intended to allege liability or damages against this Defendant. To the extent the allegations in the above Paragraphs are not directed at this Defendant, no response is required.

7. This Defendant denies the allegations set forth in Paragraphs 13 and 14 of Plaintiff's Complaint as stated and demands strict proof thereof.

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8. This Defendant denies the allegations set forth in Paragraph 15 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant denies any allegations intended to allege liability or damages against this Defendant.

9. Responding to the allegations set forth in Paragraph 16 of Plaintiff's Complaint, this Defendant admits it is a Delaware limited liability company with no registered agent in South Carolina, but denies the remaining allegations set forth in the above Paragraph.

10. This Defendant denies the allegations set forth in Paragraph 17 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

11. The allegations set forth in Paragraphs 18, 19, 20, 21, and 22 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

12. This Defendant denies the allegations set forth in Paragraph 23 of Plaintiff's Complaint as stated and demands strict proof thereof.

13. This Defendant denies the allegations set forth in Paragraph 24 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

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14. The allegations set forth in Paragraph 25 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent a response is required, those allegations are denied to the extent the allege liability or damages as to this Defendant.

15. This Defendant denies the allegations set forth in Paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant. To the extent the above allegations call for legal conclusions, no response is required.

16. This Defendant denies the allegations set forth in Paragraphs 38 and 39 of Plaintiff's Complaint as stated and demands strict proof thereof.

17. This Defendant denies the allegations set forth in Paragraphs 40 and 41 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

18. This Defendant denies the allegations set forth in Paragraphs 42 and 43 of Plaintiff's Complaint and demand strict proof thereof.

19. Responding to Paragraph 44 of Plaintiff's Complaint, this Defendant reasserts it responses to the above as if stated again verbatim.

20. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 45, 46, 47, 48, 49, 50, 51, 52, 53, and 54

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of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

21. This Defendant denies the allegations set forth in Paragraph 55 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

22. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 56 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

23. This Defendant denies the allegations set forth in Paragraphs 57, 58, and 59 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

24. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 60 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This

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Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

25. This Defendant denies the allegations set forth in Paragraph 61 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

26. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 62 and 63 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

27. This Defendant denies the allegations set forth in Paragraphs 64, 65, and 66 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

28. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 67 of Plaintiff's Complaint and therefore denies the same. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

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29. This Defendant denies the allegations set forth in Paragraphs 68, 69, 70, 71, 72, 73, 74, 75, 76, and 77 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind.

30. The allegations set forth in Paragraph 78 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

31. This Defendant denies the allegations set forth in Paragraphs 79 and 80 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

32. The allegations set forth in Paragraph 81, 82, 83, 84, 85, and 86 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

33. This Defendant denies the allegations set forth in Paragraphs 87 and 88 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

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34. The allegations set forth in Paragraph 89 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

35. This Defendant denies the allegations set forth in Paragraphs 90 and 91 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

36. The allegations set forth in Paragraph 92 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

37. This Defendant denies the allegations set forth in Paragraphs 93, 94, and 95 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

38. The allegations set forth in Paragraph 96 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

39. This Defendant denies the allegations set forth in Paragraph 97 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. To the extent those allegations call for legal conclusions, no response is required.

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40. The allegations set forth in Paragraphs 98, 99, 100, and 101 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

41. This Defendant denies the allegations set forth in Paragraphs 102, 103, 104, 105, 106, 107, 108, and 109 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant.

42. The allegations set forth in Paragraphs 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, and 129 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

43. This Defendant denies the allegations set forth in Paragraph 130 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

44. The allegations set forth in Paragraphs 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, and 154 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

45. This Defendant denies the allegations set forth in Paragraphs 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, and 165 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled

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nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

46. The allegations set forth in Paragraphs 166, 167, 168, and 169 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

47. This Defendant denies the allegations set forth in Paragraphs 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, and 185 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

48. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 186 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

49. This Defendant denies the allegations set forth in Paragraphs 187, 188, 189, 190, 191, 192, 193, 194, and 195 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations call for legal conclusions, no response is required.

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50. The allegations set forth in Paragraphs 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, and 234 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

51. This Defendant denies the allegations set forth in Paragraphs 235 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

52. The allegations set forth in Paragraphs 236, 237, 238, 239, and 240 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

53. This Defendant denies the allegations set forth in Paragraph 241 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations call for legal conclusions, no response is required.

54. The allegations set forth in Paragraphs 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, and 262 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or

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imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

55. This Defendant denies the allegations set forth in Paragraphs 263 and 264 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. To the extent those allegations are directed at parties other than this Defendant, no response is required.

56. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraph 265 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

57. This Defendant denies the allegations set forth in Paragraphs 266, 267, 268, and 269 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff of any kind. To the extent those allegations are directed at parties other than this Defendant, no response is required.

58. The allegations set forth in Paragraphs 270, 271, 272, and 273 of Plaintiff's Complaint are directed at parties other than this Defendant and therefore no response is required. To the extent those allegations are directed at this Defendant or indirectly assert or imply liability as to this Defendant, they are denied.

59. This Defendant is without sufficient knowledge or information to form an opinion as to the truth of the allegations set forth in Paragraphs 274 and 275 of Plaintiff's Complaint and therefore denies the same and demands strict proof thereof.

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60. This Defendant denies the allegations set forth in Paragraph 276 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

61. The allegations set forth in Paragraphs 277 and 278 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required. To the extent those allegations allege multiple claimants, they are denied.

62. This Defendant denies the allegations set forth in Paragraphs 279, 280, 281, 282, 283, 284, 285, 286, and 287 of Plaintiff's Complaint to the extent those allegations are directed as this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and never provided any medical care or treatment to Plaintiff or any other person. This Defendant denies any interaction or relationship with the Plaintiff's decedent of any kind. To the extent those allegations call for legal conclusions, no response is required.

63. This Defendant denies the allegations set forth in Paragraph 288 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

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64. This Defendant denies the allegations set forth in Paragraphs 289 and 290 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

65. Responding to Paragraph 291 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

66. This Defendant denies the allegations set forth in Paragraphs 292, 293, and 294 of Plaintiff's Complaint as stated and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

67. Responding to Paragraph 295 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

68. This Defendant denies the allegations set forth in Paragraphs 296, 297, 298, 299, and 300 of Plaintiff's Complaint.

69. Responding to Paragraph 301 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

70. This Defendant denies the allegations set forth in Paragraphs 302, 303, 304, 305, 306, and 307 of Plaintiff's Complaint to the extent those allegations are directed at this Defendant and demands strict proof thereof. This Defendant provides clinical and operational

consulting services pursuant to a contract with the facility. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

71. Responding to Paragraph 308 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

72. The allegations set forth in Paragraphs 309, 310, and 311 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied. To the extent those allegations are directed at parties other than this Defendant, no response is required.

73. This Defendant denies the allegations set forth in Paragraph 312 of Plaintiff's Complaint and demands strict proof thereof.

74. Responding to Paragraph 313 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

75. This Defendant denies the allegations set forth in Paragraphs 314 and 315 of Plaintiff's Complaint and demands strict proof thereof.

76. Responding to Paragraph 316 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

77. This Defendant denies the allegations set forth in Paragraph 317 of Plaintiff's Complaint and demands strict proof thereof.

78. This Defendant denies the allegations set forth in Paragraphs 318, 319, and 320 of Plaintiff's Complaint as stated and demands strict proof thereof.





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79. Responding to Paragraph 321 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

80. The allegations set forth in Paragraphs 322 and 323 of Plaintiff's Complaint are legal conclusions and therefore no response is required. To the extent those allegations allege or imply liability as to this Defendant, they are denied.

81. This Defendant denies the allegations set forth in Paragraphs 324, 325, 326, 327, 328, and 329 of Plaintiff's Complaint and demands strict proof thereof. This Defendant has never been a licensed operator of a skilled nursing facility and has never provided resident care. This Defendant denies any interaction or relationship with the Plaintiff of any kind. This Defendant denies any and all allegations inconsistent with this response or intended to allege liability and/or damages against this Defendant.

82. Responding to Paragraph 330 of Plaintiff's Complaint, this Defendant reasserts its responses above as if set forth herein verbatim.

83. This Defendant denies the allegations set forth in Paragraphs 331, 332, and 333 of Plaintiff's Complaint and demand strict proof thereof.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
*Attorneys for the Defendant*
*Fundamental Clinical and Operational Services, LLC*

Charleston, South Carolina

Dated: November 12, 2018

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State of South Carolina
County of Spartanburg

| | | |
|---|---|---|
| Barbara Owens, et al, Plaintiff, vs. Fundamental Clinical and Operational Services, LLC, et al, Defendants. | ) | In The Seventh Judicial Circuit Court |
| | ) | Docket No.: 2108CP4203447 |
| | ) | **Transcript of Record** |
| | ) | July 25th, 2019 |
| | ) | Spartanburg, South Carolina |

**Before**

**The Honorable J. Mark Hayes, II**

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

Mr. Raymond Paul Mullman, Jr.
Mr. Patrick E. Knie
Attorneys for the Plaintiff

Perry McPherson Buckner, IV
Gaillard Dotterer
Attorneys for THI of South Carolina, LLC

Betty R. Lyons, Court Reporter I (At-Large)
South Carolina Judicial Department
747 Bishops Circle, Evans, Georgia 30809

I N D E X


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THE COURT: Now we'll move to -- I'm approaching these as one case, even though they're different parties -- at least one motion -- types of motion. I know we have different Defendants. But basically I understand these motions are all pretty identical.

MR. BUCKNER: Yes, Your Honor, they are. We represent all Defendants. And I guess there were four pending motions among them, but all primarily related to the enforcement of the arbitration agreement.

THE COURT: Okay.

MR. BUCKNER: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. BUCKNER: Perry Buckner and Gaillard Dotterer on behalf of THI of South Carolina in Spartanburg, LLC. And that is a skilled nursing facility here in Spartanburg. They are the -- primarily the moving party today, which has moved to enforce the arbitration agreement signed by Plaintiff, Ms. McCraw.

And as Your Honor noted at the outset, there are three sort of collateral motions by Fundamental Administrative Services, THI of South Carolina, and Fundamental Clinical And Operational Services, which are motions to stay proceedings pending the enforcement litigation of the arbitration agreement.

Your Honor, this is -- I'm sure you've heard many

of these. This is an arbitration motion. Under the FAA, Plaintiff signed an agreement when her mother was admitted to my client's facility in July of 2015. Plaintiff has asserted to this Court -- and I have no reason at this time to suspect it is not the case -- that she did not hold the power of attorney over her mother. It may be that another daughter or another family member did.

I do not know the, sort of, boundaries of her authority at this time. But Defense Counsel is not aware of any power of attorney being validly held over her mother at time of admission. But she signed an admissions agreement on behalf of her mother, which is not in dispute -- nor is her authority to do so in dispute. Signed an arbitration agreement and also signed a litany of other documents at the time that her mother was admitted to the nursing home.

As, Your Honor, I'm sure is well aware, until the Coleman case of 2014, a loved one -- whether it be a brother, a sister, a husband or any other family member -- could validly admit a loved one to the nursing home, and then also validly sign an arbitration agreement on behalf of that loved one, pursuant to the doctrine of merger, and then collaterally the doctrine of equitable estoppel.

We've had, you know, a number of Federal Court and State Court opinions enforcing this exact agreement on those exact grounds. Things changed after Coleman, and two

subsequent appellate opinions -- both the Thompson case and the Hodge case, one in the Court of Appeals and the other one in the Supreme Court.

Your Honor, we think the arbitration agreement issue, today, is distinguishable from those cases. We don't think that anything further than the record before Your Honor is necessary to rule upon the validity of this agreement.

However, as a sort of side point, if Your Honor does not think that there are sufficient reasons to grant enforcement of this arbitration agreement today, the Defense welcomes discovery related to this issue so that we can a hundred percent determine whether there is no legal authority here by way of a power of attorney, or guardianship, conservator, or something of that like. Or there is no basis for any common law principles of agency -- apparent, actual, implicit or otherwise.

We, obviously, do not think, again, that the record is insufficient. But the problem we face, Your Honor, in this instance, is Mr. Mullman and Mr. Poliakoff, obviously, the experienced lawyers they are, know that if I noticed a deposition to take -- get their client's testimony, I'm engaging in what could be considered waiver under South Carolina's precedence.

THE COURT: They would say that to you?

MR. BUCKNER: I think they could.

THE COURT: Yeah, I think they would.

MR. BUCKNER: I think they would. I would do so, probably, if I were in their shoes. So I do not blame them for that.

But I think Court sanctioned discovery is sort of an alternative remedy that we would seek before Your Honor about the rule on this full record. But, again, we don't think that's necessary. Because this arbitration agreement still falls under the presumption of merger, and then by extension the doctrine of equitable estoppel.

And as Your Honor, I'm sure is aware, in Coleman when the Court says -- and, of course, now Coleman's prodigy -- has said that, there are certain agreements that have evidence of sufficient separateness, such that this presumption of merger that has been applied to many of these agreements, is not valid. And I think sort of the backdrop of our argument today, Your Honor, would be that we accept that this new sort of separateness examination is necessary to any ruling from Your Honor.

But I also want to impress upon the Court, that the doctrine of merger for years -- probably hundreds of years in South Carolina jurisprudence -- existed for documents that were separate -- a deed, a promissory note. Obviously these deal with different subject matters, to some

extent had different terms. And for years and years and years, the presumption of merger applied because the documents were executed at the same time, by the same parties, and of course, the same transactions.

And in this case, Ms. Owens was admitted to my client's facility. She entered into an admission agreement -- which the Plaintiff does not dispute the validity of -- and then by extension, we believe, that this arbitration agreement would be.

It's a very fact specific ruling from Coleman, and then subsequently from Hodge and Thompson about what this separateness is. Coleman, it was actually -- not to confuse the terms -- not the doctrine of merger, but a merger clause, or I'll call it, because it's easier for me to understand, an entirety of the agreement clause.

Now it's important for the Court to be aware from Defense's perspective, is not that that clause existed. It's not the fact every agreement that we all probably sign in business dealings has an entirety agreement clause. What's important from Coleman, is that the entirety of the agreement clause, the admission agreement, referenced the separate arbitration agreement.

South Carolina Supreme Court said, that's too separate. That is not passed (sic) muster for what we think of as qualifying for merger -- documents executed at the

same time by the same parties in the course of the same transaction.

We don't have that here, Your Honor. There's nothing that Coleman would forbid the application of merger -- the doctrine of merger in our agreement, because the agreement doesn't -- the admission agreement doesn't explicitly reference the arbitration agreement.

In Hodge it was governing law. In Hodge the Court was concerned with the idea that the admission agreement referenced either State or Federal law. And then the arbitration agreement had one or the other, whichever one it was. We don't have that issue here, Your Honor. There's nothing in the agreement in terms of governing law.

There's also been an issue that's popped up in these cases about revocation -- or disclaimer I should say. And one agreement says the admission agreement can be disclaimed within thirty days. The arbitration agreement doesn't have that provision.

That's the kind of separateness we're talking about. Because one document may not even come into a legal binding nature, and the other one, obviously, will. We don't have that problem in the agreement before the Court today, Your Honor. So we think that under the fact specific record, Coleman, Thompson and Hodge can be distinguished such that we fall back into the category of merger and

equitable estoppel. Being that if Ms. McCraw can sign an admission agreement to admit her mother into the nursing home, she can also validly sign an arbitration agreement.

And also again I concede to the Court, Your Honor, I can't prove common law agency without discovery. I don't know if there are issues that Your Honor -- Plaintiff is probably in a better position to know. I've looked at the medical records in this case, but it seems to me there is an issue of whether the principal -- in this case Ms. Owens -- had capacity.

Certainly there is some notation of some cognitive issues, but whether she had contractual capacity, I think, could be in dispute. Those would be issues that would need to be determined before I know if I could make an argument of actual authority or apparent authority.

We have -- just a couple of weeks ago, Judge Gravely in Greenville permitted us to go take arbitration enforcement related discovery. And we got a ruling out of the discovery that the principal -- in that case the son -- was admitted by his mother. And there was apparent authority based on the son's conduct and statements when he was admitted. I don't have that information at this time, but discovery would help that. But we do think that Your Honor can make rulings with regard to the doctrine of inherent agency, and possibly even agency by estoppel. The

doctrine of inherent agency was brought most prominently from the second restatement of agency, and then endorsed by the South Carolina Courts. South Carolina Courts have not, to my knowledge, embraced the third restatement of agency. Inherent agency basically just says that an agent has authority to enter into that which he or she has actual authority to do, and all business coextensive thereto.

So the way we feel we fall under that doctrine, Your Honor, is if the loved one could admit someone to the nursing, and they can sign an admission agreement under the Adult Health Care Consent Act, which gives them the statutory authority to do so, they can also sign an arbitration agreement, a financial disclosure, and a litany of other things that they do, because that's coextensive with their business admitting their loved one to the nursing home to begin with. So we think those doctrines are relevant to the proceeding here today, Your Honor.

A couple of other things that really were broached by Plaintiff. Mr. Mullman, Mr. Poliakoff and I obviously argue these a lot in this world, and we're sort of familiar with the arguments. But a motion to compel arbitration is a little unique in the idea that I filed a motion -- I really somewhat hesitate to throw out every possible attack that they might can bring on the agreement for fear of inviting that argument. So, almost -- some of it -- what

might come in reply, we have briefed the vast majority of the issue before the Court, Your Honor. But I didn't have an opportunity to touch on, in our brief, the notion of the lack of consideration, or lack of meeting of the minds for the wrongful death issue.

With the Court's permission, and without further hearing, we'd possibly like to submit supplemental briefing in the next five days on those issues. Like I said, given that we deal with Mr. Mullman and Mr. Poliakoff on these issues, we feel we can get that turned around pretty quick.

THE COURT: Mr. Owens can't argue those now?

MR. BUCKNER: I can -- I can go into them. But the only thing in consideration that we'd like to point out, Your Honor, is we think that South Carolina, for a certain precedence, is very clear that mutual promises to arbitrate are quid pro quo valid consideration. And that both parties are forfeiting something.

Even though it's true that, more likely than not, the Defense is trying to force arbitration, the Plaintiffs are not. The Defense is forfeiting the right to a jury trial, which is something of legal value that's being forfeited, and it's valid consideration.

With regard to the meeting of the minds, this arbitration agreement lays out the process of how an arbitrator is selected, including limiting it to a specific

group of people or type of folks. It also gives the option that if the parties cannot agree on one in court, Your Honor can select one. And then it also tells that the proceedings will be governed by the South Carolina Alternative Dispute Resolution Rules, which themselves have a litany of guidance for the parties, both in terms of confidentiality, admission of evidence, prehearing discovery, all of that.

In cases past, Mr. Mullman has argued that those agreements are only, I think, binding upon post-dispute agreements and not pre-dispute what the parties have. But that's the default rule. If you were to go to arbitration here, the parties have actually expressly agreed that the South Carolina ADR rules will apply. So I think the meeting of the minds argument misses the mark. There's a consideration and an agreement on all necessary terms here.

Unconscionability, we obviously view as sort of a throw away argument, both because of the high burden and this arbitration agreement has probably been litigated both in this Court and at least eight or ten others. I'm not aware of any Court for this precise arbitration agreement that has found it to be both substantively and procedurally unconscionable.

We think that -- particularly with regard to substance, there is not much of a meaningful attack. The terms of this arbitration agreement are only geared to

reaching an unbias, third-party, neutral decision. No party is given any advantage by its terms. It's not as if one party can opt out, and the other couldn't. Or that any party is given a leg up in any meaningful way.

The last issue that, Your Honor, is before the Court is the wrongful death issues, which I am a hundred percent happy to acknowledge has not been particularly, squarely addressed by South Carolina courts. It's been litigated in this state, and of course, in just about every other state in the country. There's a split of authority with regard to it.

And there's some State Court -- Circuit Court rulings that have come out upon this issue. And since a lot of those rulings have come out -- the South Carolina Supreme Court issued the Dean versus Heritage Health case, which has a footnote where they were reversing the Trial Court based on the language that wrongful death claims in South Carolina are not arbitrable.

And Dean reversed on those grounds to say that that per se ruling is improper. And we think that that Court, obviously, on additional sustaining grounds, could have taken that issue up, because the Plaintiffs prevailed. The fact that they reversed on those grounds to note that that is not the rule in South Carolina, albeit a footnote, we think it is, very supported of the idea that South

Carolina followed -- what I think to be a majority, even if a slight majority -- that wrongful death claims are arbitrable, because the South Carolina wrongful death statute is derivative in nature.

And the reason for that is primarily that, just like any other defense -- whether it be statute of limitations, or a signed release, or anything else -- South Carolina's derivative statute makes those defenses binding on the beneficiaries just as they would be on the decedent.

I don't think any -- Mr. Mullman or Mr. Poliakoff would ever argue in any other case that if the survival claim had a statute of limitations problem, that the wrongful death claim would somehow not. That defense would be binding on it in the same nature, and we think that's true of the arbitration defense here.

We have one valid in the first instance that if such -- that it applies to survival, we necessarily have it such that it applies to wrongful death. And, of course, Ms. McCraw, the signatory for this agreement, is the named Plaintiff. She signed it herself. I don't know if there could be some sort of ruling that she would have it applied, but not the others.

But we certainly think that South Carolina will ultimately -- although we only have Trial Court guidance -- rule that the wrongful death claims are subject to

arbitration the same as survival rules.

And with that, Your Honor, we just rest on our brief and can hear from Plaintiff's Counsel.

THE COURT: Thank you very much.

MR. MULLMAN: Thank you, Your Honor. Ray Mullman for the Estate of Barbara Owens and the statutory beneficiaries.

I want to first talk about the need for discovery. I'm a little confused by that. That was never, you know, discussed with me in the last eight months. I would have agreed to depose Lisa Meising (phonetic), the admissions director, who was there -- and I think the only person there -- when the contract was signed.

Now Perry said some things that are just, you know, in dispute. He said the authority of her is not in dispute. Yes, it is. He said that validity of the admission agreement is not in dispute. Yes, it is. This woman, Barbara Owens, was 65. She was competent. She had never been declared incompetent. She didn't suffer from dementia. She had capacity to enter into a contract.

Let's imagine that wasn't true. If that's not true, then she could have not -- she could not have made any manifestations or representations that Mary Jane McCraw, her daughter, was her agent. If it's not true -- I mean, if it is true, if she has capacity, then the South Carolina Health

Care Surrogate Act doesn't apply. And Mary Jane McCraw, once again, did not have statutory authority or any authority to sign this contract.

There is absolutely no evidence, Your Honor, presented today or in existence that will say the principal, Barbara Owens, made any kind of representation to any one that Mary Jane McCraw was her agent. Mary Jane McCraw has an affidavit.

She said "I'm the daughter of Barbara Owens. I was appointed PR" -- obviously after her death -- "for the Estate. I made no representations as to my legal authority over my mother. My mother did not make any statements about my legal authority during the admission process." And it goes on to talk about it wasn't discussed and all of those things.

In prior cases when there was an argument that there was some representation, they always get it from the admission director -- an affidavit -- saying, "Hey, I explained everything," and they didn't have that in this case. They easily could have asked Lisa Meising to provide an affidavit to make it a question of fact, by -- Your Honor.

And under Section Four -- if I may approach -- of the FAA, if the Judge -- if you're going to say there's a question of fact on agency, under this section, we get a

jury trial on that issue. I want it to be clear that we are asking for that if that -- I don't think there is an issue, but if there is an issue, it's a question of fact for the jury, not for this Court.

Now, let's get into -- it's their burden -- first of all, when you get admitted to a nursing home, they do numerous assessments -- wandering, elopement, fall risk, brain scale for pressure ulcer. They also look at your capacity and cognitive abilities. So they knew at the time of admission -- or should have had known based on their admission -- that she was competent to enter into a contract, and they should have had her sign it -- or at least have her sign something that says, "Mary Jane will sign the admission paperwork on my behalf."

All right, let's get into equitable estoppel. Part of equitable estoppel under State law is there has to be a representation, doesn't exist here. It has to be reliance. Doesn't exist here because they admit signing the arbitration agreement is not a condition to be admitted into the facility. So there's no reliance or prejudice or change of position as a result of signing or not signing the arbitration agreement. They would have let this lady into the facility anyway.

Now that's under State law. They argue that Federal law applies, and do they get a direct benefit? The

Thompson case handles that. There's no direct benefit as it relates to an arbitration agreement for the resident. So the only way they could possibly win that is, if there's a merger between these two separate independent stand alone documents -- one of which being the admission contract that deals with admissions. One that is the arbitration agreement that deals with the methodology of trying to resolve claims pursuant to the ADR.

Perry is exactly right. There is a presumption -- if two contracts are done at the same time, about the same issues, same date, all of that, there is a presumption of a merger. But he forgets the second part. Unless there's a contrary intention, the entire agreement clause in the admission agreement is strong presumption against a merger. It is considered what they call an anti-merger clause.

That is the law in Coleman, Thompson and Hodge. They don't say you have to have an anti-merger clause -- i.e. the entire agreement clause -- and a thirty-day disclaimer. It's any contrary intention. Here there's clearly a contrary intention. And it is drafted by them. So any kind of vagueness or ambiguity is against them not us.

Barbara should have signed the contract. She didn't sign the contract. She didn't make any representations to the staff. We're here. The evidence

should be presented now. There's no need to do any more discovery. Mary Jane was the signatory. She did not have power of attorney. I don't believe anybody had power of attorney -- to answer your question as an officer of the court, I can represent that. I know she did not.

There was -- I think -- I think I might have told Perry that one of the other kids had POA. We can't find it. I'm not sure if they did. But that would actually support our position. That would actually hurt them. If Barbara had picked a power of -- one of her other children for power of attorney, that would show that Mary Jane McCraw was not the power of attorney and was not the agent of Barbara Owens.

The admission contract -- well once again the South Carolina health care surrogate act doesn't apply because Barbara was competent and had the capacity to enter into any kind of agreement. The admission contract is separate from the arbitration agreement. It's not a precondition of admission. There was no benefit. The agreements are not merged.

At the end of the day, there's no valid and enforceable contract against the Estate of Barbara Owens and the statutory beneficiaries. It doesn't matter that Mary Jane McCraw is now the personal representative. She didn't have authority at the time the contract was signed.

And I find it interesting also, that this nursing home didn't know if she had capacity or not -- or can't prove it based on records they already have. But in South Carolina the burden of proof of a party asserting agency is on them -- those asserting the agency. And the burden is not to make just a mere prima facie showing, but rather to show that agency is clearly established by the facts.

They just can't do that in this case, Your Honor. There's no representation. There's no evidence at all of agency -- actual or apparent. And South Carolina imposes this weighty burden, because the person dealing with an alleged agent has a legal duty of due care to determine the scope of the perceived agent's authority.

So they should have asked Mary Jane, "Hey, what's your legal authority? Do you have power of attorney? Can you get your mom in here to make sure that she says you can sign for her?" They had the duty to do that, not Mary Jane.

You know, they're trying to make it seem like, "Well, Barbara Owens was in her room, and she passively accepted the benefit of being admitted," which, you know -- well, I'll leave that -- I was going to say there's no benefit. But the benefit would be different from the admissions to the arbitration, anyway. But they're implying or assuming that Barbara Owens had knowledge. She had no knowledge of an arbitration agreement. She had no knowledge

of the admission paperwork. She was in her room while the paperwork was being signed in a different room altogether.

So like I said, to establish apparent authority, the proponent must establish that the principal consciously or impliedly represented Millie (phonetic) to be his agent. There's no evidence of that today, and there's not any evidence in existence if you ask for discovery. That the facility reasonably relied on representation.

Once, again, you can't reasonably rely on the agent. You have to rely on what the principal said. There's no evidence the principal said anything about arbitration or admission agreement. And then, of course, there has to be a change of positioning to the nursing home schedule. Which there clearly is in here. They admitted signing condition of admission. That admit that she would have she been admitted if she didn't sign the arbitration agreement.

So there's no reliance and no prejudice. They have the duty to ascertain the scope of the agency relationship. Here the agreement -- the arbitration agreement is voluntary. It was not required for admission. It contained no provision or benefit for medical, nursing, nor health care services. These are all important things under Hodge, Coleman and Thompson.

Equitable estoppel cannot not apply when there's

two separate agreements, when there's no merger of those two separate agreements, and there's no benefit from the arbitration agreement under Thompson. These are two pre pro tem adhesion contracts with an entire agreement clause showing the contrary intention, Your Honor.

THE COURT: The three items you reference with equitable estoppel, are they -- all three required, or just one of the three is required?

MR. MULLMAN: It says "and". So all three are required under the Thompson case. Quoting the Froneberger versus Smith Case, 748 S.E. Section 625 Court of Appeals 2013, Your Honor. I believe all of this is in the memo. Now they'll argue that the Federal law applies, International Shoe -- or whatever they call it. And that's the direct benefit argument which also was rejected by Thompson, too. There's no direct benefit to agree to an arbitration agreement for a nursing home resident.

A The -- Perry didn't argue it, but I'll raise it as an issue. Sometimes they bring up third party beneficiary. That only applies if there's a valid contract. There's no contract here. And we're not trying to enforce the arbitration agreement. We're not trying to sue for breach of contract. We're not trying to, you know, get the benefits of one contract, and then ignore the other benefits.

We're not saying she had authority to sign any contract. Barbara Owens should have signed both contracts on her own. And there's certainly no ratification that conflates the arguments. There's no evidence that Barbara Owens knew about the arbitration agreement, and no affirmative representation that she accepted the agreement.

There's also -- this is a very strange arbitration agreement, especially for a nursing home. Often times they'll say, "Hey, we'll let AAA (sic) or James or somebody be the arbitrator and use those rules." Here there are no rules. The South Carolina ADR is mentioned, but it's not true that the ADR rules tell you how to choose an arbitrator or that discovery is allowed. This agreement says the FAA applies.

Under the FAA, Section 7, there is no pretrial discovery allowed in the Fourth Circuit unless the arbitrators determine exceptional circumstances -- which are very difficult. I won't get into what that includes. There is no meeting of the minds here, because there's no agreement as to the arbitrator.

They said, "Well, if you don't agree, you can always go to the Court." For me to get to the Court, I've got to file a Notice of Intent, give them all my information, then go to the Court and ask for an arbitrator. They already have all my discovery. I have to give them my

expert affidavit. I have to give them my medical records. They don't have to give me anything.

So then we go into arbitration, they already have everything they need from me. So they take the position, "Well, there's no discovery under Section 7 of the FAA." And that's what they've said before to us -- in the Camsen (phonetic) case which is exhibit to the memo.

So there's no -- it's two vague indefinite. They don't say how you pick the arbitrator -- how the Judge is suppose to pick the arbitrator. So now we have the Judges picking material -- under the Grant case -- material issues in a private contract. I don't think that's what the FAA intended, Your Honor, that the Courts should get involved in private contracts and pick and decide who the "neutral, unbiased" arbitrator should be.

There's nothing about the rules of evidence. There's nothing about any kind of rules of discovery. It's vague and indefinite, no meeting of the minds. It also lacks consideration. The contract says, "Hey, we'll sue related to anything about the care, or about the admission contract." Well when would the facility ever sue my client about the care she received?

It also doesn't allow us under unconscionability -- because all of this goes through unconscionability, that we don't know the rules. We don't

have to get any discovery. There's no consideration. We're not allowed to bring in necessary and indispensable parties like Fundamental Clinical and Operational Services, and Fundamental Administrative Services.

They take the position that, they get to stay in this case. We have to go arbitrate with the facility, and then, I guess, we get to sue FAS and FCOS after the arbitration is over. But, of course, they'll say, "Well, you already got your damages. We have a set off. There's not purpose to go forward against FAS and FCOS."

So basically, FAS and FCOS get immunity from the lawsuit just because somebody else enters into a contract. There's no consideration that FAS and FCOS provides for that protection. And they didn't sign this agreement. Either they should be -- if there's a valid arbitration agreement, then FAS and FCOS as intertwined related entities should be part of that, or none of them should be part of the arbitration.

The other part of the unconscionability is that -- the costs. The costs of these arbitrations is just too much for the Estate of Barbara Owens or for most residents. They don't have the money to pay for the arbitrators. It's unconscionable. There's several cases out there around the country that say it can be unconscionable, as long as you can kind of prove how much it would cost.

That's why Gary was kind enough to do an affidavit. He has more experience than I do in affidavits -- in arbitrations. So he did an affidavit showing that -- how expensive the costs are. And I think it's very interesting that Defendant didn't fight that. They didn't say, "Oh, no it doesn't cost much," or "We'll pay for it." That's what you normally hear. "Oh, don't worry, Judge, we won't make the Plaintiffs pay for it. We'll pay for it."

THE COURT: Do I recall that Ms. Owens also did an affidavit?

MR. MULLMAN: Mary Jane McCraw, the daughter, the signatory, did do an affidavit. Ms. Owens, of course, had passed away. She did do one. I have a copy here, but it has some of my writing on it.

THE COURT: I think I got a copy here.

MR. MULLMAN: It's part of the memo, Your Honor. I apologize -- I don't see where it is.

THE COURT: But in her memo she says the Estate just has no money.

MR. MULLMAN: Yeah. She said, "Based on the assets in the Estate, the Estate is unable to pay the likely cost of arbitration. I live on a fixed income, and have no money to spare for arbitration proceedings. I am unable to pay the administrative fee or the arbitrator's fees needed

to arbitrate the case.'"

That's the other problem we have, Your Honor -- which just came up in a different situation. Under the South Carolina ADR Rules, the arbitrators and mediators are limited on how much they can charge. The problem is the Judges don't realize that, and the arbitrators don't realize that. So if you pick somebody, they say, "Well, my hourly rate is 'X'." And we're going to say, "Well, no. Under the South Carolina ADR Rules, you're limited to whatever it is."

So that causes a problem. You're going to have a hard time picking somebody to do a two-week arbitration at the level of fee that the South Carolina ADR Rules allow you to. I do have this copy if you'd like the copy of the affidavit.

THE COURT: Thank you.

MR. MULLMAN: The Defendant also cited an Alabama case in 2007 called Carraway, for the proposition that a principal is bound by an agent if they don't speak up -- if they passively just sit there and allow their agent to do it. First of all, that didn't happen in this case. Barbara Owens didn't have knowledge of what was going on. But Carraway is not binding precedent in this Court. And its expansive view of apparent agent -- agency was rejected in Hodge, where the Court rejected the notion that a nursing home resident represents her -- her family member has the

authority to enter into an arbitration agreement on the resident's behalf, simply by failing to object to the family member's signature. That's in Hodge.

And Hodge just said, you know -- they represented by allowing the occurrent of the admission, and that -- that by accepting the admission, that somehow you're agreeing to the arbitration agreement. I don't know why they still quote Carraway, Your Honor. Hodge rejected that. It's just not South Carolina law on agency.

Even -- let's imagine that they can say, "Oh, well, in the past Mary Jane McCraw signed on behalf of her mom." So there was some course of dealing with a pattern -- which I don't believe exists. I don't think it would matter. But there certainly wasn't a course of dealing in a pattern when it relates to waiving a right to a jury trial and agreeing to an arbitration agreement.

So even if she did have an agency for allowing her to sign into the nursing home by signing the admission contract, there won't be one for the arbitration agreement. And once again, there's no merger. These are two separate contracts. The presumption for the merger doesn't apply because there's an anti-merger clause.

I think the rest of the arguments are well handled by the memo. But I will answer any questions the Court may have.

THE COURT: Any reply?

MR. BUCKNER: Your Honor, just briefly, a couple of things.

First just toward globally, this idea -- I didn't know before coming in today, what position the Plaintiffs would take with regard to Ms. Owens' competency. Now learning for the first time that they agreed she was competent. And there seems to just be this notion that she's competent. So if she doesn't sign the arbitration agreement or any agreement, it's invalid. They should have forced Ms. Owens to sign it.

But I actually think it's a plus for the Defense with regards to common law agency and those arguments and sort of a bolster for the need for discovery. But that's the way -- you know, everybody in this courtroom right now, at some form of fashion, has used an agent to do business for them. And this idea that she's competent, therefore she must sign it, makes no sense, quite frankly, to me.

If she was incompetent, you would think that there would be sort of stronger arguments from the Plaintiff that this was somehow underhanded. But the idea that the facility did the wrong thing here by dealing with the daughter -- who's not being admitted to a health care facility because of the problems that she's having.

Obviously, Ms. Owens was not in good health. She

was being admitted there for a reason. She had a number of co-morbidities. The facility is trying to deal with the person they think is the best person to do so under the circumstances. Quite frankly it makes all the sense in the world.

Mr. Mullman argued that there was no representation by Ms. McCraw that she had any authority. That's contradicted by the expressed provisions of the arbitration agreement itself. Which says, "By signing here below, I am representing that I have the authority to sign on resident's behalf, so as to bind the resident as well as the representative." It expressed representation, by signing the agreement that she had that authority. Again, I think that ninety-nine percent of folks in this same position would deal with Ms. Owens -- excuse me, Ms. McCraw to the same extent.

There is no argument from the Defense, Your Honor, that we are trying to engage in discovery to prove statutory authority. We recognize that we don't have statutory authority, except to the extent we can bootstrap the Adult Health Care Consent Act under the doctrine of merger. We think that the reason for discovery is to prove common law agency.

Again, we now know that we had a competent principal who was capable of making manifestations. The

affidavit presented to this Court says that it never made any statements. Well, the law in South Carolina of apparent agency makes it clear that both conduct and implied action can qualify for making representations for apparent agency.

And again, there are certain circumstances -- not just in Carraway and the Alabama case, but in South Carolina cases, where mere silence -- and I will admit that it's under certain circumstances that South Carolina -- I wanted to, of course, point this out. But under certain circumstances mere silence presence of the principal aside -- right beside the agent who's executing agreements on their behalf, can be sufficient apparent agency.

One of the most cardinal rules of agency lawyer, Your Honor, is that a third party should not be disadvantaged for dealing with an agent rather than the principal. If the principal is present at the time of the execution -- which we do not know at this point -- then the third party should not be disadvantaged for dealing with the agent.

The other thing I want to touch on, Your Honor, is the idea that the -- we would argue that Federal law controls the notion of discovery, because of a past case in Camsen. The agreement in this case says the FAA controls enforcement of the agreement -- expressly. It does that for the particular purpose that the South Carolina arbitration

act would exclude this. So we expressly say the South Carolina Arbitration Act doesn't govern enforcement.

But it's very clear that the South Carolina Alternative Dispute Resolution rules do govern the actual arbitration. So we're not taking the position that the FAA controls that. And the South Carolina ADR rules do have provisions about prehearing discovery, and evidence, and confidentiality.

I, quite frankly, cannot get my head around the argument that as a backup, allowing this Court to pick an arbitrator is somehow evidence of the Court inserting material terms to the agreement. That may be true if the Court somehow did that on its own. But here two private contracting parties have said, Ms. McCraw had signed the agreement, the facility signed the agreement.

So if we can't make up our minds on an arbitrator -- given the parameters of this agreement -- we agree the Court can supply the terms. So the Court is not supplying their terms for any other legal reason other than the power and legal nature of the contract. If the parties agree to it, how that can be evidence of supplying material terms, the parties supplied those terms. So we think that the Court as the backup selector of an arbitrator is more than reasonable in supporting our arguments.

The argument that we will never sue Ms. Owens!

Estate or Ms. McCraw under the provisions of this arbitration agreement make it a one-way promise -- is what I thought I addressed in the first instance. I just want to revisit.

The Defendant is waiving its right to a jury trial, too. There are certainly cases where these facilities decide they don't want to enforce it. In this case, we have a right to a jury trial for the claims asserted against us.

Just because of the unlikelihood of the facility asserting offensive claims, has absolutely nothing to do with the forfeiture of a valid legal right. Which is to say that when these folks file suit against the facility, we have to make a decision whether we want to waive our constitutional right to a jury trial, and we did. So it's not a one-way street, with that regard, regardless of the unlikelihood of us asserting offensive claims. But certainly I can think of a few.

But, Your Honor, again, we think that the legal arguments of the inherent agency and merger and equitable estoppel are sufficient. We don't think under estoppel we have to prove a benefit. I think that would be the third-party beneficiary, which we concede is not a valid argument. We don't think there is a third-party beneficiary argument after Coleman and Thompson and Hodge. We're happy

to concede that. I think that is gone -- now from -- as a feather in our cap for these arguments.

But, again, we think there are areas that could use factual discovery. And the reason that we have not come to this Court with any more information is for the fear of waiver. And we feel like it's a little bit of Hobson's choice to have to prove our case, but worry that we're going to undermine our argument. Or not prove it and get slammed for not having enough evidence. We just don't want to do that without the permission of the Court, because we think we're threatening the very legal right that we're seeking to exist, the right to arbitration. Thank you.

MR. MULLMAN: Your Honor, can I handle that last issue right there?

If you've already asserted arbitration and filed your motion, then you can't waive it then by asking for discovery related to the arbitration. You've already asserted that there's an arbitration agreement. Waiver doesn't apply in that situation then, Your Honor.

I don't understand that -- you know, today is the first time they realize that Barbara Owens was competent and had capacity. It's all over the chart. There's nothing that indicates she had dementia or she didn't have capacity to enter into a contract. There's nothing that says she was designated as incompetent. She did have depression. That's

it. And she was here for a short-term rehab for a respite, and she got a nasty stage-four pressure ulcer that killed her.

The importance of her competency is not because she made representations. The South Carolina Health Care Surrogate Act doesn't apply. It only applies if she's incompetent and unable to understand.

All these -- you know, Perry keeps going back to, "Well, you know, Mary Jane McCraw signed the agreement and made representations." So what? It doesn't matter what the agent does. It matters what the principal does. If I go up to you, Judge, and say, "Hey, I'm Bill Gates' agent. Give me a million dollars and Bill Gates will give you ten million." Oh, "Well, you signed it. You said you represented Bill Gates." No, you're going to go check with Bill Gates, right?

So it doesn't really matter what Mary Jane said, did, or anything. It matters what Barbara Owens did. And I don't know how you're going to find that out through discovery. They could easily have contacted Lisa Meising, their admission director, and said, "Hey, do you remember this lady? Did she make any representation about the arbitration agreement?"

I'm telling you right now it's going to be, "No". Even if she said, "Yes, I'm going to let my daughter sign

the paperwork for admission," that's different than agreeing to an arbitration agreement. Remember, these are two separate contracts. They're conflating the issue, Your Honor.

Thank you. That's all I have.

THE COURT: What about -- what about y'all's motion? Your motion for confidentiality.

MR. MULLMAN: Yeah, I think we've -- they're not going to do any discovery, any way. So it's not going to be any confidential things to resolve until we've resolved -- we resolve this.

But, if you want to talk about that, then, I mean, I can talk about it. But it was my understanding that we need to kind of resolve the arbitration agreement first.

THE COURT: It's on the docket. And I am -- I'm not going to say the Clerk's office makes me do things. But, yeah, they put it on the docket, so I've got to make some entries ---

MR. MULLMAN: Sounds good. We asked for a confidentiality agreement to protect trade secrets in the medical records. The problem is, we need to share information, because they're setting me up to violate the confidentiality. Because let's say they give me Document A in one case. I know about it, but I can't go up to you and say, "Hey, I need Document A in this case," because then I'm

in trouble on -- in a Bland Richter case where they used it to assist the Court in understanding what documents exist.

So I would ask for a sharing provision, where anybody I shared with -- it would only be South Carolina attorneys that you have jurisdiction of -- would have to sign the agreement, say that they're under the jurisdiction, and they have to keep it confidential. And/or, if you don't want me to share it with somebody else, at least let me share it with myself so I can use it in other fundamental cases.

Obviously, that doesn't mean I can make it public. I can't put it on a blog or the website. I can't give it to any competitors. I can only use it in litigation against these same entities. Now that might mean FAS and FCOS and not this specific facility -- because they have fourteen different facilities around South Carolina. I think we have cases against five of them right now.

So, you know, Judge Buckner has allowed a sharing provision, similar. Judge Kelly has. I believe you signed one in the White case where the Defendant agreed to it. Many Defendants agree to it. As long as I keep it confidential, then they don't really mind. Because here's what happens. If it's not confidential -- I mean, if it's stamped confidential and I can't share it with myself, we're going to be in front of the Judge numerous times arguing

about, well, should this document really be confidential.

I don't have to argue that if I can share it in my other case. If I can't share it with somebody else, then obviously I'm going to challenge each and every designation. And I have to take the position that they over designate everything. They, obviously, don't agree with that. But we're going to spend a lot of time in front of this Court picking through what's confidential, what's a true trading secret, what's just embarrassing.

Now related to that. There are certain things I would -- I wouldn't agree with anybody -- I wouldn't share with anybody, just myself. Personnel files, I wouldn't share with anybody else because that has Social Security numbers and information. I wouldn't use any kind of financial -- internal financial documents, I wouldn't do. Because I do believe those are truly confidential and shouldn't be shared among anybody except the people in this litigation.

But things like policy and procedures, emails, cost reports -- which are public anyway. You know, certain documents -- it just would streamline the discovery. We don't have to be here for five different cases, five different times, asking the Judges to make the same decision over and over again.

There are several benefits of having the sharing

provision. It streamlines the case. It keeps the Defendant honest. If they know they gave it to me in one case, perhaps they'll give it to me in another case, and I don't have go and -- it lessens the number of motions to compel in the court docket, which I'm sure you'd appreciate, Your Honor.

There's really no downside to do a sharing provision. Except they'll argue, "Well, you know, he's going to share it with everybody." Well, that's true with any kind of confidentiality. If I share it with somebody, I get in trouble. So what's the big difference? And that's what Judge Buckner says. He says, "Well, listen, there's really no reason, except discovery abuse, that you would not agree to this."

Everything is still confidential. It still protects trade secrets. It still prevents us from doing public disclosure. It prevents us from talking to previous -- I mean, from the Defendant's competitors. Because one of the big issues here, Your Honor, that I have, is let's say I have five cases. And I have the same administrator expert in all five cases. It hurts him that he knows this information in one case, but he can't use it in another case, because I haven't convinced the Judge to give it to me, or I haven't convinced a Defendant to give it to me in that case.

The other big issue is, let's say I'm associated in one case with Pat Knie. So I share the information in that case with Pat Knie. Then I have another case with Matt Christian who associated me (sic). So I have a different set of documents with that person. Pat Knie and Matt Christian can never talk about anything because they have different information? They can't share? It just creates an ethical dilemma. How do I properly, zealously advocate for my client's position, when I'm not sure how I can use information that is in my possession, but I'm not allowed to use it in a certain case?

We wanted confidentiality. We want to protect the Defendant's information. We just think the sharing provision is beneficial for everybody in this case. The Court -- even the Defendant, they can have one global list of documents provided to us. Thank you, Your Honor.

THE COURT: Do y'all object to that.

MR. BUCKNER: We do, Your Honor.

We would also object to having it heard today. I think that Mr. Mullman's impression was shared by Defense Counsel that it's probably not right for a hearing given that the threshold issue of jurisdiction still hasn't been decided.

THE COURT: Okay.

MR. BUCKNER: And there's certain parties that ---

THE COURT: I'm not asking for more things to decide today. I was just ---

MR. BUCKNER: Your Honor, we would ask that it not be decided, because we don't think its right for a hearing. And in prior cases, our position has been the standard confident -- standard Federal confidentiality order should apply. And the sharing fight is, obviously, a fight in a lot of those. Everything I just heard about confidentiality is problems for Mr. Mullman's office. But I don't think those problems trump the rules of discovery. The discovery should be decided by the particular facts and circumstances of each case.

Just because you sue nursing homes -- the lawyer -- doesn't mean that you now become the universal arbiter of what should be given to what lawyers and when. The idea that -- in that case -- any case they file is now treated like class action litigation -- like a med (sic) pharm drug or something like that. They're now replacing the Court's discretion to decide what discovery is.

Again, we don't think that that should be heard today, until the threshold issue of jurisdiction has been ruled upon. These other parties that have been served with discovery have asked for a stay, pending enforcement of the other agreement. So we don't think it's right for a hearing, and we would ask at appropriate time for a

confidentiality order to be entered that's consistent with the standard Federal order. We haven't briefed that for those reasons today, Your Honor.

And with regards to the two or three other subject matters in the arbitration issue, we would like to have just a short reply to read to the Court -- no need for a further hearing -- by Wednesday, if that's okay.

MR. MULLMAN: I'd like to object to that, Your Honor.

You know, this happens in every case. We're supposed to get things to you forty-eight hours in advance. And I sit there and wait for the Defendant to provide it. And they never do it timely. I produce mine forty-eight hours in advance -- my memo. They produce theirs at nine o'clock the night before. Then he ---

MR. BUCKNER: That's not -- I'm just not going to sit here for that. That's not true. I didn't file at nine o'clock last night. I do think we filed it on Tuesday ---

MR. MULLMAN: Posted on the ---

MR. BUCKNER: And it wasn't -- I don't know the State Court filing system. It was filed forty-eights hours, but not posted to the public index. I think there's some distinction ---

MR. MULLMAN: Until yesterday like nine or ten. I mean, it's their -- they -- it's their motion. Their memo

should be first. But they had an opportunity to read my memo and responded to it directly in their memo that was six hours later. I don't think they should get another bite at the apple, Your Honor.

THE COURT: I think I've got enough information. If by chance I miss the issue and I decide in Plaintiff's favor, it can be a motion to reconsider.

MR. BUCKNER: Okay. Thank you, Your Honor.

MR. KNIE: Your Honor, going back to the first motion about the arbitration and the authority to enter into arbitration. May I approach, please, and hand up the Circuit Court Order -- Teresa Murphy as PR in the Estate of Isaac Strong against this same chain, Hunt Valley, Fundamental, et cetera -- issued by Judge McKinnon October 2018, just nine months ago. It concerns pretty much the sames issues.

If I may hand that up, please sir. Thank you.

THE COURT: Thank you.

MR. BUCKNER: The case is on appeal. Thank you, Your Honor.

MR. MULLMAN: Thank you, Your Honor.

THE COURT: Thank you.

**END OF TRANSCRIPT**

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| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF SPARTANBURG | OF THE SEVENTH JUDICIAL CIRCUIT |
| Estate Of Barbara Owens, by and through her personal representative, Mary Jane McCraw, individually and on behalf of statutory beneficiaries, | |
| Plaintiffs, | TRANSCRIPT OF RECORD 2018-CP-42-03447 |
| vs. | |
| 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, | |
| Defendants. | |

January 6, 2020
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES, II, Judge.

Julie A. Cendroski,
Circuit Court Reporter
Seventh Judicial Circuit

A P P E A R A N C E S

RAYMOND P. MULLMAN, JR., ESQUIRE
For Plaintiff Barbara Owens

EDWARD JOHN WAELDE, ESQUIRE
For Plaintiff Barbara Owens

PATRICK E. KNIE, ESQUIRE
For Plaintiff McCraw & Owens

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For Defendant Fundamental
Clinical And Operational
Services, LLC

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**NO EXHIBITS PROFFERED**

Barbara Owens v. Fundamental Clinical & Operational Svc.

THE COURT: All right. I've got that the next matter is Barbara Owens versus Fundamental Clinical and Operation Services, Incorporated, et al. I believe that we're here on first is a motion by the defense to alter or amend; is that correct?

MR. WAELDE: Yes, Your Honor.

THE COURT: Okay. I'll be more than happy to hear from you. Now, in the development of this order, remember we went through a series of e-mails back and forth, so you mention in here that there were issues that needed to be addressed that were not addressed by me. You know, if you don't tell me about them prior to issuing the order, it's sort of difficult then for me to have to backtrack them and go backtracking and figure out what issues it is that you want me to reconsider when I never was told about it in the development of the order, okay? But I'll be more than happy to hear from you.

MR. HINES: Thank you, Your Honor. May it please the Court? And I -- let me mention, and also for the benefit of our court reporter, me say I'm Russ Hines. That's R-u-s-s H-i-n-e-s. I'm here, I work with Jay Davis.

THE COURT: I'm sorry for that. We all, we all

have crosses to bear in life.

MR. HINES: That's right. But ---

THE COURT: He's a fine lawyer.

MR. HINES: And, Your Honor, your point is well taken about the exchange. As much as I feel somewhat ashamed to do it, I'm gonna say I wasn't personally involved in that exchange of information and I ---

THE COURT: I understand Mr. Davis is difficult to work with, so the Court accepts that.

MR. HINES: But, but we do have some issues that, that, well, the way I see it, Your Honor, that is if it's something akin to a, you know, a Scribner's error or something, it wouldn't be a matter of dispute, that it absolutely is the thing to do to get that ironed out in the e-mail exchange before an order is issued.

But what I want to -- and I tried to make this motion very fairly detailed, and I do intend to expedite things by telling you that we rely on it. I do want to hit some high points of it and also to talk about some of the opposition that we've received from -- well, it's presented in the plaintiff's memo.

But, again, I wanted to -- I guess I think we did make one note and one point about a certain party being identified, Hunt Valley Holdings, LLC, formerly known as Fundamental Long-Term Care Holdings being improperly

identified as a defendant in the case. In plaintiff's memo in opposition, they concede that point and are kind enough to agree they'd be happy to, if nothing else, issue a proposed order that, that revises that.

Now, but on a more substantive or on the substantive point, the high points -- well, and also, one more thing on the, on those probably strikes on the border between substance and clarity, but when these motions -- the primary motion here is this motion to compel by the facility. This is a skilled nursing home facility. Then there are these other entities that have been sued, and they're called Fundamental Clinical and Operational Services, Fundamental Administrative Services, and Thi of South Carolina, LLC. The facilities, the formal name is Thi of South Carolina, Spartanburg, LLC, d/b/a Bangor Manor Spartanburg.

These other entities besides the facility, had made motions to stay, and those motions really sort of tagged along with the primary motion, which is to compel arbitration. What those motions said essentially was, Judge, because a party to this case, the facility, has made a motion to compel arbitration, we'd ask that the entire case be stayed until that decision, until the arbitrability question is finally decided to include any arbitration proceedings that ultimately are held until

they're concluded.

This order didn't specifically address those, those motions to stay. And just out of an abundance of caution, I asked in this motion to alter or amend that they be, that the scope of the order be clarified and that the Court has addressed those other motions as well. It's really a, well, it's a housekeeping matter in a way because -- but in any event that's -- I wanted to draw the Court's attention to that, that's addressed in number, Item Number 2 in our motion to reconsider.

Now, onto the substance. What I want to focus the Court's attention on is the concept of merger and I guess as it relates to equitable estoppel. And it's really a two-part argument that we're making here. Very briefly, there is two documents that are very important to this argument. One is the admission agreement, which was signed by the residence's daughter, the resident here was Ms. Owens. Her daughter is Ms. McCraw.

When she, Ms. Owens, the resident of the facility, was admitted, her daughter, Ms. McCraw, signed an admission agreement and also signed an arbitration agreement on behalf of her mother. And these documents -- and, well, in so doing, there's a representation by Ms. McCraw that she had the authority to do this, to sign on behalf of her mother.

Now, but as a result of that, the arbitration agreement, if one were just to look at it by itself, it would appear to be facially valid. Reading it, it would appear to have the language that it's supposed to have, identifying the parties, providing for the arbitration, which is to take place in accordance with the South Carolina ADR rules, and at the bottom including the language: By his/her signature below, the executing party represents that he/she has the authority to sign on a resident's behalf so as to bond the residence, as well as the representative.

Now, where that comes -- where that's challenged is when we moved to compel arbitration a while back. We get an affidavit from Ms. McCraw, filed in conjunction with the plaintiff's opposition to our motion. And in that affidavit, Ms. McCraw says, well, I didn't have authority to do that. Notwithstanding the representation at the time, I didn't have authority.

So, Your Honor, the question here is whether or not that arbitration agreement can be enforced against Ms. Owens, or her estate rather, and in more particular, when Ms. Owens herself was not a signatory to it. And, according to Ms. McCraw's affidavit, which we haven't had a chance to really look behind via any discovery, but putting it aside, that latter point, Ms. McCraw's

affidavit said she didn't have authority.

That brings us to the question, you know, of this merger estoppel because estoppel is one of the ways in which South Carolina courts have recognized there is a valid way to enforce an arbitration agreement against a non-signatory. For that theory to work, what we look to, this is the case of Coleman versus Mariner Health, is that when documents are executed at the same time by the same parties for the same purpose to enforce the same transaction that'll be construed together, it would be deemed to have merged.

And the point of this, Your Honor, is to say if you merge the admission agreement with the arbitration agreement, then we would argue that Ms. Owens falls within the, within the direct benefits rule of the equitable, determining finding equitable estoppel. The idea is that she cannot be admitted to the facility and receive benefits in accordance with that admission agreement, which is merged with the arbitration agreement, and at the same time say, well, I deny the validity, excuse me, of the arbitration agreement.

And so it's sort of a one, two punch, Your Honor. You have ---

THE COURT: So someone could not be admitted to the nursing home unless they absolutely agree to

arbitration?

MR. HINES: No, Your Honor, it is not a requirement of admission. And so ---

THE COURT: But I thought you -- but isn't that -- doesn't that destroy your argument of estoppel?

MR. HINES: No, Your Honor, it doesn't. And that's -- I think that's certainly a point that I'm happy to address.

THE COURT: Okay.

MR. HINES: It's not -- this is this way it works. And this is, well, it's on page ---

THE COURT: And I just want to be clear, because it sounds like you're going to where in order for someone to receive care at Magnolia Manor, they have to in advance say we're going to bind ourselves, our estates, our heirs, everybody to go to arbitration. Sounds like arbitration becomes the primary focus of admission.

MR. HINES: Your Honor, let me dispel that notion.

THE COURT: Okay.

MR. HINES: The arbitration agreement does not have to be signed at all, in which case you wouldn't have any question of merger rise. It would be an admission agreement and that's all you'd have. Once the

arbitration agreement is voluntarily agreed to, then the question of merger arises.

And I would -- forgive me for the sequencing of this. It is always trouble for me because different aspects of it will have a tendency to pop into my head at different times. But in plaintiff's memo in opposition, they note that these two documents, the arbitration agreement and the admission agreement have separate titles. They are separately paginated. They have their own signature pages.

Well, first of all, that's entirely consistent with what I just told the Court that the arbitration agreement doesn't have to be signed at all. Now, there's a difference between something being in condition of admission and something being done in conjunction with admission. And I guess moreover, you're never gonna have a question of merger rise without separate instruments and separate documents.

The whole point of merger is what do we do with these two documents that were executed at the same time, by the same parties, same purpose and, of course, the same transaction?

And make no mistake, that is exactly what we have here in the case of Coleman versus Mariner Health. The Supreme Court was looking at a situation where you had

an admission agreement. Actually, I think it was multiple cases that were consolidated, but admission agreement and arbitration agreement. Was there a merger? This is what the court said: 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, appellate's are correct that there was a merger.

So the Supreme Court, even though it didn't have a merger under the facts of the case then in Coleman, it actually then recognized that merger -- well, the, the documents at issue there, which are the same types of documents, although materially different in some respects, and I'll mention, were executed same time, same parties, same purpose, same transaction.

Now, as I mentioned in Coleman the court found that the documents, the admission agreement and arbitration agreement there, were -- there was no intention for a merger. And the court did so really on two bases. Number one, in the admission agreement, there was an entire agreement clause in the Coleman, in the admission agreement that was at issue in Coleman that specifically referenced the arbitration clause.

The court found that to be an enitia or indicative of an intended separateness of the two

documents because the entire agreement clause, again, in the admission agreement made separate specific reference to the arbitration agreement.

That's not what we have here. The entire agreement clause in our admission agreement doesn't mention at all an arbitration agreement. In fact, it includes language at the bottom that says, the undersigned further acknowledge -- acknowledges that he/she has received the admission handbook and other admissions materials. And understand that these documents are made a part of this agreement by reference herein.

And, Your Honor, going back to my point earlier about this not being a requirement, if the arbitration agreement had not been signed, then it wouldn't be a part of the admissions materials, but it was signed and it is a part of the admissions materials. So, again, it's not required, but once it is signed, it becomes a part of the admissions materials. That's why it's in conjunction with admission.

Now, Your Honor ---

THE COURT: So it didn't matter whether it was her daughter, her son, her cousin, or a next of kin, or a neighbor that brought her to it, it's just the fact that it was signed by somebody?

MR. HINES: Your Honor, that is -- yes. Under this theory, this is an estoppel theory, an equitable estoppel theory. And, and so you -- we are dealing with a situation. What we don't have are an actual true agency. We don't have actual or apparent authority. We don't have a power of attorney. So we -- but the way it works is nonetheless, and this is in, oh, Wilson versus Willis, a Supreme Court case from just last year.

South Carolina has recognized several theories that combine nonsignatories to arbitration agreements under general principles of contract and agency law, including, one, incorporation by reference; two, assumption; three, agency; four, veil piercing alter ego; five, what I'm talking about, estoppel.

So, yes, Your Honor. But the safeguard there, though, is ---

THE COURT: So you agree with me that it didn't matter who signed it, just as long as it was signed?

MR. HINES: At least as a predicate to my argument, it does not, it does not. But the safeguard, Your Honor ---

THE COURT: Is that a Yes?

MR. HINES: Yes, I do.

THE COURT: Okay.

MR. HINES: I ---

THE COURT: Okay. So it doesn't matter who signed it, just as long as it was signed?

MR. HINES: Now, I suppose one caveat to this would be if there were evidence that was the way it was no question that -- and, really, it's hard for me to imagine a situation where this would arise, you know, where there was evidence that the person who signed it maybe told the facility I don't have authority to do this, but I'm gonna go ahead and sign it anyway. You know, maybe something of that extreme nature, and then -- but you'd be talking about a different thing. You really wouldn't be talking about my merger or are you failing, you'd be talking about fraud in the formation of a contract.

But, but if you have a signed document that purports to where the person who signs it on behalf of the resident purports to have the requisite authority to do so, and you have then the -- well, the merger of that document with the admissions agreement, then what you have is where the estoppel comes in, is the direct benefit that's received by the resident. The resident, again, can't on the one hand be admitted by virtue of the admissions agreement with which or -- with which the arbitration agreement merged and then still deny the validity of the arbitration agreement.

So that's the, that's the one/two punch. And, Your Honor's been incredibly lenient with letting me go on so long, but I realize there's some nuance to this argument that I want to answer. In particular, any questions that, that I might erase in Your Honor's mind.

But I do want to give, I guess, another point, if I may. In plaintiff's memo in opposition, there are efforts made to liken the situation hereto in Coleman. But, again, remember in Coleman the, the legal basis for my argument was recognized, which is you can have a merger and you can have the same time, same parties purpose of transaction, and then you have the combined documents. And if you have benefits under, under those documents or under that contract, then the stage is set for, for equitable estoppel.

The Coleman court found against merger. And I think I told you that he did so on the basis that the arbitration agreement in that case was specifically mentioned in the entire agreement clause of the admission agreement, which is -- that was a large part of it. And then another part of it was that the arbitration agreement could be disclaimed within 30 days of signing while the admission agreement could not evidence in attention when each contract remains separate.

We don't have that situation here. There is no ability to disclaim the arbitration agreement within some time period. And so, again, the Court found that the separateness was reflected in the entire agreement clause itself in Coleman. We don't have that here. In fact, we have this reference to other admissions agreements being -- other admissions documents being a part of this. We don't have the ability to disclaim, like you had in Coleman.

THE COURT: But you don't dispute that they are separate?

MR. HINES: Well, I, I don't dispute there are two. I do dispute whether or not they are intended to be separate for purposes of contract interpretation.

THE COURT: But I thought you said that a patient could be admitted and not sign the arbitration.

MR. HINES: And they could, in which case ---

THE COURT: Okay.

MR. HINES: In which case the arbitration agreement would never be a thing that existed.

THE COURT: Right.

MR. HINES: And so, you wouldn't have the question of merger arise. But once, once it is signed, it absolutely is signed in conjunction with the admissions process. There's no other reason why it

would be signed. You know, for instance, plaintiff argues in the motion memo in opposition to us that these, these contracts or, excuse me, the documents don't have the same purpose.

Well, in Coleman, the court specifically said that that part was true. Even ruling against the Coleman appellate, the court still said, yes, these, these do have -- this is the same time, same parties, same purpose in transaction. And so, again, you're never gonna have the merger question arise without multiple instruments. It's not gonna happen.

So if it's auspicious and sort of illusory. And, I guess, I'm wanting to say ah ha, these documents have separate titles or separate page numbers or separate signature pages. Of course, there's always gonna be more than one instrument if the question of merger arises.

The other thing to remember is that presumption is in favor of merger. What, what Coleman says is that the general rule is that 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 then, of course, the same transaction. The courts will consider and construe the documents together. The theory is that the documents -- excuse

me, are that the instruments are effectively one instrument of contract. Again, we have multiple instruments, but they merge. You're always gonna have multiple instruments if merger arises. And think about the, it's a very specific set of circumstances that has to happen before we even talk about merger, which at the same time parties, purchase, transaction.

And all of that coming together is what gives rise to a presumption in favor of merger, not against it. And unless that presumption is gonna be completely devoured, you know, by the exception to that rule, which is if the parties show a contrary intention. If he has to take something beyond mere speculation or conjecture that there's any intent to have the documents treated separately. And I submit to Your Honor there is no such intent that could reasonably be found in the, in these documents or in the evidence of the record. And, again, once their ---

THE COURT: Isn't her affidavit very clear?

MR. HINES: Her affidavit doesn't say anything about whether or not the documents were intended to be separate. It just says she didn't have authority to sign.

THE COURT: Okay.

MR. HINES: Your Honor, I guess, wrapping it up,

again, I mentioned that the -- and, again, Your Honor, believe it or not, as much as I've rattled on, there's probably -- there's bound to be some points in here that I've not actually hit.

Oh, one just jumped out to me right now. One of the arguments that the plaintiff makes in opposition to our equitable estoppel argument is that in the Wilson case, the case I just read from a moment ago, that direct benefits estoppel, and that's what we're talking about here, the direct benefit to, to the resident. It's not implicated simply because a claim relates to or would have arisen -- excuse me, or would not have risen but for a contract's existence. And then it goes on to cite a Texas decision that the Wilson court, our Supreme Court favorably cited, which says: When a claim depends on the contract's existence and cannot stand independently, that is the alleged liability rises solely from the contract and must determined by reference to it, that really prevents a person from avoiding the arbitration clause that was a part of that agreement.

But when a substance of claim arises from general obligations imposed by state law, including statutes towards another common law duties or federal law directly benefits estoppel, is not implicated, even if

the claim refers to or relates to the contract or would not have risen, but for the contract's existence.

Now, plaintiff looks at that and says, ah-ha. Our claims are not contract claims. We're suing them on the basis of independent duties you owe under tort law or under some regulatory or statutory authority.

The thing is this is -- it takes a bit of close reading but it's right there. This is talking about it doesn't matter -- it wouldn't be enough to say that a contract is involved in terms of -- this is trace.

This is looking where the claim arises from. Where the proper place to look, and this is evidence in the rest of the opinion, is where the benefit arises from. The benefit arises from the contract, which is the admission agreement with which the arbitration agreement merged. And some I realize there is, well, quite a bit of nuance to this, Your Honor, but we're not saying that their claims arose out of a contract. We're saying a benefit arose out of a contract. That's where -- and that's, really, that's. That's the heart and soul of, of the equitable estoppel doctrine is that she got a benefit from the very contract you're trying to avoid part of.

The last thing, Your Honor, other than, again, standing on our motion, is our alternative request for

discovery. If we, we admit that we cannot today point out or show to Your Honor that there's a basis for an actual agency, whether apparent -- excuse me, whether or not an actual or parent agency. And we can't show you that there was a ratification.

This all goes to the merger. And estoppel argument, I should note, operates independent of this. This was -- these would be other basis, potentially, to enforce the arbitration agreement. But if you are not to reverse course and grant our motion to compel arbitration on the basis of merger and estoppel, we could argue that it's a lesser alternative that we be allowed to conduct limited targeted discovery to get into these questions that would be the subject matter of whether there's evidence of an actual parent agency or ratification after the fact. Plaintiffs have admitted in this case that Ms. Owens was competent while she was admitted to, to the facility. And the ---

THE COURT: Do you all agree with that?

MR. HINES: That she was competent?

THE COURT: Right.

MR. HINES: I don't have any reason to disagree with it, Your Honor.

THE COURT: Okay.

MR. HINES: But I -- but -- let me say it like

this. The only reason why my motion, or our motion to compel arbitration, is -- well, the challenge, the evidentiary challenge to this arbitration agreement comes in the form of two affidavits that the plaintiffs have submitted.

First, Ms. McGraw's affidavit, that's an affidavit we haven't had a chance to ask Ms. McGraw anything.

THE COURT: Now, wait a minute. You have access to the lady or the gentleman that admitted your patient.

MR. HINES: Well, Your Honor, that is ---

THE COURT: Would they not have observed her?

MR. HINES: Your Honor ---

THE COURT: Would you not have access to every doctor, every nurse, every CNA, every -- anybody that ever came in contact with her?

MR. HINES: If they were all still there. I mean, you know...

THE COURT: Well, aren't you in a better position to know if they are or not?

MR. HINES: Well, to know if they're there, we certainly are in that position.

THE COURT: Okay.

MR. HINES: But, but, Your Honor ---

THE COURT: And you could have gone and talked --

MR. HINES: Well, I'm not sure ---

THE COURT: -- to them.

MR. HINES: Your Honor, if I ---

THE COURT: You could have explored whether or not you have an argument that she was or was not competent.

MR. HINES: Your Honor, we could not have explored it fully. We might have been able to ---

THE COURT: Sir, you haven't presented this Court any information to make that an issue, have you?

MR. HINES: Well, Your Honor, we're asking for discovery so that we can present that information.

THE COURT: Anything stopped you from asking those people those questions when they are in your employ?

MR. HINES: Well, we wouldn't have had a reason to ask them when they were in our employ. And, I mean, I'm not trying to be cute here, Your Honor.

THE COURT: And I'm not trying to be cute either, but you're trying to create an issue to which you have control over, ask me to give you permission to go do something you already have the ability to do.

MR. HINES: But, Your Honor, let me say it like this, I understand your point.

THE COURT: Okay.

MR. HINES: We have the ability to, to take certain steps, but this is a factual point that ought to be decided on a, on a full and, you know, reasonably complete record. And let me use this.

THE COURT: So you're abandoning your other arguments?

MR. HINES: Not at all.

THE COURT: Okay.

MR. HINES: No, no. No. Your Honor, this is hard, as you can tell, it's hard for me to argue this because ---

THE COURT: Because Coleman presents a very difficult case for you.

MR. HINES: Well, there are a lot of moving parts. And, again, Coleman, keep in mind, Your Honor, Coleman, the real importance of Coleman is to say that the Adult Healthcare Consent Act does not allow for someone to sign an arbitration clause on behalf of the, you know, a surrogate to decide arbitration clause on behalf of the incapacitated person. But that was a major point in Coleman, and whether or not that violated the FAA and, essentially, the supremacy clause by being an undo well, Your Honor, not treating arbitration agreements, putting them on more equal footing without contracts.

The argument that was made from my ---

THE COURT: Did you want me to address that?

MR. HINES: Well, no. No, no, no. That's not something that we've raised to this point.

THE COURT: Okay.

MR. HINES: I'm just saying that, that that's really what -- that was the meat, that was the heart and soul of Coleman. Coleman does get into this issue of merger and estoppel. And as I've mentioned to the Court, I think Coleman actually gives me the factual -- excuse me, the legal ammo or the legal, you know, I mean, I can speak metaphorically, it gives me the legal basis to make my argument, which is to say same time, same party, same purpose, same transaction, which arbitration agreements and admission agreements are, creates a presumption in favor of merger.

Now, it said that its case under its facts, well that we find that the intention of separateness, separateness, you know, in the intention of contrary mergers, we find, we find it in this case. That's a factual point, and it would be subject to the facts which differ materially in this case. Again, it looked at the fact that the entire agreement clause referenced arbitration, the arbitration agreement specifically. Therefore, the court said, see, there's a, there's an

express reference on the face of this they make separate. Furthermore, you have this disclaimer provision in the arbitration agreement. We don't have either of those here.

And then we put this in the brief, but it doesn't make any sense for these documents to be considered separate. The only reason for the arbitration agreement to exist is the admission agreement that's, you know, they really work together, well, hand in glove. The arbitration agreement, you know... And I think I've concluded that thought, Your Honor.

But what I was saying before about the discovery, in support of their opposition to our motion to reconsider, this is the plaintiffs, the plaintiffs have presented the affidavit of someone named Lisa Mason, the admissions coordinator at Magnolia Manor in Spartanburg in July of 2015. This was filed on the third of this year, so this is breaking news.

She says that she was the person who went over the paperwork with Ms. Owens and Ms. McCraw. She has no recollection of any events that transpired that would essentially the events that would give rise to these agency arguments we're making.

It's an unusual thing. I understand Your Honor's point, and I'm not at all trying to be cute or to run

away from it. There are certain investigative steps that we can take that would be -- that might give us some progress down the road of understanding this situation. But we can't use the tools of discovery for fear of a waiver argument that we've now implicated. That's why we're asking the Court to help with that. We're asking the Court to allow us to do this without waiving the discovery, without waiving our arbitration rights.

But what we have is the only evidence that cuts against me are two affidavits that obviously are people that are ---

THE COURT: All right. You have lost me. When you come to court as an officer of this court and say that your client cannot go ask simple basic questions of its employees to which would make this court run more efficient, would make you in a better position to give me arguments that are factually correct and not based upon your closing your eyes or having your client to close their eyes to what the true facts are in a case, is simply wanting to protect legal arguments, as opposed to create and present arguments that are supported by factual information.

MR. HINES: Well, I'm acknowledging the absence of factual information, so I'm not -- I hope I ---

THE COURT: Absence of factual information, the way you're telling me, is the fact that your client has not decided to go ask any questions of the people that are within their control.

MR. HINES: With Ms. Mason, I don't believe is in our client's control at this point. And this issue didn't arise until she was not in our control. Two affidavits we have are from a former employee, Ms. Mason, and the plaintiff's client.

THE COURT. Okay. How many other employees are there that were there when this lady was a patient in your facility?

MR. HINES: Your Honor, I don't know. I mean...

THE COURT: You don't know because you haven't asked?

MR. HINES: That's true, I have not.

THE COURT: Your client has not asked?

MR. HINES: I don't know that ---

THE COURT: How long has this suit been filed?

MR. HINES: A couple minutes. Your Honor, it's got an 18 case number, I know that. I can see that, so I don't know.

THE COURT: Anything else that you would like to present to me that you have not argued yet?

MR. HINES: Nothing that I haven't argued or it's

written down in our motion, Your Honor.

THE COURT: Anything else that you've written down that you would like for me to take note of?

MR. HINES: Your Honor, I, I mean, I don't intend to abandon anything that's written down. So, and I think I've covered it, but I don't think there's anything -- there's nothing that's -- I certainly have tried to hit the high points, Your Honor. And, again, this is not me trying to be cute, but at the same time I certainly don't want to unwittingly abandon an argument that was duly presented to the Court.

THE COURT: And I certainly don't want oral arguments to be just merely an exercise in futility. I want to know what those arguments are, the same way that when I develop orders in the case, I depend upon things that are not on the record, such as e-mails that take place between lawyers instructing me on what they feel is significant and important in orders. And I want to do that so that lawyers don't come back later and try to accuse the Court of not paying enough attention to the orders that this Court signs.

MR. HINES: Your Honor, there certainly was no intention to do that. And if there was -- well, all I can do is offer a sincere apology if it was taken that way. I'll tell Your Honor candidly, what I do primarily

is appeals, and I spent the first couple years out of law school in the Supreme Court as a staff attorney, and I think I've developed a very healthy paranoia for issue preservation. The whole exercise, and I'll tell you I don't mind saying it on the record, I wish the issue of preservation wasn't the potential doomsday that it is. The reason I have to make these arguments, Your Honor, is strictly to protect my client's interest.

THE COURT: And I understand that, sir, and I respect that. And I've had other lawyers that come in that have the same paranoia that you do. But as a trial Court, I have to make decisions based upon what this Court is given. And the decisions based upon this Court is not going to -- what legal arguments that may be made, but it's also legal arguments that are supported by the factual information that's particular to an individual case. And each case that is presented in this court is different.

MR. HINES: Yes, it is. And ---

THE COURT: And so we need to -- I look for lawyers to be of assistance in helping me make the decisions I have to make to try to figure out, okay, what is this case about? What is this -- what are the legal issues that are particular to this case? What are the facts that are particular to this case that I need

to take a look at?

MR. HINES: Briefly, Your Honor, then let me say this.

THE COURT: Because you know this Court's docket, do you know what it's like?

MR. HINES: I'm sure that it's chock full --

THE COURT: Yes, sir.

MR. HINES: -- of all kind of things --

THE COURT: Correct.

MR. HINES: -- that I can't even imagine. And, Your Honor, I want to be respectful of the Court's time. And the Court has been incredibly respectful and lenient with me. I mean, I -- and so, I hate to, well, at all give the impression of -- I've always thought that the best way to get a judge to make a decision that favors your client is to try and help the judge out by making a ---

THE COURT: We appreciate that. At least I do.

MR. HINES: And so, I mean, I try and have great sympathy --

THE COURT: Yeah.

MR. HINES: -- for the plight of a judge with a stack of who knows how much to read.

THE COURT: You heard the case that was right before you. I mean, these people are arguing their

class action case that started in 2017.

MR. HINES: And so, I can assure Your Honor, I'm not trying to -- it's for lack of ability, not for intentional trying to be confusing, if I am. Let me try to say this factually. The only two things factually that I'm looking to with my merger estoppel argument are the admission agreement and the arbitration agreement. That's it.

So, I mean, in every other respect I've got nothing factually. That's why what we have is the only evidence in the record otherwise, I mean, is the two affidavits that we hadn't got a chance to cross-examine. I certainly understand Your Honor's point. There's a, there's a number of investigative steps that could have been done without formal discovery. I simply would make a point that had we done that, you know, you hear me submit an affidavit that says something different than what it says to the contrary of the plaintiffs have presented, I'm quite certain the plaintiffs are gonna say, well, hold on a minute now, that doesn't prove anything. We've got to go and figure out what -- we've got depositions to take, Your Honor. So, you know, I don't think that that really -- what we would be, if we're gonna have a -- if a factual point is gonna be decided, it is a fulsome targeted discovery effort. And

the reason -- and that's what, that's what we ask for.

And then so, our point, though, is certainly not to make a judge, your life harder, or any other judge's but, you know, again that's our fallback argument on discovery. My number one argument is merging estoppel. Number two argument is discovery so we could get into the issues, well, the facts that bear upon whether there's an actual agency or a true piece. The language of it always kind of gets my head spinning. I believe it says, the case law says, true agency can be either actual or apparent. And then whether or not there is a basis for ratification.

THE COURT: Okay.

MR. HINES: But I do not have any facts to support those currently. I have to acknowledge that.

THE COURT: All right, thank you. The point, though, for future reference, on your alternative argument of limited discovery, I understand the argument you're trying to not have the other side raise, but you might, for future reference, benefit that argument if you did, in fact, engage in limited discovery based on what you have to actually show that there was a conflict, a factual conflict. Otherwise, you're asking the Court to engage in a presumption that there would be a conflict; that, in fact, there would be a factual

dispute. So for future reference, you might want to say, okay, I'm going to take the chance that I might enhance that argument on the estoppel or on the discovery issue and say, okay, I'm gonna prove to the judge that we, in fact, might have a discovery issue that we need a limited discovery on, as opposed to asking me or some other judge to actually take that leap of not knowing what's out there. And then, am I just, in fact, delaying the inevitable, which is that preventing the plaintiff from actually obtaining their day in court, be able to pursue their lawsuit.

Just future reference. You make the decision, you know best how to represent your client and you do an excellent job on doing it. Just for future reference, if you're gonna take that argument with me, you might want to prove to me that there was, in fact, a factual dispute.

MR. HINES: Thank you, Your Honor.

THE COURT: Potential -- go ahead.

MR. HINES: I sincerely appreciate it.

THE COURT: And I sincerely appreciate your arguments. Why not do what he says? Why not take and just say, well, both documents were executed approximately at the same time. They were both documents that were executed by the same person, even

though the person didn't have any legal authority to do so, or apparently not having a legal authority to do so. Why not just take the documents and read them as one and say, well, she was admitted. She received a benefit at the nursing home; therefore, she has to go to arbitration?

MR. WAELDE: John Waelde in for Ray Mullman for plaintiff, Your Honor. If it please the Court?

THE COURT: Yes, sir.

MR. WAELDE: Just to clarify, would you like me to directly answer that or would you like me to go forth and plead to the argumentation?

THE COURT: Well, you could sort of answer that, but please do not not tell me anything you want me to know.

MR. WAELDE: And can you restate the question one more time, Your Honor?

THE COURT: Yeah. Why not do what he's asking us to do, which is just to say that both documents, they were executed at approximately the same time, they were executed by the same person? You know, let's just say that they were merged and that since she, Ms. Owens -- I'm sorry, Ms. McCraw received benefit of the nursing home, why not then just send her to arbitration?

MR. WAELDE: Well, there's three reasons, Your

Honor. Firstly, the third part of that is purpose. And there is a distinct purpose that was noted in the Coleman case that what Coleman actually says the arbitration agreement was not required for decedent's admission, contained no provision for medical or nursing or healthcare services to be provided. So I think right there off the cuff that goes against the merger argument.

Also, like I said, they're two separate and distinct documents. You know, to presuppose that they've already merged, it takes out a lot of arguments that they have not merged. Even then going backwards, they're not valid contracts. So, you know, as Your Honor is well aware, South Carolina law offer acceptance consideration for a valid contract. And arbitration agreements are cherished state contract law.

We don't have valid acceptance here. As the defense has conceded, there is no power of attorney and there was no parent or actual agency. Therefore, you can't have a valid acceptance of the contract of either one. And we need to look at them separately because, not saying the direct benefit analysis here is correct, but I do not believe it applies, but direct benefit analysis can say the admissions agreement, but it can't say the arbitration agreement as for listed directly and

by the Coleman court of that, there's, there's no separate purpose. Does that answer your question, Your Honor?

THE COURT: If you're satisfied with it, then I will move on.

MR. WAELDE: Okay. So I'd like to start off, there is a presumption against arbitration when the party resisting arbitration is a nonsignatory to the agreement. That's from Wilson v. Willis. That case cited by the defense in their motion.

So, started with that. I'd like to go to why equitable estoppel doesn't apply here today. The asserting party has the burden of proof. That would be the defense. As I mentioned earlier, state law applies. Arbitration is a state contract. Valid and so equitable estoppel first one active than the principle has an actual way for to be a false representation.

We have the McCraw affidavit. She makes -- she states the sworn testimony. She doesn't make any false representations. We have Lisa Mason, the admissions coordinator, who is an employee of the facility at the time and she can't remember anything about that interaction. So I don't see how the defense has proven the first element of equitable estoppel.

The second element involves intent. There is no

intent for false representation to be made because, as Ms. McCraw stated, she didn't make any false representation. So I don't see how they're getting the intent when no apparent false representation was made.

And then the third element, had actual or constructive knowledge of the real facts. Like I said, Ms. McCraw didn't do any false representation. She only stated what she knew. That's from Strickland, Your Honor, those three parts of equitable estoppel, so I don't see how the defense can meet their burden of proof here for equitable estoppel.

THE COURT: So it's their burden?

MR. WAELDE: The party asserting equitable estoppel has the burden of proof, Your Honor.

THE COURT: Well, what about the presumption that counsel argues is created by the two documents? Is there that presumption under Coleman?

MR. WAELDE: No, Your Honor, the presumption is not there. If you -- if -- when you continue reading Coleman, it states that the entire agreement clause, and the paperwork facially show them as separate documents, defeating the merger.

And then Coleman goes on to state that even if it isn't a 100 percent facially separate, it creates ambiguity. And if you look at the case they cited,

Davis v. K.D. Homes of SC, it says: At a minimum this creates ambiguity, the documents that must be construed against the drafting party, the defendants.

So even if Your Honor doesn't find that the entire agreement clause facially makes them separate, at a minimum it would create ambiguity which must be construed against the drafter, which is the defendant.

You know, what Coleman, Thomas, Hodge, they've all held this. It's, you know, it's ambiguous. It shouldn't even be construed against merger against the defendant. As we stated, each docket had separate titles, had separate imagination, had separate signature blanks for them.

As I stated in response to Your Honor's question at the beginning, they're not for the same purpose. The admission agreement is for care. The arbitration agreement is for litigation. They have distinctly separate purposes.

Now, continuing that, for which the plaintiff contends that no merger has occurred, that throws out defendant's direct benefits argument. First, under direct benefits the Wilson court stated that there can be no third-party beneficiary unless a valid contract exists.

As plaintiff stated today, Your Honor, we do not

believe a valid contract exists. There is not a valid acceptance because, as defendant's conceded, there was no authority by Ms. McCraw to accept the contract, the arbitration agreement.

Secondly, as the defendant read out to the Court, we disagree with their interpretation of the law. We believe that Wilson clearly states when it favorizes her general obligation suppose such as state common law with statutes, torts, direct equitable estoppel is not implicated. I think the court in Wilson is very clear on that, and I don't see how it can be misinterpreted.

Also, we don't see how there could be a direct benefit from the arbitration agreement. I point the Court's attention to the Thompson case, which held that arbitration itself cannot be a benefit, which makes sense when you think about in an arbitration agreement, the only thing happening to plaintiff is that they're giving up their constitutional right to a jury trial. I don't foresee how that could be a benefit to anyone. So the ---

THE COURT: But they might disagree with you on that.

MR. WAELDE: That's true. So I think for those three reasons as stated in the Wilson case, direct benefits estoppel does not apply here. Also, very

quickly, defense conceded there was no agency and there was no power of attorney. You know, that takes out the fact that these documents are invalid in the first place.

And as for the limited discovery, plaintiff believes that, you know, as the Court stated that this case has been on the docket for a long time. Defense could have made efforts to interview former employees and collect their own affidavits, just as plaintiff, you know, we got an affidavit from our client and then we also got an affidavit from we sought out a former employee. The employee who signed the arbitration agreement on behalf of the facility and the admissions agreement.

We went out and we did that discovery, just to not, you know, waste the Court's time. Also, we even filed a notice of deposition of Lisa Mason, the ex-admissions coordinator, to which the defense never got back to us on.

MR. HINES: That ---

MR. WAELDE: Excuse me. Pardon me, Your Honor, they did, but they said they wouldn't have time to do it and that they were too busy. So plaintiff has tried to engage in good faith with the discovery and we believe that the evidence is quite clear. It's quite clear that

it's not about arbitration agreement. There's no issues about that. There's no issues about misrepresentation.

And we believe, honestly, Your Honor, if you look at Ms. Mason's affidavit, she's the employee at the time in charge of throwing the arbitration in the admissions agreement. Any alleged misrepresentation that's going to be made, it would have been made in the presence of Ms. Mason. Well, the issue is Ms. Mason has given sworn testimony that she does not remember anything from Ms. Owens' admission.

Therefore, I, I fail to see how defendant would be able to find anything discoverable that would lead to anything deposed to look like it was presented to the Court today. We believe it is unduly burdensome and it could be a delay in litigation that we've already had to suffer through for over a year now.

THE COURT: Why is it -- I mean, I have, according to my information, that the plaintiffs have filed a motion for confidentiality.

MR. WAELDE: Yes, Your Honor.

THE COURT: Why?

MR. MULLMAN: I might be the better one to answer that in theory.

THE COURT: I mean, it seemed like that should come from the defendants.

MR. MULLMAN: Yeah. They won't give me anything until I agree to confidentiality. They want me to agree on their confidentiality. They don't -- I personally think it's a billing tactic. They just won't give me discovery until I agree to their confidentiality agreement.

I don't like their confidentiality agreement because I want a sharing provision because we have ten other cases against this same chain. I want to be able to share with myself at least, so I filed a motion for confidentiality so I can ask the Court for a sharing provision, at least with myself.

And let me -- John mentioned that we noticed the deposition of Lisa Mason. I am aware of James' reluctance to participate in discovery because of the waiver issue, so I thought we were doing him a favor by noticing Lisa Mason because I do think the one argument they have because Barbara Owens was competent is did Barbara Owens make a representation to Lisa Mason to say Mary McCraw is my agent? That's their one good argument.

So I said, all right, let's ask Lisa Mason because Mary McCraw says that didn't happen. So I was confident. So I said let's depose Lisa Mason. Jay called me up, actually did it for today because we knew

they'd be here, so we could just do it, you know, ten minutes right before the hearing. Jay called me up and said I have to do it, I'm not available that day. So that's kind of where we are there.

We would be willing to do the Lisa Mason deposition, because I think she's the only person who could actually help them survive this motion. But then we decided, well, we need something for the hearing for the record on appeal so we got this affidavit. So I just wanted you to understand how that history went on.

THE COURT: Okay.

MR. MULLMAN: But that's why also why I filed for a motion for confidentiality because I also assumed at the deposition there might be something in there that might be sensitive, HIPAA protected her, so that's why I filed.

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 the defendant's asked for confidentiality on, from not sharing it with third parties?

MR. MULLMAN: 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. And that's the problem I have. If I

have co-counsel with Pat Knie and co-counsel with Matt Christian and I can't share things with them, it makes it very difficult to corroborate and it injures my representation of my client and prejudices the preparation for trial. Thank you.

THE COURT: Any reply?

MR. HINES: Yes, Your Honor, just briefly as humanly possible. To these points, and I'll just argue that while I did admit there was no agency, I admitted that I don't have evidence to present furtherance of that argument and that's why that whole discovery discussion.

As far as there being, you know, a situation of a lack of an acceptance and certain contractual formality, estoppel would supercede all that. I mean, we're talking about a theory that, you know, is not operating -- well, the idea is it would stop Ms. Owens' estate to say otherwise. You know, to say that this arbitration agreement isn't enforceable because, again, we went through the whole rigamarole with merger, the direct benefits estoppel and how that would sort of, you know, get us a one, two situation. Got a merger, got a benefit associated with admission.

And I would mention to include in that, you know, room, board, various treatments. It's not as if the

plaintiffs are claiming that every single thing that happened while she was there was no good. And so certainly there was benefits.

THE COURT: It's my understanding their argument, correct me, their argument is that in order for there to be a merger there has to have two separate documents, two separate contracts or actually has to be a contract by definition. Contract definition includes consideration, consideration only apply -- their argument. I'm not saying I believe it. Their argument is that consideration only came with the admission agreement, not consideration came with the arbitration agreement.

MR. HINES: Well, certainly consideration, Your Honor, with arbitration agreement, simply in the form of mutual concurring promises to arbitrate, based on Hilton Head versus -- excuse me, O'Neil versus Hilton Head Hospital, 115 F.3d 272: A mutual promise to arbitrate constitutes sufficient consideration for this arbitration agreement.

So I don't think there's a lack of consideration here. But also, Your Honor, when they -- when we have operation on the admissions intent, you may credibly know if the admissions agreement being operated on and receiving benefits in accordance with it. Now, the

Court may or may not, obviously, agree that there was a merger, but once you have a merger then it's, it's a part of that. And that's where, you know, you have its won, and that's where the defendant is. I'm not trying to a direct benefit. You know, my argument is predicated on the merger. I'm not going so far as to say about the procedure based on arbitration.

Now, and I say that with this qualification. You know, arbitration is not -- the arbitration is favored under federal and state policy. So I'm not saying that having the arbitration clause in place is not something that would be beneficial to the estate, to Ms. Owens' estate. I'm saying, I'm saying, I guess, here limited to the purposes of this case, this argument, that I'm not suggesting that she did, in fact, under the arbitration agreement exercise -- she's not made a claim.

You know, she's -- but I'm not saying that the arbitration agreement couldn't be a benefit to someone because, again, this idea that there's a presumption against arbitration agreements where there's some nonsignatories have signed it, I'm not aware that that is in the Willis, Wilson case versus Willis. What I know is that you have plenty of cases that say under state and federal policy the, the arbitration is a favor

to defend.

Oh, and then one more time, Your Honor, where it was said that -- it's in, it's in our file, where it's cited specifically, but in the Coleman case itself, there's no question it says there was no merger on the facts. They said admission agreement, arbitration agreement, same time, same party, for the purpose of transaction. That's not at all something that's likely in favor.

And this issue of it it's ambiguous, you break that tie in favor or against, rather, the facility. Number one, this is a technical point, but a valid one, that's addictive, as I read it because it's not essential of holding that case. What they said the court said was essential to the holding was there's no merger. We found evidence of no merger. That's Coleman.

This -- well, even if there was -- were, excuse me, evidence, I mean even if it was confusing or ambiguous, you could construe that against the facility as drafter. And I maintain that's at least technically addictive. And, furthermore, it's confusing because I don't know how you can have a presumption that only arises under a specific set of circumstances. A presumption, and you rebut that presumption with

something that doesn't even say what -- you know, it's not enough that you can say to the contrary. It might just cloud the issue. To me, if that's, if that's the rule, then the exception will certainly devour the rule.

But let me mention on points of the confidentiality order, Your Honor. The problem that we have there, and I think this is probably gonna be mooted is because confidentiality order, you know, its import would be in conjunction with the continued progress of this case, you know, in litigation.

If Your Honor were to agree, you know, with our motion now and then reverse course and we'll work a better motion or if, you know, at the end Pat proceeds our motion, ultimately we would -- our right to arbitrate is bound to exist.

The question of the confidentiality, we really need to get in front of the arbitrator, and so I don't know if this bridge needs to be crossed.

THE COURT: But what if you're wrong?

MR. HINES: Well, if we're wrong, then we will be -- well, it's at least -- well, then we would need to cross this bridge I guess at some point. But the problem we have with this particular confidentiality agreement is that it -- somehow I managed, Your Honor, to set it aside. It provides for this hearing provision

and also a retention of these confidential materials.

And what the, what the confidentiality order allows, Your Honor, is not just Mr. Mullman to keep the documents to use them in his other cases, which I don't -- we have a problem with that, too. But he can distribute them to lawyers. It says plaintiffs suing these folks anywhere, plaintiffs' lawyers. And I think to myself, Your Honor, how in the world?

What we're saying is that these documents are confidential and, therefore, subject -- because we don't have a problem with confidentiality, nor do we have a problem with them being able to use for all -- you know, fully and fairly and for all reasonable purposes in this litigation to use those documents that if under no circumstances are we're talking about in this case, that litigants in play in this case, have any compromise to what they can do with the documents.

The whole point of what we're fussing about operates after this case is over, essentially. Even though I suppose it operates at any time during the pendency too. We're saying, hey, don't -- why would we want our confidential information distributed around to other -- to plaintiffs' lawyers, produce and prosecuting other litigation against us? I mean, this -- I don't understand how, how that has anything to do -- I mean,

it's patently only relevant to other litigation and not this case.

And so, what they wanted to do is to be able to distribute far and wide with no real enforcement mechanism, by the way. I mean, these lawyers in these facilities are not just in South Carolina. I don't know how it works out with the Court being able to enforce this. There's some document or agreement that they would like to have lawyers, other lawyers distribute the confidential materials to assign the same invalid terms of this. That guy is in another state.

I mean, it seems to me there's a whole host of problems with the enforcement of it. But before you get there, just the very idea to what they're wanting to do, is to use this stuff in other litigation, not this one. It seems to me, we'd be getting off on the very wrong foot right off the bat.

THE COURT: Why?

MR. HINES: Because the discovery rights that the plaintiff has -- no. We're talking about materials that are already acknowledged to be confidential, by the way. We're not talking about unconfidential materials.

THE COURT: Right. And so I think materials are already protected.

MR. HINES: But confidential material that is,

that is compiled in discovery in this case, it's absolutely capable of being used in this case.

THE COURT: I'm gonna tell you where I -- and I'm probably older than anyone in this courtroom. I remember the Corvair.

MR. HINES: Yeah.

THE COURT: And the manufacturing of the Corvair. And it was then, I believe, proven that there was knowledge on the part of the manufacturer that this was a dangerous car that would explode if it was hit from the rear, it would kill people. Why would I want to protect that kind of information? Not saying that your client does that, but if information like that came forward that it was something that was systematic that was so blatantly wrong to society, why would I want to protect that information? And would I be able to protect that information?

MR. HINES: Your Honor, just one of those things in our mind, I'm thinking of the argument in the Supreme Court on the Pentagon papers. And one of the lawyers that was representing the president was asking about if there was some document in there that he knew was gonna lead to the death of, you know, 100 G.I.'s that his only crime was having, you know, low draft numbers was gonna -- would kill. Are you saying the First Amendment right

to publish this is more important than the lives?

THE COURT: Are you asking me?

MR. HINES: No. I'm saying that was the setup. And he said, you know, I suppose that, you know, notions of humanity would certainly trump abstract emotion to, to act ---

THE COURT: I'm not asking anything in abstract. That was a real case to where people died. As a matter of fact, there was a case -- there was an accident that occurred on 85 back when I was a child that my father happened to have witnessed where he pulled up on a Corvair that had been rear ended where the people in that Corvair died because they were all burned.

MR. HINES: Well, Your Honor, that's a terrible and heartbreaking tragedy.

THE COURT: And so why would I want or would I be able to tell a plaintiff that discovers that type of information as part of a litigation that they should not disclose that information to other lawyers that might want to correct that type of public wrong?

MR. HINES: Well, we're talking about here, Your Honor, and confidentially ---

THE COURT: We're talking about maybe we need to terminate this discussion about a discovery order because your client has not even shown enough

willingness to come forward to say, engage in discussions to which this Court can judge the validity or the appropriateness of a confidentiality order in this case. So I have none to judge, other than the confidentiality order that has been issued by the plaintiff.

MR. HINES: Your Honor, but I am -- we are doing this because we're objecting to that order. Now, true, we have not presenting -- well, it would be fine with a standard federal confidentiality order. And I think in other cases this has been dealt with. Again, I'm not trying to throw anything Mr. Davis's way. Candidly, where I come in this has to do with arbitration. This motion to compel, at least my primary focus -- excuse me, the motion for the confidentiality order, I think in other cases, they, they've operated under, you know, that well let's identify some document. It's a standard federal confidentiality order. And also dealing with some financial information, certainly.

But my main point that I wanted to say, you mentioned the case of the Corvair, well that's horrible, but you're talking about an extreme case. Now, this we're talking about documents that are confidential. The right that the litigant has in this case. Again, we're not talking about non confidentialities.

Confidential documents and whether or not they've been used fully and fairly in this litigation. There's no question about that. What we're talking about is them being distributed to other lawyers.

Well, for one, it seems to me the right of discovery belongs to the litigant anyway and not her lawyers.

THE COURT: I didn't hear that from Mr. Mullman. I just heard that he wishes to share with the other lawyers that are involved in this case.

MR. HINES: No, not in this case, the other cases. And anywhere. Anywhere, you know.

THE COURT: I didn't hear that.

MR. HINES: Well, then I'm happy to have that made clear in the order. My understanding of what the order says is that it will allow -- it doesn't place any restriction on sharing it with other plaintiffs' lawyers.

THE COURT: Have you or your client proposed an alternative order to Mr. Mullman in this case?

MR. HINES: Well, we would propose the standard federal confidentiality order, if we have to propose one.

THE COURT: Well, I think you're gonna have to propose one. I think in order for this case to move

along, whether or not this Court's decisions that I'm asked to do today or not, we need to get this case moved along. It may be that this Court is incorrect in whatever decision it makes today.

It may be that at some point an appellate court or an arbitrator or somebody tells this Court that it's wrong, but we need to get this case moved along. This case was filed in 2018. It's now 2020. We need to get this case moved along. So let's do as much as we can to get it moved along. Let's don't do it piecemeal.

MR. HINES: And I understand that, Your Honor.

THE COURT: Okay.

MR. HINES: And if the Court on this confidentiality order, if the Court is instructing us to submit a proposed confidentiality order, we'd be happy to do that. We've not made a motion, but we're not opposed to confidentiality, obviously. Our problem is retention of the documents and being able to distribute outside the needs of this case.

We, you know, think that discovery in this case should be used fully and completely in this case and nowhere else. And there's obviously discovery that will need to take place in other litigation in accordance with the rights that those litigants have.

THE COURT: And I, again, what you're saying

generally is what I see and what I approve, but if there's something that's uncovered that shows that your client is systematically engaged in some type of public harm, I would not protect that information from disclosure.

MR. HINES: Your Honor, I suppose maybe what I'm thinking about is, is -- I'm thinking on the fly here. If there was something of that nature, perhaps the way to handle it would be to actually involve the Court in some sort of in-camera review of the documents. Because, I mean, the idea ---

THE COURT: Let's hope that that doesn't occur.

MR. HINES: Oh, I -- well, I'm certainly hoping and I have zero reason whatsoever to even think that that's even a bridge we can cross. You're concerned, though. I certainly understand. Well, I wouldn't have a problem with an in-camera review. The problem would be the plaintiffs being the sole judge of whether that threshold is met.

THE COURT: All right. I think we're in agreement that discovery will take place -- that if discovery takes place, it will be done under a confidentiality order. Just propose to the Court a confidentiality order after y'all discussed it and looked towards the general terms that usually this Court

sees and I'll take a look at it.

MR. HINES: Thank you.

MR. MULLMAN: Thank you, Your Honor.

MR. WAELDE: Thank you, Your Honor.

THE COURT: Any reply to anything he just argued?

MR. MULLMAN: Well, I just wanted to emphasize two things. If we do share it with another lawyer, they have to sign the agreement and have to agree to be under the jurisdiction of this Court. If they're in Arizona, they have agreed to be under your jurisdiction to punish them. So you can enforce it with an Arizona lawyer, just like you can enforce it against me, Your Honor. That's a red herring.

THE COURT: Okay.

MR. WAELDE: And just very quickly on the arbitration issue, Your Honor.

THE COURT: Okay.

MR. WAELDE: I'd point out to excerpts from the Wilson case. Firstly, moreover, because arbitration of all favored exists solely by agreement of the parties, a presumption against arbitration arises when the party resisting arbitration is a nonsignatory to the written agreement to arbitrate, which is what we see here today.

Secondly, from Wilson: Equitable estoppel is ultimately a theory designed to prevent injustice and

should be used sparingly. At the most observing, equitable estoppel should be used sparingly in arbitration in noting, quote, is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration, end quote. And then parentheses, an equitable estoppel should be used with restraint and only exceptional circumstances, end parentheses. That's it, Your Honor.

MR. HINES: Your Honor, a point of personal preference?

THE COURT: Are you gonna quote from the case as well?

MR. HINES: No. I'm gonna, I'm gonna apologize. I had forgotten that language, candidly that Mr. Waelde brought to your attention about the presumption with regard to a nonsignatory. Touche on that. I'm certainly not gonna, you know, swim upstream. The only thing that I would notice was you got that presumption on one hand and then when I mentioned merger, all those things, time, place, purpose of transaction, presumption in favor of merger which I think starts the ball rolling towards equitable estoppel. Thank you.

THE COURT: Okay. Is that it?

MR. MULLMAN: Yes. Thank you, Your Honor.

MR. WAELDE: That's it, Your Honor.

THE COURT: Thank y'all. Thank y'all very much.

MR. MULLMAN: Happy New Year, by the way.

THE COURT: Yes, sir, you as well.

(Hearing concluded at 2:26 p.m.)

--- THIS ENDS REQUESTED TRANSCRIPT ---

ELECTRONICALLY FILED - 2018 Jun 08 11:56 AM - SPARTANBURG - COMMON PLEAS - CASE#2018NI4200008
ELECTRONICALLY FILED - 2018 Oct 04 1:48 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

STATE OF SOUTH CAROLINA )
)
COUNTY OF SPARTANBURG )

RE: Barbara J. Owens
DOB: */**/**

My name is Paige Swatman. I am a Registered Nurse with 24 years' experience in the long-term care field. My experience includes Director of Nursing Service, Regional Clinical consultant, Vice President of Clinical services, and Long-term care surveyor of the South Carolina department of Health and Environmental control.

I have reviewed the medical records of Barbara Jean Owens for the time period of 7/23/15 through 12/7/15. These records include Magnolia Manor Inman and Spartanburg Regional Medical Center.

Based on the medical records review, it is my professional opinion that during the time period of 7/23/15 and 12/5/15, Magnolia Manor failed to provide the proper care to Ms. Owens and deviated from the standard of care for prevention of dehydration, malnutrition, Urinary tract infection with sepsis and pain, and also from standard of best practice for skin and wound monitoring.

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

1. Ms. Owens was admitted to Magnolia Manor with diagnoses to include Iron Deficiency anemia, Malnutrition, Protein deficiency anemia, Vitamin D deficiency, Dysphagia, gangrene distal fingers 2 and 4, sacral shearing, and open wound to foot.
2. The initial care plan for pressure ulcer and skin care included, "inspect skin per facility protocol".
    - The CNA (Certified Nursing Assistant) daily skin inspection records indicate that the skin was noted as "clear" in August. In September, the skin was not inspected on the 20th, 21st, 22nd, 25th, and 26th. In October the skin was not inspected on the 11th, 17th, 18, 20th, 21st, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, and 31st. In November the skin was not inspected on the 3rd, 7th, 8th, 10th, and 13th through 27th. In December no inspections were documented on the 1st, 2nd, and 4th.
    - The documentation also shows that weekly Nursing skin audit documentation was only done on 7/23/15 (admission) and 7/28/15. The nursing skin audit was not documented as done for 17 weeks while Ms. Owens was a resident.
3. Ms. Owens was admitted with a Percutaneous Endoscopic gastrostomy (PEG) feeding tube.

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- The admitting plan of care states, "at risk for dehydration related to tube feeding status. Staff to monitor for dehydration." This is not documented as being done.
- The medical record shows that she had episodes of nausea and vomiting on 8/1/15, 8/5/15, 8/21/15, 8/27/15, 8/31/17, 9/11/15, and on 11/23/15 at which time she was sent to the hospital.
- The Physician's note on 11/23/15 at SRMS states, "admitted from Magnolia Manor for vomiting brown stringy sputum. PEG has brown drainage around tube. Diagnosis Clinical Sepsis.
- She returned to Magnolia Manor on 11/27/15. Per nursing documentation, on 11/27/15 Ms. Owens complained of "belly pain". On 11/28/15, it is documented "when touched or moved, hollers in pain. Swelling in left and right lower extremities, dry mucous membranes." Ms. Owens had vomiting again on 11/29/15. The medical record states, "nausea and vomiting. Emesis had mucous and strings of Jevity feeding in it." There is no documentation that the MD was notified.

4. The medical record states that on 12/5/15 the family found Ms. Owens to be lethargic with oxygen saturation at 69% and with "vomit all over her." She was sent to SRMC where she expired on 12/7/15. The diagnoses included dehydration, Malnutrition, Urinary tract infection, Sepsis and pneumonia.
5. The Medical record states that Ms. Owens was given both Depakote and Remeron for anxiety routinely every day. There is no documentation to indicate the need for these medications.
   - Remeron side effects include:
     Decreased appetite, Dyspepsia, bitter taste, elevated triglycerides, vertigo, constipation, fatigue, insomnia, and increased cholesterol.
   - Depakote side effects include:
     Abdominal pain, nausea, anorexia, weight loss, skin rash and fever.

**Federal Regulation for nursing homes 483.25 (j) (F327) states:**
**"The facility must provide each resident with sufficient fluid intake to maintain proper hydration and health."**

**Federal Regulation for nursing homes 483.25 (g) (F322) states:**
**"A resident who is fed by enteral means receives the appropriate treatment and services to restore, if possible, oral eating skills and to prevent complications of enteral feeding including but not limited to aspiration pneumonia, diarrhea, chronic vomiting, dehydration, metabolic abnormalities..."**

**Federal Regulation for nursing homes 483.25 (d) (F315) states:**
**"Based on the resident's comprehensive assessment, the facility must ensure that --**
**(1) A resident who enters the facility without an indwelling catheter is not catheterized unless the resident's clinical condition demonstrates that catheterization was necessary; and**

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**(2) A resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible.**

**Federal Regulation for nursing homes 483.25 (d) (F514) states:**
**"(1) The facility must maintain clinical records on each resident in accordance with accepted professional standards and practices that are--**
**(i) Complete;**
**(ii) Accurately documented;**
**(iii) Readily accessible; and**
**(iv) Systematically organized."**

Concerns:
The staff at Magnolia Manor did not notify the Physician in a timely manner about episodes of vomiting. They did not appropriately assess, monitor, and treat Ms. Owens for dehydration, adverse medication reactions, chronic vomiting, pain, fluid retention, appropriate care of enteral tube insertion site and overall decline in condition.

Summary:
The staff at Magnolia Manor failed to provide the necessary care needed to prevent the overall decline and ultimate death of Barbara Jean Owens.

Conclusion:
It is my professional opinion that the staff at Magnolia Manor contributed in a direct and proximate way to the decline and wrongful death of Barbara Jean Owens.

Paige Swatman, RN LNC

Sworn to and subscribed before me,
This 31 day of May, 2018.

Notary Public

BRYAN L PARTON NOTARY PUBLIC COM. EXP. 07-27-2021 SOUTH CAROLINA

ELECTRONICALLY FILED - 2018 Nov 12 5:27 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | **DEFENDANT THI OF SOUTH CAROLINA AT SPARTANBURG, LLC D/B/A MAGNOLIA MANOR – SPARTANBURG'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, COMPEL ARBITRATION AND STAY COURT PROCEEDINGS** |
| 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, | ) | |
| DEFENDANTS. | ) | |

PLEASE TAKE NOTICE that the Defendant, THI of South Carolina at Spartanburg, LLC, d/b/a Magnolia Manor-Spartanburg (hereinafter referred to as "this Defendant" or the "Facility"), by and through its undersigned attorneys, will move before this Honorable Court, at a time and place to be designated by the Court, and as soon as counsel may be heard, for an Order dismissing this action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure and compelling this matter to arbitration, or, alternatively, staying the action pending arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq.

Plaintiff has sued this Defendant for "Negligence/Recklessness", "Corporate Negligence", "Joint Venture", "Alter Ego/Piercing the Corporate Veil", "Amalgamation of Interests", "Neglect of a Vulnerable Adult", and "Wrongful Death" pursuant to the Plaintiff's

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decedent's residency at the Facility. However, prior to being admitted to the Facility, Plaintiff's decedent entered into an Arbitration Agreement with the Facility. (See Arbitration Agreement attached as **Exhibit A**).

The parties to the Arbitration Agreement agreed that the South Carolina Uniform Arbitration Act would not apply; rather, the arbitration would be governed by the Federal Arbitration Act, because the services and reimbursement thereof to be provided to the Plaintiff upon his admission to the facility involved interstate commerce. In accordance with the terms of this agreement, the Defendant respectfully requests that this matter be compelled to arbitration.

Alternatively, this Defendant requests that these proceedings be stayed pending the outcome of arbitration pursuant to Section 3 of the FAA. Defendant respectfully requests that this Honorable Court specifically stay any further requirement to file any responsive pleading as well as any requirement to respond to any other motions or discovery filed or served by Plaintiff while the current motion is pending.

This Motion and Petition are supported by the attached Arbitration Agreement, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

[signature block on following page]

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant
*THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg*

Charleston, South Carolina

Dated: November 12, 2018

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*PLEASE READ CAREFULLY*

# FACILITY - RESIDENT/REPRESENTATIVE ARBITRATION AGREEMENT

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

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

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

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

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

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

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

Mary Jane McCraw
Resident/Representative Signature — Date

Mary Jane McCraw
Printed Name of Resident/Representative

L. Mason 1/23/15
Authorized Agent of Facility — Date

LISA MASON
Printed Name & Title

Original: Business File • Photocopy: Resident/Representative

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | |
| 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, | ) | **FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S MOTION TO STAY** |
| DEFENDANTS. | ) | |

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

PLEASE TAKE NOTICE that Defendant Fundamental Administrative Services, LLC, hereinafter referred to as "this 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 staying this action.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

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This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
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*Attorneys for the Defendant*
*Fundamental Administrative Services, LLC*

Charleston, South Carolina

Dated: November 12, 2018

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | |
| 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, | ) | **FUNDAMENTAL CLINICAL AND OPERATIONAL SERVICES, LLC'S MOTION TO STAY** |
| DEFENDANTS. | ) | |

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

PLEASE TAKE NOTICE that Defendant Fundamental Clinical and Operational Services, LLC, hereinafter referred to as "this 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 staying this action.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

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This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

By: *s/ D. Jay Davis, Jr.*
D. Jay Davis, Jr.
Perry M. Buckner, IV
J. Joseph Owens
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
*Attorneys for the Defendant*
*Fundamental Clinical and Operational Services, LLC*

Charleston, South Carolina

Dated: November 12, 2018

ELECTRONICALLY FILED - 2018 Nov 12 5:47 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| | ) | |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | |
| 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, | ) | **THI OF SOUTH CAROLINA, LLC'S MOTION TO STAY** |
| DEFENDANTS. | ) | |

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

PLEASE TAKE NOTICE that Defendant THI of South Carolina, LLC, hereinafter referred to as "this 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 staying this action.

Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Facility Defendant") has filed a Motion in this case to compel Plaintiff's claims to arbitration pursuant to a valid and enforceable arbitration agreement entered into between those parties.

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This Defendant respectfully requests this Honorable Court specifically stay any requirement to file any further responsive pleadings as well as any requirement to respond to any motions or discovery filed or served by Plaintiff until such time as this Court has made a final decision on the validity of the arbitration agreement and the appellate process, if any, has been exhausted and the arbitration proceedings, if any, are completed in their entirety.

This Motion and Petition will be supported by the pleadings filed in this case, the Motion filed by Facility Defendant and all supporting exhibits, the statutory and case law of the State of South Carolina and the United States, any subsequent memoranda of law, affidavits or other evidence which may be submitted prior to the hearing on this motion, as well as any oral argument to be presented by counsel at the hearing on this matter.

YOUNG CLEMENT RIVERS, LLP

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*Attorneys for the Defendant*
*THI of South Carolina, LLC*

Charleston, South Carolina

Dated: November 12, 2018

ELECTRONICALLY FILED - 2019 Mar 15 2:02 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiffs,<br><br>v.<br><br>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,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-03447<br><br>**PLAINTIFFS' MOTION FOR CONFIDENTIALITY** |

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

PLEASE TAKE NOTICE THAT Plaintiffs, by and through their undersigned attorneys, will move on March 27, 2019, before the Honorable Judge Robin Stillwell for an Order protecting the confidentiality of Plaintiffs' medical records pursuant to HIPAA Section 45 CFR §164.512(e)(1)(v). The Order shall apply to all documents exchanged during discovery. Plaintiffs have proposed a standard Confidentiality Agreement that will protect any trade secret or proprietary information from being made public. (**Exhibit 1 – Plaintiffs' Proposed Confidentiality Agreement**). Plaintiffs sent a Proposed Agreement to Defendants on January 23, 2019. (**Exhibit 2 – Correspondence**). Defendants refused to respond, as always.

Plaintiffs' Order protects confidential information, and is consistent with HIPAA Section 45 CFR §164.512(e)(1)(v). Rule 26(c) permits a party to seek a protective order that precludes or restricts dissemination of discovery materials that constitute "a trade secret or other confidential research, development, or commercial information." Plaintiffs contend that the proposed

Confidentiality Order protects Confidential information from dissemination to the public and will protect against any economic harm that Defendants may suffer from public disclosure.

Respectfully Submitted,

*/s Gary W Poliakoff*
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*Attorneys for Plaintiffs*

Dated: March 15, 2019
Spartanburg, S.C.



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ELECTRONICALLY FILED - 2019 Mar 15 2:02 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

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| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG | ) | IN THE COURT OF COMMON PLEAS |
| Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiffs,<br><br>vs.<br><br>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,<br><br>Defendants. | ) | C. A No. 2018-CP-42-03447<br><br>**PLAINTIFF'S PROPOSED CONFIDENTIALITY ORDER** |

WHEREAS the parties hereto have been and may be requested to produce or disclose through discovery certain materials and information that they maintain contains privileged trade secrets, proprietary information, other confidential commercial information and/or financial or personal information and the parties agree to the following:

1. **Scope.** All confidential documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not

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interfere with the legibility of the document and which will permit complete removal of the Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney[1] who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. Information or documents which are available in the public sector may not be designated as confidential.

4. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

5. **Protection of Confidential Material.**

a. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below (¶ 6.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation).

[1] The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the Bar of South Carolina.

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b. **Limited Third Party Disclosures.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;
(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;
(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;
(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit; and
(5) other attorneys involved in similar litigation against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by this Order (See attached).

c. **Control of Documents.** Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

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d. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies"), of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

6. **Filing of Confidential Materials.** In the event a party seeks to file any material that is subject to protection under this Order with the Court, that party shall take appropriate action to insure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential; (2) where appropriate (e.g. in relation to discovery and evidentiary motions), submitting the documents solely for in camera review; or (3) where the preceding measures are not adequate, seeking permission to file the document as to such other rule or procedure as may apply in the relevant jurisdiction. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to allow any document be filed under seal. The parties understand that documents may be filed under seal only with the permission of the Court after proper motion.

7. **Greater Protection of Specific Documents.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

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8. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;
(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 9.b. above; or
(3) the Court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

9. **Treatment on Conclusion of Litigation.**

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a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

b. **Return/Retention of CONFIDENTIAL Documents.** The Parties to this litigation may keep documents designated confidential at the conclusion of the litigation so long as the parties and their counsel agree to be bond by the terms of this Order until such time as the documents are returned or destroyed.

This provision does not apply to HIPAA sensitive documents. Any documents protected from future disclosure pursuant to HIPAA must be returned to the providing party within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal.

10. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

11. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection or otherwise until such time as a document-specific ruling shall have been made.

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13. **Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; (2) their respective clients; and (3) any person referred in Paragraph 5 (b)(6).

14. **Production of Privileged or Otherwise Protected Documents or Materials.** The Parties agree that the inadvertent production of information subject to a privilege shall not constitute a waiver of the privilege.

AND IT IS SO ORDERED.

_____
Honorable Grace Gilchrist Knie
Judge for the 7th Judicial Circuit
Court of Common Pleas

_____, 2019.

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WE SO MOVE AND CONSENT

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*And*

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Matthew Poliakoff
(1919-1979)

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January 23, 2019

**VIA EMAIL**
D. Jay Davis, Jr., Esq.
Young Clement Rivers, LLP
P.O. Box 993
Charleston, SC 29402

RE: The Estate of Barbara Jean Owens 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; Jennifer Caldwell; and Gillian Gray Broderick
C.A. Number: 2018-NI-42-00008

Dear Jay:

Please see attached for Plaintiffs' proposed Confidentiality Order. I doubt we can agree on a Confidentiality Agreement with a sharing provision but I wanted to send you our proposed Order before filing a Motion for a Confidentiality Order with sharing provision. This is the same Order Judge Buckner signed. We believe it is sufficient to protect both parties confidential information. Let me know what you think or if I should file a Motion. Thank you.

Also, please provide responses to the requests for production and interrogatories (attached via email) Plaintiff sent on October 9, 2018 to Defendants Fundamental Administrative Services, LLC and Fundamental Clinical and Operational Services, LLC with the Complaint. The responses are way past due.

Please feel free to contact us if you have any questions.

With best regards, I am,

Yours truly,

Gary W. Poliakoff
*Attorney*
POLIAKOFF & ASSOCIATES, P.A.

GWP/maw
Enclosures

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br>Plaintiffs,<br><br>v.<br><br>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,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-03447<br><br>**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY COURT PROCEEDINGS** |

**TO: D. JAY DAVIS, ATTORNEY FOR DEFENDANT THI OF SOUTH CAROLINA AT SPARTANBURG, LLC D/B/A MAGNOLIA MANOR - SPARTANBURG:**

COMES NOW the Plaintiffs, the Estate of Barbara Owens and her statutory beneficiaries, does submit this memorandum of law in opposition to Defendants' Motion to Compel Arbitration. In opposing this motion, Plaintiff would show that the Arbitration Agreement is unenforceable for the reasons set forth below:

## STATEMENT OF ISSUES

a. The Arbitration Agreement is unenforceable where Mary Jane McCraw did not have authority to bind Barbara Owens to the Arbitration Agreement.
b. The affirmative defenses of equitable estoppel, ratification and third-party beneficiary do not apply.
c. The Arbitration Agreement is not a valid and enforceable agreement because a lack of consideration and mutuality exists under the circumstances.
d. The Arbitration Agreement is missing material terms and lacks definiteness, and cannot be enforced without the Court providing material omitted terms which would violate the Federal Arbitration Act and applicable case law.
e. The Arbitration Agreement does not govern the wrongful death claim.
f. The Corporate Defendants have not moved to compel arbitration because they are non-signatories. A stay is not necessary for those Defendants who are not bound by the alleged Arbitration Agreement.
g. The Arbitration Agreement is both procedurally and substantively unconscionable, and should not be enforced even if the Court finds it is a valid contract.

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## FACTUAL BACKGROUND

This matter arises out of two civil actions --- a Survival Action and a Wrongful Death action. Both actions involve allegations of corporate negligence, professional negligence, and custodial neglect resulting in injuries and the wrongful death of Barbara Owens ("Ms. Owens"). (**Exhibit 1 – Complaint**). The Facility is owned and operated by the billion-dollar national for-profit nursing home chain Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings, Inc. The claims are brought against the nursing home facility as well as Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the facility), and Fundamental Administrative Services, LLC (which Defendants assert provided "administrative services" to the facility), these latter two related entities being referred to as the "Corporate Defendants." Plaintiffs allege that while the Corporate Defendants did not provide direct care or services to Ms. Owens, they are indispensable parties and proper Defendants in this matter because their control over the Facility directly affected the quality of care Ms. Owens received.

Mary McCraw was Ms. Owens's daughter and now serves as the personal representative of her estate. She was not power of attorney at the time of the admission into the nursing home. Ms. Owens was admitted into the Fundamental facility on **July 23, 2015**. There were two separate agreements signed during the admission process. The separate and distinct Admission Agreement allowing Ms. Owens to become a resident governed the type of care Ms. Owens would receive at the Facility and Ms. Owens's financial obligation to pay for those services. Upon information and belief, the Admission Contract contains a section titled "Entire Agreement"[1] provision indicating

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

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this Contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility.

Another document called "Arbitration Agreement" was signed by McCraw later on **July 23, 2015 after Mrs. Owens was already admitted to the facility.** This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provides for alternative dispute resolution for any claim a party may bring against another arising out of Ms. Owens's care at the Facility. Defendant has represented that agreeing to arbitrate was not a prerequisite to admission at the Facility or a condition of admission.

On **March 1, 2018**, McCraw initiated this lawsuit as the personal representative for Ms. Owens's estate by filing a Notice of Intent. On **August 29, 2018**, the parties finally participated in an unproductive pre-suit mediation. Nothing about arbitration was mentioned or asserted during the pre-suit phase of the litigation. If Defendant truly believed a valid arbitration agreement existed, Defendant should and could have raised it over a year ago since the whole purpose of arbitration is a quick efficient resolution.

On **October 4, 2018**, Plaintiffs filed the Complaint alleging wrongful death and survival claims arising from Defendants' failure to monitor and supervise Ms. Owens's safety and well-being while at the Facility. On **November 12, 2018**, the Facility filed a frivolous Motion to Dismiss, Compel Arbitration and Stay State Court Proceedings. Defense counsel knows or should know that no valid or enforceable arbitration agreements exists based on well-established case law in South Carolina including the Coleman, Hodge, and Thompson cases. Defendants are clearly using this Motion to delay and obstruct the orderly progression of this litigation. Defendants have

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refused to respond to discovery or participate in litigation for the last 8 months waiting on a hearing to be scheduled. The Facility must show a valid and enforceable arbitration agreement between Ms. Owens and the Facility to prevail on its motion. Defendants know that they cannot meet this burden.

## BURDEN OF PROOF

The Facility seeks to compel arbitration. Defendant carries the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable as Defendant represents.[2] Courts interpret a jury trial waiver narrowly and construe contract ambiguities against Defendant who drafted the Arbitration Agreement[3] Whether the parties agreed to arbitrate is a question of substantive state law.[4] In Chassereau v. Global Sun Pools, Inc., 644 S.E.2d 718 (S.C. 2007), the Supreme Court stated:

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

Thus, the presumption favoring arbitration only applies *after* the court finds there is a valid, enforceable arbitration agreement.[5] The mandatory language in the Federal Arbitration Act ("FAA") only applies in instances where a valid arbitration agreement has been well established. This is self-evident from the FAA provisions: "The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not

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[2] See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (S.C. Ct. App. 2008).
[3] Nat'l Acceptance Co., 381 F.Supp. at 271).
[4] Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (S.C. 2007)("General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[5] EEOC v. Waffle House, 534 U.S. 279, 293-294, 122 S.Ct. 754, 764, 151 L.Ed.2d 755 (4th Cir. 2014); Toler's Cove Homeowners Ass'n v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003).

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in issue." 9 U.S.C. § 4.. The U.S. Supreme Court has often cited the FAA's savings provision that denies enforcement of agreements susceptible to the general contract defenses of fraud, duress, and unconscionability.[6] The FAA looks to state law to decide the threshold questions of contract formation.[7] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[8] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[9] In short, pro-arbitration policy does not validate a contract lacking the building blocks of a binding contract.

## LEGAL ANALYSIS

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

### A. Signatory Had No Legal Authority

[6] Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985); 9 U.S.C. § 2.
[7] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").
[8] Rent-A-Center, West. Inc. v. Jackson, 561 U.S. 63, 130 S. Ct 2772, 2776, 177 L.Ed.2d 403 (2010) Simpson, 373 S.C at 14, 644 S.E.2d at 663 ("general contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause.").
[9] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

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

For agency situations, the legal burden is on the party asserting that an agency exists.[10] In this case, Defendant must show all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Id. An agency may not, however, be established solely by the declarations and conduct of an alleged agent.[11] Moreover, Defendant has failed to provide any evidence beyond McCraw's signature to suggest she was Ms. Owens's agent. The fact that McCraw signed documents so that Ms. Owens could be admitted to the facility and receive medical care in no way indicates a manifestation of authority by Ms. Owens to waive her right to a jury trial or agree to arbitration. Ms. Owens never manifested any form of assent establishing McCraw as her agent. Moreover, Ms. Owens was competent to sign contracts on her own behalf when she was admitted to the Facility.

McCraw was one of Ms. Owens' children. She was not Mrs. Owens' power of attorney. She had no legal authority to enter contracts on Ms. Owens's behalf. Additionally, McCraw signed the arbitration agreement *after* Ms. Owens was already admitted to the facility. (**Exhibit 2 – Mary McCraw Affidavit**). Our Supreme Court has held that a surrogate without proper legal

[10] Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).
[11] Muller v. Myrtle Beach Golf & Yacht Club, 303 S.C. 137, 142-143,399 S.B.2d at 433 (Ct. App. 1990) overruled on other grounds by Myrtle Beach Hosp., Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000)).

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authority cannot bind a person to arbitration.

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

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

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

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

Defendants incorrectly allege Plaintiff is equitably estopped from opposing enforcement of the Arbitration Agreement. Equitable estoppel is a contract defense for which the asserting party

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bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Defendants briefly mention some of these elements but make no effort to apply them.

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

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

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Defendants argue Ms. Owens created an agency relationship to support arbitration because she "accepted" admission. Defendants then argue McCraw is estopped from denying authority to bind Ms. Owens to arbitration because she does not deny authority to admit Ms. Owens to the Facility. Accepting merger is a prerequisite to accepting Defendant's arguments, but Coleman and its progeny rejected similar merger arguments. Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson v. Pruitt Corp. and Hodge v. UniHealth Post-Acute Care of Bamberg, LLC applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302. The Admission Agreement and Arbitration Agreement are separate contracts that do not merge. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 2018) (cert. denied Aug. 21, 2018); Thompson v. Pruitt Corp., 416 S.C. 43, 55, 784 S.E.2d 679, 686 (Ct. App. 2016); Coleman v. Mariner Health Care, Inc., 407 S.C. 346, 352, 755 S.E.2d 450 (2014) (Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. Thompson and Hodge applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. 416 S.C. at 52, 784 S.E.2d at 684; 422 S.C. at 563, 813 S.E.2d at 302.

Like in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title.

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

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

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

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admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

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

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

Therefore, Defendant cannot prove merger of the Admission Agreement and Arbitration Agreement. Defendant can also not claim to have been misled and cannot rely on equitable estoppel if it, by the exercise of reasonable diligence, could have acquired knowledge to determine

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

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the truth of facts in questions.[14] Furthermore, Defendant had the capacity to determine whether McCraw had authority to sign the Arbitration Agreement on Ms. Owens's behalf. Defendant is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission. Defendant is very familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask McCraw for power of attorney documentation. Defendant certainly had the power to review its own paperwork and documentation. Therefore, Defendant cannot argue merger or estoppel and the court should deny Defendant's motion based on the same.

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

Again, precedent is decisive on this point. Citing International Paper, the Court of Appeals held in Thompson that any benefit of admission "is of no moment" for the application of equitable estoppel to a separate arbitration contract. 416 S.C. at 59-60, 784 S.E.2d at 688; see also Coleman,

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

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407 S.C. at 354-55, 755 S.E.2d at 455. Hodge cited and reaffirmed Thompson's estoppel analysis. 422 S.C. at 558-59, 813 S.E.2d at 300.[15] Since admission is unavailable as a "direct benefit" to support estoppel, Defendant would be required to point to some benefit Ms. Owens received from the Arbitration Agreement alone. However, Ms. Owens and her estate derived no benefit from the Arbitration Agreement. Hodge, 422 S.C. at 563, 813 S.E.2d at 302 (finding family members, resident, and resident's estate "received no benefit from the Arbitration Agreement"). Even if they had, "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [Ms. Owens] waive [her] right to access the courts and [her] right to a jury trial." Thompson, 416 S.C. at 60, 784 S.E.2d at 688. In sum, Defendants cannot meet its burden to prove merger. The Admission Agreement and Arbitration Agreement are distinct and should not be construed as a unit.

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

This argument is flawed for several reasons. First, Mrs. Owens's presence alone can 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

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

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agreement on the resident's behalf simply by failing to object to the family member's signature. 422 S.C. at 573-74, 813 S.E.2d at 308 (noting home argued resident "represented" her husband had authority by "allowing him to procure her admission" but still finding "no evidence . . . that [the resident], as the principal, represented husband was her agent"). Defendants make the precise argument Hodge rejected.

Defendants argue Mrs. Owens "accept[ed] the benefits of the contracts." However, the only "benefit" Defendants cite is admission itself, a benefit Defendants have admitted to be separate from arbitration. Defendants never attempt to explain what supposed "benefit" of the independent Arbitration Agreement Mrs. Owens derived during her time as a resident in Defendants' facility. Any such attempt would have been futile given the Court of Appeals' unambiguous ruling in Thompson. which held that "**any possible benefit emanating from the [arbitration agreement] alone is offset by the [arbitration agreement's] requirement that [resident] waive her right to access the courts and her right to a jury trial.**" 416 S.C. at 60, 784 S.E.2d at 688 (emphasis added).

Unmoored from logic, precedent, and ethics, Defendants then make a broader argument that it would be "manifestly inequitable" for Plaintiff to pursue a tort claim based on the Admission Agreement while denying McCraw's authority to sign the Arbitration Agreement. Defendant misunderstands the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C.

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at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, Defendant misrepresents Plaintiff's claims. Plaintiff is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

Since Ms. Owens made no affirmative representations that McCraw had authority to sign the Arbitration Agreement on her behalf, Defendant's motion to compel arbitration must be denied.

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

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of the existence of the remainder of the terms of the Admission Agreement and not to the terms of the Arbitration Agreement.

**C. Lack of consideration and mutuality**

The Arbitration Agreement is not a valid and enforceable agreement due to a lack of consideration and mutuality. Every contract must contain an offer, acceptance, and valuable consideration.[16] "Valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[17] Where a contract lacks valuable consideration, the contract must fail. Courts have held that where there is a mutual promise to arbitrate, there must be additional consideration. However, in determining whether adequate consideration exists in a contract, the court must examine and stay within the confides of the four corners of the instrument.[18] Therefore, the court must assess whether the contract itself contains sufficient consideration in the form of a mutual exchange of promises to arbitrate. Here, the Arbitration Agreement does not contain the required consideration There is no direct benefit to nursing home residents from a pre-admission arbitration contract separate from the Admission Agreement. Admission can be the "direct benefit" that forces Plaintiff to arbitrate **only if admission and arbitration are governed by the same contract.** In this case, even assuming McCraw had authority, there is no valuable consideration in agreeing to the Arbitration Agreement. The one-page agreement contains no benefit or detriment to the parties. Therefore, the Arbitration Agreement lacks consideration, and the court should deny Defendant's Motion. Moreover,

[16] Sauner v. Pub. Serv. Auth. of S.C., 581 S.E.2d 161, 166 (S.C. 2003).
[17] Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 206, 687 S.E.2d 714, 718 (Ct. App. 2009) (quoting Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship., 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct.App.1998).
[18] State Acc. Fund v. S.C. Second Injury Fund, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010) (quoting McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945)).

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Defendant was prohibited from asking or receiving any consideration from Ms. Owens. **Facilities must "not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the state plan...any other consideration as a precondition of admitting (or expediting the admission of) the individual to the facility or as a requirement for the individual's continued stay at the facility**." 42 U.S.C. § 1396r(c)(5)(A)(iii). Any nursing home facility that accepts Medicare or Medicaid funds for resident care is *expressly forbidden* from accepting any other money, benefit or other consideration as a precondition for admitting a patient to the facility or as a requirement for continued stay in a facility.

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

Defendant's counsel has admitted the Arbitration Agreement was not a condition of admission. Under similar circumstances, the Honorable Judge Perry Buckner held in Holmes v. Bayview that an arbitration contract was not enforceable. Judge Buckner's Order (**Exhibit 3**) states:

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

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The Honorable Judge Diane Goodstein recently had a similar analysis in Rawl v. West Ashley (**Exhibit 4**):

> The Arbitration Agreement was not necessary for admission. Additionally, there was no bargain for exchange nor consideration in Ms. Brown's agreement to the Arbitration Agreement.
>
> Upon admission Ms. Brown was asked to sign the admission paperwork. Ms. Brown then signed the Arbitration Agreement separate from the admission paperwork. **Having already signed the admission paperwork there was no additional consideration in agreeing to the Arbitration Agreement**. In fact, the Arbitration Agreement states "[t]he patient will receive services in this center whether or not this agreement is signed." Neither party gained a right, interest, profit or benefit by agreeing to the Arbitration Agreement. Plantation, 386 S.C. at 206, 687 S.E.2d at 718. Additionally, neither party suffered a forbearance, detriment, loss or responsibility given, suffered or undertaken by the other the party, when agreeing to the Arbitration Agreement. Id. Finally, viewing the Arbitration Agreement itself there is no mention of consideration. The court is required to make its assessment by viewing only the four-corners of the Arbitration Agreement, and cannot go beyond the confines of the Arbitration Agreement itself. Consequently, where the Arbitration Agreement is guided by the FAA and principles of contract law - the Arbitration Agreement is unenforceable where the Arbitration Agreement lacks valuable consideration.

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

A valid contract under South Carolina law requires a meeting of the minds between the parties ***with regard to all essential and material terms of the agreement***.[19] The forum chosen for the arbitration to take place is an essential and material term. A contract lacking material terms may be found unenforceable for indefiniteness.[20] "Ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced." Id. Here, even if the contract was validly executed, there was no "meeting of the minds" as to (1) the choice of arbitrator; (2) the rules of evidence; or (3) allowance of pre-hearing discovery. The choice of an arbitrator is an important, essential, and material term of an agreement to arbitrate, to say otherwise undermines the purpose of the arbitration process. See the Honorable

[19] Player v. Chandler, 299 S.C. 101, 105, 1989 (citing Hughes v. Edwards, 265 S.C.529 (1975).
[20] Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

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Judge Kristi Lee Harrington's Order in Powell v. Fundamental Long-Term Care Holdings, LLC. (**Exhibit 5**). No rules for arbitration were included in or attached to the Arbitration Agreement. The parties cannot now arbitrate this dispute without the presence of an agreed-upon arbitrator chosen by this Court. But, "ordinarily, a court will not supply omitted terms to an agreement, and an agreement where the parties did not agree to essential terms will simply not be enforced."[21] As a result, the promise that the dispute "shall be resolved by arbitration, as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules" is moot and ineffective. The choice of arbitral forum also dictates the rules of arbitration and the rights of the parties including, but not limited to, presentation of evidence, scheduling, deadlines, discovery issues, costs, expenses, and appeals. None of this was negotiated or discussed by the parties. No agreement or meeting of the minds to material terms exists.

Further the cost of arbitration far outweighs the cost of proceeding in Court and therefore the agreement is unconscionable. (See **Exhibit 6 - Affidavit of Gary W. Poliakoff** and **Exhibit 2 – Affidavit of Mary McCraw**). Also, the cost of the arbitration must be paid by the parties including the Estate of Barbara Owens which contains no money or assets. Plaintiff did not and does not have the financial wherewithal to pay or prepay arbitration fees. The amount of money that it would cost to begin and proceed through the arbitration process, including hearing, exceeds that available to the Plaintiff.

> Although the costs of arbitration may be a basis for determining that an agreement to arbitrate is substantially unconscionable, since Green Tree the issue of the prohibitive costs of arbitration has developed into a separate defense to the enforcement of an arbitration agreement. See Zephyr Haven, 122 So.3d at 921–22. "[W]here 'a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.' " Id. at 921 (quoting Green Tree, 531 U.S. at 92, 121 S.Ct. 513). In determining whether the costs of arbitration in a fee splitting arrangement are so prohibitive as to render the agreement unenforceable because it denies the plaintiff access to the arbitral forum, a case-by-case

[21] Lindsay v. Lindsay, 491 S.E.2d 583 (S.C. App. 1997).

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analysis is appropriate. Id. at 922. The focus is on the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigating in court, and whether the cost differential is so substantial as to deter the bringing of the claims. Id. In order to invalidate the arbitration agreement, the plaintiff, at an evidentiary hearing, must show the expected cost of arbitrating the specific claim is greater than litigating it and that the cost of arbitration would be prohibitively expensive. Id.

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

An arbitration agreement may be substantively unconscionable if the fees and costs to arbitrate are so excessive as to "deny a potential litigant the opportunity to vindicate his or her rights." [Cite omitted] Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 81, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000) (holding that excessive arbitration costs may preclude litigants from effectively vindicating their rights). The party seeking to invalidate an arbitration agreement on such grounds has the burden of proving that arbitration would be prohibitively expensive. [cites omitted] Whether arbitration is prohibitively expensive is a question of fact that depends on the unique circumstances of each case. See Harrington, 119 P.3d at 1055 (explaining that "the Supreme Court adopted a case-by-case approach to determining whether fees imposed under an arbitration agreement deny a potential litigant the opportunity to vindicate his or her rights") (citing Randolph, 531 U.S. at 92, 121 S.Ct. 513). In determining whether arbitration costs are prohibitively expensive, courts have considered several factors. First, the party seeking to invalidate the arbitration agreement must present evidence concerning the cost to arbitrate. [cite omitted]. This evidence cannot be speculative; it must be based on specific facts showing with reasonable certainty the likely costs of arbitration. [cite omitted]see also Phillips v. Assocs. Home Equity Servs., Inc., 179 F.Supp.2d 840, 847 (N.D.Ill.2002) (party must make "a reasonable, good faith effort to estimate" arbitration costs). Second, a party must make a specific, individualized showing as to why he or she would be financially unable to bear the costs of arbitration. This evidence must consist of more than conclusory allegations stating a person is unable to pay the costs of arbitration. Rather, parties must show that based on their specific income/assets, they are unable to pay the likely costs of arbitration. Third, a court must consider whether the arbitration agreement or the applicable arbitration rules referenced in the arbitration agreement permit a party to waive or reduce the costs of arbitration based on financial hardship. Id. (holding an arbitration agreement was not substantively unconscionable because, in part, the agreement provided that any claim or dispute would be resolved under the American Arbitration Rules ("AAA"); the applicable AAA rules provided for waiver or reduction in arbitration fees based on "extreme hardship"); Jones v. Gen. Motors Corp., 640 F.Supp.2d 1124, 1134 (D.Ariz.2009) (finding arbitration fee not substantively unconscionable under Arizona law in part because arbitration rules referenced in arbitration agreement provided for waiver and deferral of fees based on financial hardship). We conclude there is reasonable evidence to support the trial court's finding that "[i]n this particular case, Plaintiff has established that he has a fixed, limited income that would make it extremely difficult, if not impossible, to pay to arbitrate the claim."

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

**E. The Arbitration Agreement does not govern the wrongful death claim**

Even if there is a valid and enforceable arbitration agreement, it should not include the wrongful death cause of action because no one with legal authority could enter into an agreement that waives the right to a jury trial on behalf of the statutory beneficiaries. No person other than the court-appointed personal representative can waive the rights of the statutory beneficiaries. The wrongful death claims are separate claims apart from the Ms. Owens's claims. According to South Carolina's Wrongful Death Act:

> Whenever the death of a person shall be caused by the wrongful act, negligent or the fault of another and the act, negligent or the fault is such as would, if death had not ensued, had entitled party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued shall be liable to an action for damages.

South Carolina Code Ann. §15-51-10 (1977)

The wrongful death beneficiaries are as follows:

> Every such action shall be for the benefit of the wife, or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none, for the benefit of the heirs or the person whose death shall have been so caused

S.C. Code Ann. § 15-51-20.

As decided in Young v. NHC (**Exhibit 7**) the wrongful death cause of action should not be included in the arbitration proceeding if a valid and enforceable arbitration agreement is found by the Court for the Survival cause of action:

> It appears that the question of whether a wrongful death action is subject to mandatory arbitration pursuant to the terms of a contract is one of first impression in South Carolina. Case law across many jurisdictions within the United States is split as to whether an arbitration agreement covers a wrongful death claim brought by the Ms. Owens's statutory beneficiaries who were not a party to the contract. [cite omitted]

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> This Court finds persuasive the reasoning of those jurisdictions that have held that an arbitration agreement executed by a Ms. Owens cannot bind the Ms. Owens's statutory beneficiaries who were not parties to the agreement. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries, and that such claims are distinct and separate claims from those that are brought under the survival statute. *See* Bennett v. Spartanburg Railway Gas and Electric Company, 97 S.C. 27, 81 S.E. 189 (1914).
>
> However, this Court agrees with the Supreme Court of Kentucky which said regarding binding non-signatory wrongful death beneficiaries in Ping v. Beverly Enterprises, "[A]s interesting as life might be if we could bind one another to contracts merely by referring to each other in them, we are not persuaded that a non-signatory who receives no substantive benefit under a contract may be bound to the contract's procedural provisions, including arbitration clauses, merely by being referred to in the contract. It is one thing to say that a third party for whose substantive benefit a contract is made may not enforce his or her rights under the contract without also abiding by the contract's other terms. That is the general third-party beneficiary rule discussed above. It may even be that tort claims by such a directly benefitting third party are appropriately subjected to the contract's arbitration provisions, at least where the tort and the contract are significantly intertwined. It is something else entirely, however, to say that incidental beneficiaries of a contract-individuals or entities with no substantive rights under the contract and no direct benefits-may have their tort claims against the parties swept up into the contract's arbitration provisions merely by being mentioned in the contract as potential claimants."
>
> Ping, 376 S.W.3d at 599-600.

A similar analysis and holding can be found in Wilson v. NHC by the Honorable Judge Michael Nettles (**Exhibit 8**) which held:

> [T]the Arbitration Agreement is unenforceable against the Ms. Owens's wrongful death statutory beneficiaries under South Carolina contract law defenses. The Arbitration Agreement neither covers the wrongful death statutory beneficiaries' claims within the scope of the agreement nor was the Arbitration Agreement signed by an individual who had authority to bind the statutory beneficiaries.
>
> South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries and that such claims are distinct and separate from those brought under survival claims. Bennett v. Spartanburg Railway Gas and Electric Co., 97 S.C. 27, 81 S.E. 189 (1914). The alleged Arbitration Agreement by its own terms is an agreement between "Kenneth Wilson ('patient')" and "NHC Healthcare/Mauldin, LLC ('center')". While at some point during Ms. Owens's admission to the facility, he might have had the authority to bind himself and his claims to arbitration but was never given the chance. However, even if Ms. Owens had agreed to arbitration, he did not have the legal authority to bind his statutory beneficiaries who are not parties to the Arbitration Agreement. The signatories to the agreement are Daughter on behalf of Ms. Owens and NHC Healthcare/Mauldin, LLC. No other persons

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are parties to this agreement. The scope of the agreement does not include the statutory beneficiaries' claims.

However, even if the Arbitration Agreement did contemplate the wrongful death statutory beneficiaries' claims, Ms. Owens and/or Daughter had no authority to waive the statutory beneficiaries' claims. Daughter signed the Arbitration Agreement in her *individual capacity*. However, as the Hodge court noted, actions taken by Daughter in her *individual capacity* will not be held against the estate as the estate has other beneficiaries and may have other creditors.

Further confirming the separateness of each statutory beneficiary's claim from that of the survival action, a Federal District Court in South Carolina has analyzed this issue under the South Carolina Non-Economic Awards Act of 2005. Diane Boyle as Personal Representative of the Estate of John Francis Boyle v. United States of America, 944 F.Supp.2d 577 (D.S.C. 2012). In Boyle, the Court concluded that the wrongful death beneficiaries' claims were separate and distinct claims for purposes of stacking damage caps and for purposes of being individual claimants. This analysis supports the contention that the wrongful death claimants have separate and distinct claims apart from that of the survival action.

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

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Carolina Care Plan, Inc. v. United HealthCare Servs., Inc., 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). If a court as a matter of law finds any clause of a contract to have been unconscionable at the time it was made, the court may refuse to enforce the agreement. S.C. Code Ann.§ 36-2-302(1) (2003). In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker. See Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938 (4th Cir.1999). It is under this general rubric that courts must determine whether a contract is unconscionable due to both an absence of meaningful choice and oppressive, one-sided terms.

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Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. See Carlson v. General Motors Corp., 883 F.2d 287, 295 (4th Cir.1989). In determining whether a contract was "tainted by an absence of meaningful choice," Id. at 295, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. Id. at 293. See also Holler v. Holler, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct.App.2005) ("A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case." (quoting 17A Am.Jur.2d Contracts§ 279 (2004))); see also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007).

The choice of a nursing home is made in the midst of a crisis brought on by a precipitous deterioration in health status, disability level, or the loss of a care giver or spouse.[22] The need to find a placement arises quickly[23] and nursing home admissions are often unplanned; there is little time to investigate options or to wait for an opening at a nursing home of choice.[24] Time pressure significantly impairs the ability to seek and carefully consider alternatives.[25] Ms. Owens had no

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

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

[24] Denise Ashbugh Vlosky, et al., "*Say-so*" as a *Predictor of Nursing Home Readiness*, 93 J. of Family & Consumer Science 59 (2001).

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

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choice or time in making such a decision. Many facilities lack a coherent admissions process, adding to the chaos surrounding the admission of a resident.[26] Residents and their family members do not have time to read and deliberate on complex or obscure contract terms. An arbitration clause is not part of the core transaction involved in a contract for medical care or service.[27] It is not, therefore, likely to get much attention from the non-drafting party.[28] As is true in the present action, facilities often present the contract *after* the person decides to apply for admission, rather than beforehand, when the individual can assess the rights affected by the contract.[29]

The Honorable Judge Diane Goodstein found an arbitration agreement unconscionable in a similar circumstance in Rawl v. West Ashley Rehab (**Exhibit 4**) based on the following facts that also apply to the circumstances in this case:

1. Resident lacked a meaningful choice and the terms in the Arbitration Agreement are oppressive, one-sided terms.
2. Upon admission the standard Arbitration Agreement form was presented on a take-it-or leave it basis.
3. Resident did not contribute to the drafting of the Arbitration Agreement
4. Resident did possess the bargaining power to negotiate the terms of the Arbitration Agreement.
5. An inherent disparity in bargaining power between the parties to the transaction.
6. The Arbitration Agreement was inconspicuous.
7. The injuries include wrongful death.
8. Resident did not have sufficient time to allow any meaningful explanation of the terms and significance of the alleged arbitration agreement, considering the number and complexity of admission documents other than that alleged arbitration agreement.

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

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

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

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

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

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

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

No other FAA provision discusses any allowed compulsion of witnesses or discovery by the parties. *See* 9 U.S.C. § 1, *et seq.* In fact, parties to a private arbitration agreement "relinquish the right to certain procedural niceties which are normally associated with a formal trial...*one of these accoutrements is the right to pre-trial discovery.*" *See* Burton v. Bush, 614 F.2d 389, 390-91 (4th Cir. 1980) (emphasis added). A hallmark of arbitration is its limited discovery process. See Id. at 391. The "essence of arbitration is its freedom from the formality of ordinary judicial procedure." Harvey Aluminum, Inc. v. United Steelworkers of Am., AFL-CIO, 263 F. Supp. 488, 491 (C.D. Cal. 1967) (quoting Canuso v. City of Philadelphia, 326 Pa. 302, 307, 192 A. 133, 136).

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

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

The FAA does not authorize an arbitrator to subpoena third parties during pre-hearing discovery, absent a showing of special need or hardship. See Comsat Corp. v. Nat'l Science Foundation, 190 F.3d 269 (4th Cir., 1999). The subpoena powers of an arbitrator are limited to those created by the FAA's express provisions. The statute provides, in pertinent part: "arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a

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

Then-Judge Samuel Alito agreed with the Fourth Circuit's position when, writing for the Third Circuit, he concluded FAA Section 7 "unambiguously restricts an arbitrator's subpoena power to situations in which the non-party has been called to appear in the physical presence of the arbitrator and to hand over the documents at that time." Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404, 407 (3d Cir. 2004); see also CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 708 (9th Cir. 2017) ("we reject the proposition that section 7 [of the FAA] grants arbitrators implicit powers to order document discovery from third parties prior to a hearing"); Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210, 212 (2d Cir. 2008) (citing Hay Group and finding FAA "does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding").

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Defendants have previously taken the position that this very Arbitration Agreement does not allow for ANY discovery outside the limited powers of the arbitrators under FAA. (See **Exhibit 9 - Campsen v. THI of SC Motion for Clarification and/or Protection from Discovery** and **Exhibit 10 - Campsen v. THI of SC Brief in Opposition to Plaintiff's Motion to Compel** (outlining Defendants' believed position that the arbitration agreement precludes any pre-hearing discovery)). This is unconscionable considering the nonmoving Corporate Defendants possess relevant and material information, and the Stay they seek would prevent discovery of that information.

Failing to have all the Defendants in one forum makes the agreement unconscionable. Plaintiffs will be unable to recover full justice. The Corporate Defendants are all related entities[30] of the Facility and have a significant relationship in the ownership, operation, and management of the nursing home, and derive significant economic benefits from its revenue. Judge Nettles' Order in Coleman (**Exhibit 11**) covers this issue as well:

> Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. **Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.**
>
> Instructive on this issue is the matter of Birl v. Heritage Care, *LLC,* 172 Cal.App.4th 1313, 91 Cal. Rptr.3d 777. In Birl a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility south to compel arbitration. Of relevance, the Court here noted that "(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement." In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted

[30] Related entity is an industry term that means the entities are have common ownership, management, and control.

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> that "the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not joined to the court action with the other defendants... Different triers of fact in different proceedings could come to different conclusions..." Id. at 1321.
>
> While the circumstances of the current actions differ slightly from those of Birl, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in Birl. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums.

In Hawthorne v. Fundamental et al., these same Defendants moved to compel arbitration on behalf of similar related entities arguing that "The arbitration agreement contractually ***is enforceable by each of the moving defendants as either a parent company, agent or as an employee of the facility and legally is enforceable by these defendants under the circumstances*** and Pennsylvania law in any event." Defendants also argued a Ms. Owens and his estate are equitably estopped from arguing that the arbitration agreement is not "binding and enforceable ***by each of the defendants***." The Honorable Judge Cercone's Order in Hawthorne (**Exhibit 12**) which states:

> Each of the moving defendants are entitled to enforce the arbitration agreement. Plaintiff essentially alleges that each defendant may be held accountable under theories of ownership and control, agency, joint venture and integrated enterprise. Specifically, it is averred that defendants collectively managed the (1) operation, (2) planning and (3) quality control of the facility, which included control over the quality of care provided.
>
> THI of Pennsylvania is a parent corporation of the facility and THI of Baltimore is the parent corporation of THI of Pennsylvania. Fundamental Clinical and Operational Services, LLC, and Fundamental Clinical Consulting, LLC, were agents providing services to the facility. The arbitration agreement is expressly applicable to plaintiff's claims against the facility's parent entities, purposes underlying enactment of the [FAA].").

A parent company has been forced to arbitrate under a valid and enforceable contract even though the parent company was not a party to the agreement when the subsidiary was a party to the agreement under a theory of equitable estoppel. Int'l Paper Co. v. Schwabedissen Maschinen

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& Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000) quoting quoting J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 320-21 (4th Cir. 1988)) (citing Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc., 10 F.3d 753, 757 (11th Cir. 1993). Pearson v. Hilton Head Hosp. (S.C. App., 2012). (**Exhibit 13 - Pearson v. Hilton Head Hospital**).

As this Honorable Court decided in Young v. NHC the Corporate Defendants should be included in the arbitration proceedings if a valid and enforceable arbitration agreement is found by the Court:

> Further, the Court finds that the Corporate NHC Defendants were intended beneficiaries of the Arbitration Agreement; therefore, the order compelling arbitration of the Survival Action shall also apply to the Corporate NHC Defendants as the allegations against those Defendants are based on the same facts and are inherently inseparable from the claims made against NHC-Mauldin. *See* Int'l Paper Co. v. Schwabedissen Maschenen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000); *see also* Pearson v. Hilton Head Hospital, 400 S.C. 281, 733 S.E.2d 597 (S.C. Ct. App. 2012).

Furthermore, Plaintiff's claims against all the moving parties are based on a theory of unified operation and control. Each is said to have participated in exactly the same wrongful conduct. Agency law extends the right to enforce an arbitration award against agents, sister corporations, subsidiaries, and parent/ownership entities of a contracting party "where the interests of such parties are directly related to, if not congruent with, those of a signatory." Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 7 F.3d 1110, 1112 (1993) (citing Isidor Paiwonsky Associates, Inc. v. Sharp Properties, 998 F.2d 145, 155 (3d Cir. 1993). Under all accounts advanced by plaintiff each of the moving parties is a parent entity, agent or employee of the facility that shares a congruent interest. Plaintiff thus presumptively would be able to enforce any judgment from the proceeding against these defendants and in turn each can rely on the principles of agent law and the broad scope of the FAA to compel and participate in the arbitration agreement. Cf. Id. ("Where the parties to such a clause unmistakably intend to arbitrate all controversies,

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which might arise between them, their agreement should be applied to claims against agents or entities related to the signatories."); Sharp Properties, 998 F.2d at 155 ("Applying Barrowclough [v. Kidder, Peabody & Co., 752 F.2d 923 (3d Cir. 1985)]' s logic here, because Bared's and ARI's interests are directly related, if not in fact congruent, it can fairly be assumed that within the arbitration proceedings ARI advanced arguments protective of Bared's interests. There is, therefore, no reason to conclude that the Federal Arbitration Act's overarching policy favoring the enforcement of arbitration awards does not apply to this case.").

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

## CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings, must be denied. Ms. Owens did not sign the Arbitration Agreement and McCraw lacked any legal authority to sign on her behalf. In the absence of a valid Arbitration Agreement, Defendants' motion must be denied. The claims in this case are not subject to arbitration. Under no scenario would a Stay be appropriate. All claims should proceed in the same forum.

***SIGNATURE BLOCK ON FOLLOWING PAGE***

Respectfully Submitted,

*/s Gary W. Poliakoff*

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| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG<br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br>Plaintiffs,<br>v.<br>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,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br>C.A. No: 2018-CP-42-03447<br>**AFFIDAVIT OF MARY JANE MCCRAW** |

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

1. I am the daughter of Barbara Owens.
2. I was appointed Personal Representative of the Estate of Barbara Owens.
3. I was not the power of attorney for Barbara Owens prior to her admission into the nursing home.
4. I made no representations as to my legal authority over my mother.
5. My mother did not make any statements about my legal authority during the admission process.
6. The Admission process was quick and occurred while my mother was being transferred into her room. There was no time to review the dozens of pages shown to me.
7. I was under significant pressure to sign all the paperwork so I could return to my mother.
8. No one explained the alleged Arbitration Agreement to me.
9. I do not recall signing the alleged Arbitration Agreement.
10. Based on the assets in the Estate, the Estate is unable to pay the likely costs of arbitration.

11. I live on a fixed income and have no money to spare for arbitration proceedings.

12. I am unable to pay the administrative fee or the arbitrator's fees needed to arbitrate the case.

Executed this 18th day of July, 2019.

Mary Jane McCraw

SWORN and subscribed
before me this 18 day of
July, 2019.

(SEAL)
Notary Public for South Carolina

My Commission Expires: Aug 3, 2028





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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | **DEFENDANT THI OF SOUTH CAROLINA AT SPARTANBURG, LLC D/B/A MAGNOLIA MANOR-SPARTANBURG'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, COMPEL ARBITRATION, AND STAY COURT PROCEEDINGS** |
| 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, | ) | |
| DEFENDANTS. | ) | |

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

**COMES NOW** the Defendant, THI of South Carolina at Spartanburg, LLC (hereinafter "this Defendant" or "Defendant") and submits the following Memorandum in Support of its Motion to Dismiss pursuant to the Federal Arbitration Act ("FAA") 9 U.S.C. § 1, et seq., and Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Plaintiff has sued this Defendant for "Negligence/Recklessness", "Corporate Negligence", "Joint Venture", "Alter Ego/Piercing the Corporate Veil", "Amalgamation of Interests", "Neglect of a Vulnerable Adult", and "Wrongful Death" arising out of Plaintiff's decedent's residency at this Defendant's skilled nursing facility (hereinafter the "Facility" or "Magnolia Manor-Spartanburg"). However,

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this Defendant and Plaintiff entered into an Arbitration Agreement prior to Plaintiff's decedent's admission at the Facility which covers all allegations raised in the Complaint. Accordingly, and for the reasons set forth herein, this Defendant respectfully requests that Plaintiff's Complaint be dismissed and that this matter be compelled to arbitration, or in the alternative, stayed pursuant to 9 U.S.C. §1, et seq.

## FACTUAL BACKGROUND

Plaintiff's decedent, Ms. Barbara Owens was admitted to this Defendant's Facility on July 23, 2015 for skilled nursing care relating to her medical conditions with the assistance and aid of her daughter, the named Plaintiff, Mary Jane McCraw. Upon admission, Ms. Owens was 65 years old and was suffering from a host of medical problems, which included asthma, anemia, osteoporosis, wounds, and gangrene. Prior to her admission, Ms. Owens entered into a number of contracts with Magnolia Manor-Spartanburg. The contracts were each signed by the Plaintiff, as representative of Ms. Owens, on July 23, 2015. These executed contracts included an Admission Agreement and Arbitration Agreement (Attached hereto as **Exhibits 1 and 2** respectively). Based on the Admission Agreement and pursuant to the agreements set forth therein, Ms. Owens was admitted to Magnolia Manor-Spartanburg and received skilled nursing care and treatment. During her stay at the Facility, Ms. Owens accepted the benefits of the contracts entered into on her behalf by her representative, Ms. McCraw. Such benefits included, but are not limited to, Ms. Owens' admission to the Facility and her receipt of the skilled nursing care provided therein. Ms. Owens never challenged any agreement's validity during her lifetime nor did any representative challenge any agreement until now. Notably, Plaintiff does not assert that the Admission Agreement is invalid or that Ms. Owens entered Magnolia Manor-Spartanburg unwillingly or without consent.

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Upon admission, Ms. McCraw explicitly represented that she was authorized to admit Ms. Owens to the Facility and execute necessary documents on her behalf, including an Arbitration Agreement. Indeed, the very first provision of the Admission Agreement states that all information provided, including her authority to bind her mother to certain agreements, is truthful and correct.

The Arbitration Agreement at issue defines Magnolia Manor-Spartanburg as the "Facility," Ms. Owens as the "Resident," and Ms. McCraw signed the Arbitration Agreement as Ms. Owens' "Representative." The relevant provisions of the Arbitration Agreement state the following:

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

The Arbitration Agreement further provides:

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

Regarding Ms. McCraw's authority to sign on behalf of her mother, the Arbitration Agreement states:

> 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.

The Arbitration Agreement was executed by Ms. McCraw as "Representative" and Lisa Mason, the Admissions Director for the Facility, on behalf of Magnolia Manor-Spartanburg.

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

## ARGUMENT AND CITATION TO AUTHORITY

### I. POLICY IN FAVOR OF ARBITRATION

There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration. *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir.1997). Indeed, both federal and state policy favor arbitrating disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995) ("The policy of the United States and this State is to favor arbitration of disputes."). "This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999). Therefore, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.*, 338 S.C. at 41, 524 S.E. 2d at 846 (internal quotations and citations omitted).

### II. THE FEDERAL ARBITRATION ACT GOVERNS THE ARBITRATION AGREEMENT AND THE CLAIMS ASSERTED BY THE PLAINTIFF IN THE COMPLAINT

As an initial matter, the Arbitration Agreement, by its terms and by law, is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. *See* Ex. A; *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014)(holding that skilled nursing facility admission agreements and residencies implicate interstate commerce, and thus are governed by the FAA). Under the FAA, any written provision in "a contract evidencing a

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

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

9 U.S.C. § 4 (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a... court, but instead mandates that... courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). While a court a court may invalidate an arbitration agreement based on "generally applicable contract defenses," it may not invalidate an arbitration agreement on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1423, 197 L. Ed. 2d 806 (2017)(citing *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2. As discussed and further described herein, such a binding and enforceable written agreement to arbitrate disputes exists in this case and Plaintiff's claims should be dismissed and compelled to arbitration.

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## III. THE ARBITRATION AGREEMENT IS VALID AND ENFORCEABLE

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

The Plaintiff, Ms. McCraw, represented herself to staff and admissions personnel at Magnolia Manor-Spartanburg as her mother's representative, with the authority to sign documents on her behalf and bind Ms. Owens and the Facility pursuant to those documents.[1] It was clearly Ms. McCraw's intention to bind Ms. Owens (and herself, as personal representative) according to the terms of the Admission Agreement and Arbitration Agreement and Ms. Owens evinced no intentions or directions to the contrary. The terms of the Arbitration Agreement clearly apply to the instant dispute.

Notably, this Court faced facts similar to the ones at the bar in *Macie Price v. THI of South Carolina at Magnolia Manor Inman, LLC et. Al,* 2018-CP-42-01054 (S.C. Com. Pls. August 7, 2018) (*See Price* decision, attached hereto as **Exhibit 3)**. There, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in Inman, South Carolina. Like in this case, the 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 identical to the ones in the case at bar. Ex. 3, p. 2-3 (emphasis added). Ultimately, this Court determined that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,]" in that it was clearly the intent of the wife to bind her husband (and herself, as personal representative) according to the terms of the Admission and Arbitration Agreement. Ex. 3, p. 5.

[1] "It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assignees, **personal representatives**, guardians, or any persons deriving their claims through or on behalf of Resident." (emphasis added).

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**B. Ms. McCraw Possessed the Apparent and Inherent Authority to Bind Ms. Owens under the Arbitration Agreement, and should be Estopped from Denying the Validity of the Arbitration Agreement**

**a. Agency Relationship**

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 it agent when the principal has placed the agent in a position such that third parties are reasonably led to believe the agent has certain authority and they in turn deal with the agent in reliance on this manifestation. *Eadie v. H.A. Sack Co.,* 322 S.C. 164, 171, 470 S.E.2d 397, 401 (Ct. App. 1996).

In *Carraway v. Beverly Enters. Ala., Inc.*, 978 So. 2d 27 (Ala. 2007), the facts are substantially similar to the case at bar. There, the plaintiff was the brother of a resident of a nursing home facility who executed a number of documents on his sister's behalf upon her admission to the facility, including an arbitration agreement. The brother signed the documents as his sister's authorized representative but did not have a power of attorney for his sister at the

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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. 3, p. 8. There, the plaintiff was the wife of a skilled nursing home resident at a skilled nursing facility in Inman, South Carolina. Like in this case, the 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 identical to the ones in the case at bar. Ex. 3, p. 2-3. Ultimately, this Court determined that "the terms of the Arbitration Agreement clearly apply to the instant dispute[,]" in that it was clearly the intent

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of the wife to bind her husband (and herself, as personal representative) according to the terms of the Admission and Arbitration Agreement. Ex. 3, p. 5.

Clearly, Plaintiff 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 mother, including the Arbitration Agreement. She executed these documents in her capacity as "representative." It was the Facility's reasonable and justified belief that Plaintiff was her mother's authorized representative and had the authority to execute the documents on her behalf.

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

A holding to the contrary would go against the fundamental concept of apparent agency, that an agency relationship is based on a third party's understanding of a principal's manifestations and a reasonable belief that the agent has been authorized to act. The Facility had reason to believe that by allowing Ms. McCraw to sign the admissions paperwork, including the documents providing for Ms. Owens' stay and the skilled nursing care provided at the Facility, Ms. Owens cloaked her daughter with the authority to execute those documents. Further, Ms. Owens did not repudiate or invalidate her daughter's actions, and instead, Ms. Owens accepted

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the benefits of the contracts with the Facility by remaining at the Facility and receiving skilled nursing care and services. Because no one attempted to repudiated the Arbitration Agreement or even question it, the Facility was further justified in believing Ms. Owens had authorized her daughter to execute it. It is clear that an apparent agency relationship existed such that the Arbitration Agreement should be deemed enforceable.

Even if Plaintiff lacked apparent authority to enter into the terms of the Arbitration Agreement, she still possessed sufficient inherent agency powers to render the agreement enforceable. Such powers are recognized by South Carolina courts and are used to enforce agreements where supposed unauthorized actions "accompany or are incidental to transactions which the agent is authorized to conduct...." *See,* §§ 8A, 161 *Restatement (Second) of Agency* (1958); *Smith v. Fitton & Pittman, Inc.*, 264 S.C. 129, 212 S.E.2d 925 (1975)(*abrogated on unrelated grounds)*(examining whether party had properly demonstrated the existence of inherent agency powers); *Chicago Title Ins. Co. v. Washington State Office of Ins. Com'r,* 309 P.3d 372 (Wash. 2013); *Daly v. Aspen Ctr. for Women's Health, Inc.*, 134 P.3d 450, 452 (Colo. App. 2005); *Menard, Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210-11 (Ind. 2000); *Cange v. Stotler & Co.,* 826 F.2d 581, 591 (7th Cir. 1987)("[t]he powers of an agent are, prima facia, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.")(*citing Lumbermen's Mut. Ins. Co. v. Slide Rule & Scale Eng'g Co.*, 177 F.2d 305, 309 (7th Cir. 1949)).

The basis for this doctrine is that, as between an equally innocent principal and third party, the third party should prevail. This well-established law follows from one of the cardinal principles of agency law: that third parties, such as the Facility, should not be disadvantaged because they dealt with an agent rather than a principal. As set forth above, there is no dispute as

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to whether the Plaintiff was authorized to admit her mother to Magnolia Manor-Spartanburg. To the extent Plaintiff takes issue with her own authority to bind her mother to the Arbitration Agreement and the specific terms therein, such actions merely accompanied and were incidental to her authority to admit her mother as a resident at the Facility. Magnolia Manor-Spartanburg should not be disadvantaged for acting in accordance with the express representations of Plaintiff regarding her authority.

**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

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> seemingly ignore the binding agreement. Accordingly, agency by estoppel is present based upon the record before this Court such that the arbitration agreement is similarly enforceable.

Ex. 3, p. 9. 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*, attached hereto as **Exhibit 4**). There, the plaintiff was the husband of a resident of a nursing home facility in South Carolina who executed a number of documents on his wife's behalf upon her admission to the facility, including an arbitration agreement. Like here, the husband signed the documents as his wife'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 *McCutcheon* provided that plaintiff was his wife'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.

Because the Court in *McCutcheon* determined that the arbitration and admission agreements should be merged under general principles of contract law (*See,* merger argument in following section), the Court determined that the plaintiff was bound to arbitrate his claims under the federal doctrine of equitable estoppel. *Id.* at *4. However, the Court also ruled that,

> Even if the Arbitration Agreement and Admissions Agreement constitute two separate contract, 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 form denying the enforceability of the Arbitration Agreement.

Id. at *5.

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Like in *Price* and *McCutcheon*, it would be disingenuous and inequitable to allow Ms. Owens to effectively admit that her daughter was her authorized agent as to the Admission Agreement, but not the Arbitration Agreement. In the case at bar, Magnolia Manor-Spartanburg had no knowledge or reason to believe that Plaintiff was not Ms. Owens' authorized agent for purposes of executing the Arbitration Agreement and other admissions paperwork. Magnolia Manor-Spartanburg relied on the affirmative representations of Plaintiff 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 Magnolia Manor-Spartanburg for years only for the instant lawsuit to seemingly ignore the binding agreement. Accordingly, Plaintiff should be estopped denying the validity of the Arbitration Agreement.

### C. The Arbitration Agreement and Admission Agreement Must be Construed Together, and Plaintiff Should Be Estopped from Denying the Parties' Mutual Right to Arbitration

#### a. Merger

As additional grounds to compel arbitration and in the alternative, the Admissions Agreement and Arbitration Agreement should be construed together and Plaintiff should be required to arbitrate her claims against the Facility. The Arbitration Agreement and Admission Agreement were executed by Ms. McCraw on behalf of Ms. Owens. 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).

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The Arbitration Agreement provides that "any controversy or dispute between the parties *arising out of or relating to Facility's Admission Agreement* . . . or relating in any way to Resident's stay at Facility" shall be resolved by arbitration pursuant to the terms of the Arbitration Agreement. *See* Ex. 2 (emphasis added). As described, the Arbitration Agreement and the Admissions Agreement were both signed by Ms. McCraw on behalf of her mother on the same day, at the same time, in the days leading up to Ms. Owens' admission to Magnolia Manor-Spartanburg.

Courts in South Carolina construe contemporaneous instruments together; if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated. *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977). Absent some evidence indicating a contrary intention, when instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will generally consider and construe them together on the theory that the instruments are effectively one instrument or contract. *Id. See also Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 441 S.E.2d 835 (Ct. App. 1994) (holding that promissory notes and a mortgage agreement executed contemporaneously on the same date, must be construed together). Furthermore, even when instruments are entered into by the same parties at different times but relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. *See Plaza Development Services v. Joe Hardin Builder. Inc.*, 294 S.C. 430, 365 S.E.2d 231 (Ct. App. 1988); *accord Cafe Associates, Ltd v. Gernqross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

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As indicated previously, the court in *McCutcheon* analyzed facts almost identical to the case at bar and determined that the arbitration agreement and admissions agreement had merged for purposes of equitable estoppel. *McCutcheon v. THI of S.C. at Charleston, LLC*, No. 2:11-CV-02861, 2011WL6318575 Ex. 4. Indeed, this Court has cited to *McCutcheon* on numerous occasions in holding that a nursing home arbitration agreement merged with the admission agreement for purposes of equitable estoppel under precisely the same circumstances. *See Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012). (*See Abrams, Campsen* attached hereto as **Exhibit 6**).

Accordingly, Ms. Owens, by and through the acts of her representative, the Plaintiff, and the Facility, both contemplated that the terms of the agreement to admit Ms. Owens were contained in the Admissions Agreement and Arbitration Agreement. Plaintiff executed the Arbitration Agreement at the same time as the Admissions Agreement; the Arbitration Agreement and the Admissions Agreement both covered the same subject matter and transaction (Ms. Owens' residency at the Facility); the Arbitration Agreement and Admissions Agreement were executed by the same parties; the Arbitration Agreement specifically makes citation to and incorporates the Admission Agreement; and thus the Arbitration Agreement and Admission Agreement should be construed as part and parcel of the same agreement between the parties.

**b. <u>Equitable Estoppel of Merged Agreement</u>**

"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.

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2000) (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

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

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> 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).[2]

In the present case, Ms. Owens embraced all aspects of the Admission Agreement with the Facility. It would be manifestly inequitable to permit a party to claim the other is liable in tort based upon a contractual relationship, while at the same time allowing that party to avoid the arbitration provisions of the contract upon which the party bases its claims, when such claims are in the scope of the arbitration provisions. In other words, Plaintiff cannot "have it both ways by relying upon certain terms of the Admission Agreement when it works to her advantage and repudiating the Arbitration Agreement when it works to her disadvantage.

As described, the Plaintiff's allegations fall within the scope of the Arbitration Agreement. In accordance with the foregoing law, Plaintiff cannot assert claims against this Defendant based upon certain terms of the Admission Agreement while repudiating the Arbitration Agreement, and should be prevented from doing so pursuant to the doctrine of equitable estoppel. Moreover, as is cited above, numerous courts hold that where a plaintiff

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[2] *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).

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receives the benefits of the contract, which Ms. Owens certainly did, the non-signatory is estopped from denying an arbitration agreement merely because he did not sign the contract under which he received all of the benefits.

**c. *Coleman* and *Hodge* are Distinguishable**

To the extent Plaintiff argues the Admission Agreement and Arbitration Agreement are not merged pursuant to *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018) and *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 350, 755 S.E.2d 450, 452 (2014), such reliance is misplaced.

In *Coleman*, Ann Coleman signed a number of documents, including arbitration agreements, when admitting her sister to a health care facility. 407 S.C. at 350, 755 S.E.2d at 452. Coleman brought suit after her sister's death, and the facility sought to compel arbitration. In determining that the arbitration and admission agreements in the case had not merged, the Supreme Court found, "On its face, this clause recognizes the 'separatedness' of the [arbitration agreement] and the admission agreement, not a merger of the two contracts. Moreover, the [arbitration agreement] could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate." *Id.* at 452. "By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply." *Id.*

Similarly, in *Hodge*, the admission agreement indicated it was governed by South Carolina law, whereas the Arbitration Agreement stated it was governed by federal law. 422 S.C. 544, 813 S.E.2d at 302. Furthermore, like in *Coleman*, the arbitration agreement in *Hodge* recognized a separateness, as it referenced the two documents separately, stating "[a]ny and all claims or controversies arising out of or in any way relating to this Agreement or the

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Patient/Resident's Admission Agreement." *Id.* Finally, the arbitration agreement in *Hodge* stated it could be revoked within thirty days, whereas the admission agreement contained no such indication. *Id.*

Unlike the arbitration agreements in *Coleman* and *Hodge*, the Arbitration Agreement and Admission Agreement in the case at bar should not be considered "separate" for purposes of denying merger. Unlike *Coleman* and *Hodge*, the Arbitration Agreement in this case does not state that it can be revoked after it has been signed. Furthermore, it does not state that arbitration is a precondition to admission to the Facility.

Instead, in the present case, the agreements "were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction" and, therefore, the documents merged." *Coleman*, 407 S.C. at 355, 755 S.E.2d at 455 (citing *Klutts, supra,* 268 S.C. at 88, 232 S.E.2d at 24). Specifically, the Admission and Arbitration Agreements were signed by the Plaintiff, on her mother's behalf, and the Facility on July 23, 2015. The documents were signed by the exact same people: Ms. McCraw as representative for her mother and by the Admissions Director for the Facility, as representative for the Facility. The documents were signed for the same purpose and transaction of establishing Ms. Owens' residency at the skilled nursing facility. While the Admission Agreement in this case does contain an "Entire Agreement" clause, unlike the admission agreements in *Hodge* and *Coleman*, the provision in this case does not separately reference the Arbitration Agreement (in fact, it doesn't refer to it at all). Accordingly, 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 Plaintiff's claims should be compelled to arbitration pursuant to the contract.

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**D. The Arbitration Agreement is Not Unconscionable**

Should Plaintiff contend this Arbitration Agreement is unenforceable because it is unconscionable, the law and facts surrounding Ms. Owens entering into this Arbitration Agreement and the clear language of the Agreement demonstrates this is clearly not the case. As an initial matter, both state and federal courts in South Carolina have consistently ruled that arbitration agreements identical to the one *sub judice* are not unconscionable. *See McCutcheon v. THI of S.C. at Charleston, LLC*, *supra*, at 6* - *8; *Benson v. THI of S.C. at Charleston, LLC*, No. C.A. No. 7:11-CV-2613-HMH (D.S.C. Nov. 30, 2011); *Abrams v. Fundamental Long-term Care Holdings, LLC, et al*, Case No. 2010-CP-42-6861 (S.C. Com. Pls. Jun. 25, 2012); *Campsen v. Fundamental Long-Term Care Holdings, LLC et al*, Case No. 2011-CP-42-0438 (S.C. Com. Pls. Jun. 22, 2012)(*See also Benson,* attached hereto as **Exhibit 5**).

Furthermore, anyone who enters into a written contract has a duty to read the contract which she or he signs. *Maw v. McAlister*, 252 S.C. 280, 284-285, 166 S.E.2d 203, 204 (1969). Anyone who is capable of reading and understanding, but fails to read a contract before signing, is bound by the terms thereof. *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981). Furthermore, arbitration clauses are not unconscionable and will be enforced if a person who can read fails to read the contract, regardless of whether he was advised of the arbitration terms by the contracting party. *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001) (holding the plaintiff's failure to read an arbitration provision did not render it unconscionable even though the plaintiffs claimed they were not advised of those terms). Additionally, "inequality of bargaining power alone will not invalidate an arbitration agreement." *Id.*

The Arbitration Agreement clearly articulates that the resident entering into the

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Agreement is fully aware of his or her healthcare options and other potential providers of nursing home facilities. The Agreement states:

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

Furthermore, on that same signature page, the Arbitration Agreement states clearly in bold lettering in a separate heading: "**I understand and agree that I am giving up and waiving my right to a jury trial.**" Ex. 2 (emphasis in original).

Since Ms. Owens' representative and agent, Ms. McCraw, had a duty to read and understand the documents she was signing on Ms. Owens' behalf under proper authority, she also had a duty to communicate those terms to Ms. Owens as her agent. To the extent she did not, Plaintiff cannot now claim that Ms. Owens was unaware of the terms of the Arbitration Agreement that Ms. McCraw voluntarily and with proper authority executed on her husband's behalf.

Finally, should the Plaintiff cite to 42 C.F.R. §483.10 in support of the assertion that a facility may not require additional consideration for admission to the facility, reliance upon this section of the federal regulations would be misplaced. The regulation states "[a] facility must not require a resident (or his or her representative) to request any item or service as a condition of admission or continued stay." 42 C.F.R. §483.10(c)(i)(B). Arbitration agreements are clearly not contemplated as "items or services" under this section, (rather the regulation refers to things such as dietary services, room maintenance, television, personal comfort items, etc.). *Id.* As also described, the Arbitration Agreement makes clear that the resident is free to seek health care services from another provider should her or she so wish. As such, the Arbitration Agreement is not unconscionable and should be enforced by this Court.

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**E. The Arbitration Agreement is Supported by Valid Consideration in the Form of Mutual Promises to Arbitrate.**

To the extent Plaintiff argues the contrary, the Arbitration Agreement possesses valid consideration because the parties exchanged mutual promises to arbitrate by voluntarily assenting to the provision that both parties' right to a jury trial would be waived.

Indeed, it is well-settled under South Carolina law that mutual and concurrent promises set forth within a contract afford sufficient legal consideration to validate that contract. *Furman v.* Walker, 124 S.C. 68, 117 S.E.2d 356 (1923); *Johnson v. Spartanburg County Fair* Ass'n, 201 S.C. 56, 41 S.E.2d 599 (1947); *O'Neil*, 115 F.3d 272, 275 (4th Cir. 1997)(applying South Carolina Law). Notably, other cases from the federal and state courts within the Fourth Circuit and beyond have echoed this very same principle. *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 545 (4th Cir. 2005)(applying Maryland law); *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 120, 516 S.E.2d 879, 882, *writ denied, review denied*, 350 N.C. 832, 539 S.E.2d 288 (1999); *Williams-Jackson v. Innovative Senior Care Home Health of Edmond, LLC*, 727 F. App'x 965, 968 (10th Cir. 2018)(applying Oklahoma law); *Texas Custom Pools, Inc. v. Clayton*, 293 S.W.3d 299, 309 (Tex. App. 2009); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 358 (Tenn. Ct. App. 2001); *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 835 (Ky. 2013); *Santos v. Gen. Dynamics Aviation Servs. Corp.*, 984 So. 2d 658, 661 (Fla. Dist. Ct. App. 2008).

This undisputed notion is bedrock, black-letter contract law. Moreover, this long standing principle is of equal application in the context of arbitration agreements, where both parties mutually assent to arbitration. *O'Neil*, 115 F.3d 272 (4th Cir. 1997)(holding a mutual

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promise to arbitrate constituted sufficient consideration to enforce an arbitration agreement); *Towles v. United HealthCare Corp.*, 388 S.C. 29, 524 S.E.2d 404 (Ct. App. 1999)(citing *O'Neil* for the proposition that mutual promises to arbitrate support valid, sufficient legal consideration.).

As previously described, the Arbitration Agreement at issue in this case was made mutually binding on both Magnolia Manor-Spartanburg and Ms. Owens (and her heirs, personal representatives, etc.). *See* Ex. 2 ("It is the intention of the parties to this Agreement to bind not only themselves, but also their successors, assigns, heirs, personal representatives, guardians or any persons deriving claims through or on behalf of Resident."). Accordingly, the Arbitration Agreement contains adequate consideration in the form of mutual promises to arbitrate, and any claims to the contrary should be disregarded.

To require further, additional consideration above and beyond the mutual exchange of promises would be to impose a rule in violation of the United States Supreme Court's holdings in *Concepcion, Marmet Healthcare Center, Inc. v. Brown* 565 U.S. 530 (2012), and *Kindred,* all of which stand for the proposition that arbitration agreements must be put on "equal footing with all other contracts." *See Kindred* at 1423. As a result, this Court cannot deny enforcement of the Arbitration Agreement on grounds of lack of consideration.

## CONCLUSION

For the reasons set forth herein, this Defendant respectfully requests that this Court enter an Order either dismissing or staying the pending action and compelling arbitration. Alternatively, and if the Court is not inclined to grant the instant motion on any of the grounds contained in this memorandum or asserted at the hearing, this Defendant requests that the parties be allowed to conduct additional discovery on the issues of Ms. Owen's competency at the time

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she was admitted to the Facility and on the nature of Plaintiff's agency relationship with Ms. Owens. Defendant requests permission to be heard on the above issues after such discovery is conducted and requests that it be permitted to submit supplemental memorandum along with any additional evidence procured. *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** 7).

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Charleston, South Carolina

Dated: July 23, 2019

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# ADMISSION AGREEMENT – SOUTH CAROLINA

**RESIDENT NAME:** Barbara Owens

**RESIDENT NUMBER:** 300812

**DATE OF ADMISSION:** 7/23/15

**THIS ADMISSION AGREEMENT** ("Agreement") as ~~above~~ dated is by and among Magnolia Manor Spartanburg ("Facility"), Barbara Owens ("Resident") and/or _____ ("Resident's Durable Power of Attorney for Health Care"/"Resident's Legal Guardian"/"Resident's Responsible Party" hereinafter collectively "Representative").

WHEREAS, the parties wish to admit Resident to Facility and hereto agree as follows:

## I. GENERAL CONDITIONS

1. **Inducement:** Resident and/or Representative verifies that all information submitted to Facility, including without limitation, financial information, medical history and medical diagnosis, is true and correct and acknowledges that providing false information constitutes a breach of this Agreement.

2. **Personal Property:** It is understood that Facility is not responsible for either damage to or theft/loss of Resident's valuables, monies or clothing unless the item(s) are held in trust by Facility and the damage, theft, loss was caused by the negligent or willful conduct of Facility personnel. Personal property will not be considered to be held in trust unless the policies and procedures outlined in the *Admission Handbook*, which is made a part of this Agreement by reference herein, and any future amendments thereto, have been followed. Facility reserves the right to prohibit certain personal effects, funds or other property in accordance with state and federal law. Facility is not liable for either damages to or theft/loss of any personal belongings or personal care items, such as dentures, hearing aides and eyeglasses, except with respect to damage, theft or loss caused by the negligent or willful conduct of Facility personnel.

3. **Emergency Care:** In case of an emergency and Resident's personal physician is not available, Resident and/or Representative allows Facility to retain a physician on Resident's behalf. The physician will bill Resident directly and Facility will not be responsible for payment of the bill for such service.

4. **Representative:** When Resident has a Representative, Representative will act on Resident's behalf for all purposes permitted under applicable law. Representative will pay all fees and charges incurred hereunder by or on behalf of Resident using proceeds from Resident's assets or estate. Representative may act in more than one capacity and will be bound by the applicable terms and conditions of this Agreement. Except when Representative has access to Resident's assets, or as otherwise expressly provided to the contrary herein, or as permitted by state or federal law, Representative will not become personally liable for the payment of Resident's fees and charges by signing this Agreement. To the extent possible, Resident acknowledges and consents to the execution of this Agreement by Representative.

5. **Terms and Conditions:** By signing this Agreement, Resident and/or Representative agree(s) to comply with all terms and conditions set forth in this Agreement and Facility's policies, as same apply and as may change from time to time.

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## II. AGREEMENT FOR CARE

### A. FACILITY AGREES TO:

1. Admit Resident upon receipt of a physician's order; assist in obtaining physician services if a personal physician becomes unavailable; obtain emergency physician services when required. *Resident is not deemed admitted until such time as all agreements required by law and Facility have been appropriately executed.* This provision may be waived in writing by Facility, at its sole discretion.

2. Maintain written records of financial transactions with Resident and/or Representative responsible for payment. Resident has the right to have personal funds held in trust in accordance with applicable state and federal law, as may be amended from time-to-time.

3. Furnish room, routine meals, nursing care, personal care, or custodial care to Resident in accordance with applicable State and Federal law. This provision expressly excludes extraordinary services, including but not limited to, physician care, private duty nursing, private sitters, specialty foods and therapies not required by law. Resident will be placed in a semi-private room, absent medical need for a private room as determined by Facility staff. Residents residing in private rooms will be billed accordingly.

4. Assist in applying for private insurance benefits, but not to accept assignment thereof unless otherwise noted as an exception herein.

5. Assist Resident and/or Representative in applying for Medicare or Medicaid benefits where applicable.

6. Provide assistance in daily living and restorative nursing care in accordance with Resident's care plan, where appropriate. Resident and/or Representative reserves the right to refuse said treatment. If said treatment is refused, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

7. Arrange for transfer of Resident to a hospital upon physician's order or in an emergency situation. Expenses of transfer and care of Resident at the hospital are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment of those services.

8. Obtain and administer medication as prescribed. Expenses for the cost of obtaining the medications are not Facility's responsibility. Resident and/or Representative will be responsible for arranging payment for the medications. Resident and/or Representative has the right to refuse medication. If Resident refuses medication, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

9. Provide an activities program for Resident, components of which will be at the discretion of Facility.

10. Furnish Resident bed linens and hospital gowns. All personal clothing will be supplied by Resident or Representative and will be properly labeled as outlined in the *Admission Handbook* for identification purposes.

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B. RESIDENT AND/OR REPRESENTATIVE AGREE(S) TO:

1. Provide complete and accurate information regarding Resident to Facility as requested. This information must be updated on a regular basis and when any substantial change occurs.

2. Provide Facility, prior to or at the time of admission, orders from Resident's attending physician for the immediate care of Resident, medical history, physical examination, current physician's orders and physician's statement that Resident is free from communicable disease at the time of Resident's admission or within the required time limitation. If Resident is suffering from communicable disease, Resident and/or Representative will provide a physician's certificate that the disease is not in a transferable stage, or that adequate or appropriate isolation measures are being carried out to control transmission of the disease. Facility retains the right to refuse admission to any Resident suffering from a communicable disease, whether that disease is in a transferable stage or not, so long as said refusal is in compliance with state and federal law. Resident's attending physician will provide, at Resident's expense, a physical examination performed either within five (5) days prior to admission or within forty-eight (48) hours following admission.

3. Allow Facility staff to perform such functions as may be necessary to maintain Resident's well-being, including but not limited to, assistance with bathing and hygiene, dressing, toileting, daily activities, performance of restorative nursing care as appropriate (including bowel and bladder training), and the performance of therapies determined necessary by a physician, but limited to those therapies for which Resident has funding. Resident and/or Representative has the right to refuse medication and treatment as prescribed by Resident's physician. In accordance with the policies of Facility, in the event that Resident and/or Representative refuses to abide by the physician's orders, Facility retains the right to discharge Resident from Facility if, in the judgment of appropriate Facility staff, it is determined that discharge or transfer is appropriate under applicable federal and state law. In addition, if Resident and/or Representative refuses to abide by the physician's order, Resident and/or Representative will hold Facility harmless from any injury or damage as a result thereof.

4. Pay all fees and charges described in this Agreement upon the terms agreed to herein.

5. Adhere to Facility's *Bed Reservation Policy* as outlined in the *Admission Handbook* and the *Facility's Policy and State Requirements for a Temporary Leave Bed-Hold.*

6. Provide and be responsible for personal items of clothing and property.

7. (a) Vacate/remove Resident from Facility within thirty (30) days, upon receipt of a Notice of Discharge and Transfer for any of the reasons required or allowable under state or federal law; (b) cooperate with Facility's efforts to locate alternative placement; (c) Vacate/remove Resident from Facility in less than thirty (30) days if the situation warrants immediate removal. All transfers and discharges will be carried out in accordance with state and federal law.

8. In the event Resident no longer requires Medicare or Medicaid services, Resident and/or Representative agree that Resident will be relocated to a bed certified for the appropriate level of care needed. Please note, room-to-room changes within the same certified unit of Facility are not considered a transfer for purposes of this section.

9. Notify Facility at least three (3) days in advance of Resident's voluntary discharge from Facility, excepting discharge as the result of an emergency. If advance notice is not provided, Resident and/or Representative will be liable for payment of three (3) days.

10. Accept full responsibility for, absolve and release Facility, its agents, Medical Director and/or attending physicians from any liability for any event, including but not limited to, injury, illness, accident, or deterioration of medical condition suffered by Resident when Resident is not on Facility premises and is not under the care, custody and/or supervision of Facility and its staff.

11. Abide by Facility's policies and procedures as amended from time to time and outlined in the *Admission Handbook* and other Admissions materials, which are made a part of this Agreement by reference herein, as well as the Resident Rights under applicable state law and any future amendments. Facility's rules, regulations, policies and procedures shall not be construed as imposing contractual obligations on Facility and are subject to change.

12. Cooperate with Facility in securing third-party payments, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments.

13. In the event Resident is transferred or discharged, Resident and/or Representative will be responsible for collecting and moving Resident's personal property within forty-eight (48) hours of the transfer/discharge. If the property is not moved, Facility will remove all property from the Resident's room and store same at Resident's and/or Representative's cost and risk. Facility is not responsible for any damage, theft or loss to Resident's property during this period of time. Unclaimed property will be disposed of in accordance with applicable state law.

14. Resident and/or Representative will be responsible for any damage caused to Facility property by Resident or his/her guests beyond normal wear and tear and will pay for such damage, based on the actual charge to Facility for repair or replacement.

15. Resident and/or Representative will be responsible for obtaining adequate information from Resident's attending physician before any extraordinary treatment. Absent knowledge that the consent was not informed, Facility staff may rely upon the physician's written order as evidence that the physician secured informed consent.

16. Resident and/or Representative will be responsible for any damages or injuries caused by Resident to other persons, and will indemnify and hold Facility harmless from any claims, actions or proceedings against Facility resulting from Resident's actions or omissions.

17. In the event of Resident's death, Representative agrees to authorize Facility to notify the person(s) designated by Resident and/or Representative. Additionally, Facility is authorized to transfer Resident's body to the designated funeral home. If Resident has not designated a funeral home, Resident's family will be consulted and Resident's body will be transferred in accordance with their wishes. All costs associated with the transfer and funeral expenses will be the responsibility of Resident's estate.

18. In the event Resident becomes incapable of making medical decisions and no guardian, proxy, surrogate or agent under a valid durable power of attorney for health care or no person qualified under the South Carolina Adult Health Code Consent Act is available, Facility is authorized to seek court appointment of a legal guardian. All associated costs and attorneys' fees will be borne by Resident or Resident's estate.

19. Resident and/or Representative agree that they will present grievances in an orderly manner. Information on Facility's Grievance Procedure can be found in the *Admission Handbook* and the *Resident Rights* under applicable state law. Nothing herein will preclude Resident or any other party from filing a complaint with any governmental agency, but will be ancillary thereto. Facility will review and investigate all complaints in a timely manner.



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20. Resident and/or Representative will be responsible for paying all costs, expenses and reasonable attorneys' fees, whether or not suit is brought, in the event costs, expenses, and/or attorneys' fees are incurred by Facility in the collection of sums due from and owed by Resident or any other party on Resident's behalf to Facility.

## III. FINANCIAL AGREEMENT

Resident and/or Representative will be responsible for immediate payment of all charges incurred as follows:

1. Room and board, including meals, laundering of linens and bedding, nursing care, personal care or custodial care for the health, grooming and well-being of Resident in (☐-private) (☑-semi-private) accommodations, for a basic fee of $ 167.00 per day, payable one month in advance. In the event Resident is unable or unwilling to receive any of the services included in the room and board charge, such as meals, laundry, etc., no adjustment will be made to the daily rate. Payment for all invoices is due upon receipt. In the event public aid funds are denied for services for which coverage has been expected, Resident and/or Representative will be responsible for payment and will pay such charges upon receipt of invoice. Resident and/or Representative agree(s) to pay any rate change charged to Resident so long as each party to this Agreement is given at least thirty (30) days written notice of the new rate, including any increases or adjustments in Resident's liability by any financial third party or regulatory agency. Additional notice may be provided under applicable state regulations.

   a. Additional services and items may be provided at a separate charge. The current rates charged for additional services and items are set out in Exhibit B. These charges may change from time to time. Resident and/or Representative agree(s) to pay the charges in effect at the time that the service is performed or the item supplied. Facility agrees to give thirty (30) days advance notice to Resident and/or Representative of any price changes.

   b. Services or items not provided by Facility may be supplied by third-party vendors. Facility will assist Resident and/or Representative in securing such items or services, but will assume no liability for providing the services and makes no representations or warranties regarding the quality of such items or services. Facility assumes no liability for payment of any services provided by third-party vendors.

   c. The daily rate will be charged for the day of admission. Private pay residents will not be charged the daily charge for the day of discharge if discharge occurs before 12:00 p.m., unless the discharge is for emergency medical treatment. Medicare and Medicaid Residents will not be charged a daily charge for the day of discharge. The daily rate will be charged, if applicable, on the day of death.

2. Facility may charge a private pay resident a late payment fee of interest at a rate equal to the lesser of (a) eighteen percent (18%) per annum or, if lesser, the highest percentage allowed by law, on all charges (exclusive of interest) for which resident is liable that are outstanding for more than thirty (30) days from the date on which the resident was billed for said charges or (b) the amount set forth in any Agreement Addendum.

3. Refunds will be made for any prepaid room and board services for which payment has been received. The refund of the unused portion of prepaid fees and charges will be made within thirty (30) days following Resident's discharge. In the event of Resident's death, refunds will be made in accordance with



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state and federal law. Any personal property belonging to Resident in Facility at the time of Resident's discharge or death will be released in accordance Section II-B-13 herein.

4. In the event Resident leaves Facility and has personal funds on account, Facility may deduct any outstanding monies due to Facility from said personal funds. The remainder will be distributed in accordance with applicable state and federal law.

5. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative shall pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

## IV. TERMINATION

1. Resident and/or his/her legal representative may terminate this Agreement at any time, upon written notice to Facility.

2. Except as otherwise provided herein, Facility may terminate this Agreement by providing at least fifteen (15) days advance notice to Resident and/or his/her legal representative.

3. This Agreement may be terminate immediately upon the occurrence of any of the following:

a. Resident's condition has improved sufficiently so that he/she no longer requires the services provided by Facility.
b. Resident's physical or mental condition changes and he/she requires a higher level of care which cannot be provided by Facility.
c. Resident's death
d. The safety or health of individuals in the Facility is endangered.
e. Resident and/or his/her legal representative has failed to pay for his/her stay.
f. Facility ceases to operate or is no longer able to provide services to Resident.
g. Sanctions or remedies imposed by the Department.

4. In the event Facility terminates this Agreement through an involuntary transfer or Discharge, Facility shall provide appropriate notice and discharge planning as required by State and Federal law.

## V. MEDICAID BENEFICIARIES

1. Eligibility. Eligibility for Medicaid-sponsored long-term care services is based on income and medical necessity. To qualify for assistance through the Medicaid program, a nursing home patient must need intermediate or skilled nursing care as determined through an assessment conducted by Medicaid program staff. The fact that a patient has already been admitted to a nursing home is not considered in this determination. It is possible that a patient could exhaust all other means of paying for nursing home care and meet Medicaid income criteria but still be denied assistance due to the lack of medical necessity.

**It is recommended that all persons seeking admission to a nursing home be assessed by the Medicaid program prior to admission.** This assessment will provide information about the level of care needed and the viability of community services as an alternative to admission. The Department may charge a fee, not to exceed the cost of the assessment, to persons not eligible for Medicaid-sponsored long-term care services.



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2. **Covered Services**. If Resident is a Medicaid recipient, the Medicaid Program will reimburse Facility for certain skilled services ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to: hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream, toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, and basic personal laundry.

3. **Non-Covered Services**.

a. Medicaid is a cost-sharing program. Resident's monthly income must be contributed to the cost of his or her care. Medicaid determines how much of the Resident's monthly income must be paid to the Facility (also called "patient liability"). To the extent permitted by law, Resident's monthly Social Security and pension funds, minus the personal allowance retained by Resident (or other allowance as set by law), will be paid to Facility.

b. Resident and/or Representative may purchase from Facility certain miscellaneous products and services that are not covered by Medicaid. An itemized list of fees for these additional products and services is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office.

4. **Assignment of Benefits**. In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicaid for services rendered by Facility and authorizes Facility to receive payments from Medicaid pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicaid refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative will remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicaid.

5. **Benefit Disallowance**. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

6. **Application/ Appeals**. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VI. MEDICARE BENEFICIARIES

1. **Covered Services**. If Resident is a Medicare recipient, the Medicare Program will reimburse Facility for certain skilled services such as nursing services and certain therapies ordered by a physician. Reimbursable routine services include: dietary services; activities programs; room and bed maintenance services; and customary personal hygiene items and services as required to meet the needs of residents, including, but not limited to, hair hygiene supplies, comb, brush, bath soap, disinfecting soaps or specialized cleansing agents (when indicated to treat special skin problems or to fight infection), razor, shaving cream,



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toothbrush, toothpaste, denture adhesive, denture cleaner, dental floss, moisturizing lotion, tissues, cotton balls, cotton swabs, deodorant, incontinence care and supplies, sanitary napkins and related supplies, towels, washcloths, hospital gowns, over the counter drugs, hair and nail hygiene services (other than Beauty Shop fees), bathing, basic personal laundry and medically related social services.

2. **Non-Covered Services.** Resident and/or Representative will be required to pay certain other "Allowable Charges" which include, but are not limited to:

a. Fees for certain products and services not covered under the Medicare program. Fees for such services will be identical those charged to private pay residents of Facility for the same products and services.

b. Fees for certain products and services that are more expensive than the products and services covered under the Medicare program (*e.g.*, a private room), as requested by a Resident and/or Representative. Fees charged for the more expensive products and services will be based on the difference between the fees charged to private pay residents of Facility and the customary charge for the same products and services under Medicare. Facility staff will inform Resident and/or Representative requesting additional or more expensive products or services that there will be a specified charge.

c. Certain deductibles and co-insurance amounts under the Medicare Program.

3. **Assignment of Benefits.** In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from Medicare for services rendered by Facility and authorizes Facility to receive direct payments from Medicare pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent Medicare refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment of those services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from Medicare.

4. **Benefit Disallowance.** If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. **Application/ Appeals.** Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VII. PRIVATE PAY/INSURANCE

1. **Routine Services.** If Resident is paying for his/her stay privately OR if he/she is having his/her stay paid for through a third-party insurance carrier, Resident and/or Representative will reimburse Facility for routine services ("Routine Services") which include: routine nursing services; routine dietary services; routine activities programs; and routine room and bed maintenance services. Beauty shop fees are not included in the daily rate. Resident and/or Representative shall pay a deposit of two months' basic room and board prior to admission. Each subsequent monthly payment is due on or before the 10th day of the month.



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2. Ancillary Services. Resident and/or Representative may purchase services and products that are not included in Routine Services from Facility. An itemized list of fees for these additional services and products is available in the Admissions Office and may be reviewed by Resident and/or Representative upon request during normal business hours of the Admissions Office. Resident and/or Representative shall pay for ancillary services at the end of the month in which such services are rendered.

3. Assignment of Benefits. In consideration for services rendered by Facility to Resident, Resident and/or Representative hereby assigns to Facility, Resident's right to reimbursement from any insurance company paying benefits to Resident for services rendered by Facility and authorizes Facility to receive payments from such insurance company pursuant to this assignment. Resident and/or Representative acknowledges that, to the extent such insurance company refuses to pay for any services rendered to Resident at Facility, Resident and/or Representative shall remain liable for payment for these services to the extent permitted by applicable law. Resident and/or Representative agrees to cooperate with Facility in collecting all proceeds due from such insurance company.

4. Benefit Disallowance. If Resident's third-party eligibility or coverage is denied or terminated for any reason, Resident and/or Representative will pay, from Resident's assets, any and all unpaid charges for care previously rendered to the extent permitted by law.

5. Application/ Appeals. Resident and/or Representative authorizes Facility to apply for government or private benefits on Resident's behalf and to appeal the denial of such benefits. Resident and/or Representative agrees to cooperate fully in obtaining such benefits, including but not limited to promptly and thoroughly completing all required documentation necessary to obtain such payments. Resident and/or Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application.

## VIII. NOTICES

All notices, consents, approvals and the like required to be given hereunder shall be given in writing to Facility to the address below or such other address as Facility may designate:

Magnolia Manor Spartanburg
375 Serpentine Dr
Spartanburg, SC 29303

All notices, consents, approvals and the like required to be given to Resident and/or Representative shall be given in writing to Resident and/or Representative to the address below or at such other address as he/she may designate:

Barbara Owens
REDACTED

Notice may be given via facsimile, e-mail or U.S. Mail, certified mail return receipt requested.

Original: Business File • Photocopy: Resident/Representative





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## IX. GOVERNING LAW

This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located. This Agreement will be binding and inure to the benefit of each of the undersigned parties and their respective heirs, personal representatives, successors and assigns.

## X. SEVERABILITY

If any provision(s) of this Agreement will be deemed to be illegal or otherwise unenforceable, all other provisions will remain in full force and effect as if the invalid provision had not been part of this Agreement.

## XI. CAPTIONS

Captions are for the purpose of reference only and do not govern, limit, modify, enlarge or in any manner affect the scope, meaning and intent of the provisions of this Agreement, nor will such captions be given any legal effect.

## XII. MODIFICATIONS

Facility reserves the right to unilaterally modify this Agreement to conform to law and regulations as may be passed from time to time. Reasonable notice, considering all of the circumstances, will be given to Resident and/or Representative when any change is made in accordance with this paragraph. Any other modification, except as otherwise specifically reserved herein, will be made in writing and signed by all relevant parties.

## XIII. WAIVER

Facility reserves the right to waive any obligation of Resident under the provisions of this Agreement in its sole and absolute discretion. No term, provision or obligation of this Agreement will be deemed to have been waived by Facility unless in writing, signed by Facility. Any waiver of any provision of this Agreement will not be deemed a waiver of any other term, provision or obligation of this Agreement, and the other obligations of Resident and/or Representative and this Agreement will remain in full force and effect.

## XIV. RESIDENT

Use of the term "Resident" herein includes the Resident and any person with legal authority to handle Resident's funds or property and/or make medical decisions depending on the context in which the term is used.

## XV. ASSIGNABILITY

This Agreement is fully assignable by Facility in the event that Facility is sold and/or the license is transferred such that a new licensee operates Facility. This Agreement, at Facility's option and without notice to Resident and/or Representative, may be automatically assigned to the new licensee and will be fully binding upon Resident and the new licensee.



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## XVI. INFORMATION RELEASE/BILLING AUTHORIZATION

1. Resident information included in Facility's records is confidential. Unauthorized persons will not be allowed to review these records without Resident's and/or Representative's consent, except as required or permitted by law. Resident's records are the sole property of Facility, but may be reviewed by authorized person(s) by appointment, in the presence of a Facility representative, as permitted by applicable state or federal law. Authorized persons may request and purchase photocopies of the medical record or any portion thereof with two (2) business days notice, unless a longer time period is permitted under state law. The fees for reproduction will be billed at the current rate permitted by applicable state or federal law.

2. Resident and/or Representative authorize(s) Facility to release all or part of Resident's protected health information ("PHI") as defined by the Health Information Protection and Portability Act of 1996 to any person or entity which has or may have a legal contractual obligation to pay all or a portion of the costs of care provided to Resident, including but not limited to Medicare, Medicaid, hospital or medical service companies, insurance companies, workers' compensation carriers, welfare funds and/or Resident's employer.

3. Resident and/or Representative authorize(s) Facility to release all or any part of Resident's PHI to any medical professional or institution responsible for Resident's medical or nursing care when Resident is receiving treatment, is transferring, or is discharged from Facility.

4. Resident and/or Representative authorize(s) Facility to send and release PHI to Medicare, Medicaid or other third-party payers for the purpose of receiving payment of covered services. Resident and/or Representative further authorize(s) and request(s) that Medicare, Medicaid, their representatives, their intermediaries and other third-party payers send payment for covered services directly to Facility. This authorization does not release Resident and/or Representative from financial responsibility for charges that may be non-covered or denied by Medicare or Medicaid, or other third party payer.

## XVII. MISCELLANEOUS

1. In the event Resident is unable to physically sign his/her name, Resident will sign below by making a mark. If this is the manner in which the Agreement is signed, the witness will verify that Resident was aware that he/she was signing an Agreement and that it was his/her intent to sign.

2. In the event Resident has appointed a Representative to control his/her assets and even if such appointment has not been made through a legal document, Representative will be fully bound to the extent of those assets to the terms of this Agreement, to the extent allowed by law in the State where Facility is located.

3. A copy of any court order appointing a guardian for the Resident's person or estate must be supplied to Facility. This court order must appoint the legal guardian to sign contracts on behalf of Resident. The legal guardian will only be given such rights under this Agreement as are set out in that court order. In addition, the legal guardian must file with Facility on an annual basis the same financial documents filed with the court showing the resources available to pay for Resident's care.

4. Representative will supply Facility with a copy of any power of attorney, durable power of attorney, durable power of attorney for health care or other legal documentation permitting him or her to act on Resident's behalf. It is understood that the Representative will pay for the care of Resident in accordance with this Agreement to the extent that he/she has access to Resident's income or resources. Failure to utilize the Resident's income or resources for payment to Facility may subject Representative to legal action. Facility may require an accounting from time to time as to the type of said resources. Failure to supply such an accounting will be a breach of this Agreement.

5. In the event that an individual voluntarily agrees to become legally responsible for payment for the care and treatment of Resident, said Representative will be fully bound to the terms of this Agreement. Please note, Facility does not require a third-party guarantor.

6. Facility reserves the right to apply its indigent care policy, as appropriate, in its sole discretion.

## XVIII. ENTIRE AGREEMENT

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

By signing below, I/we further acknowledge that I/we have made the above promises and representations in order to induce Facility to enter into this Agreement. The parties further understand that, by signing this Agreement, Facility is relying upon the truthfulness of the promises and representations I/we have made. The parties further agree that if any term or provision of the Agreement is found by a court or agency of competent jurisdiction to be legally unenforceable, the term and provision will be deemed severed from this Agreement and the remaining terms or provisions will be fully enforceable.

The undersigned further acknowledges that he/she has received and read the *Admission Handbook* and other Admissions materials and understand that these documents are made a part of this Agreement by reference herein.

Signature of Resident — Date

Printed Name of Resident

Resident Social Security Number

Witness Signature — Date

Printed Name of Witness

OR

Mary Jane McCraw
Signature of Representative, if any — Date

Mary Jane McCraw
Printed Name of Representative

Witness Signature — Date

Printed Name of Witness

Representative Social Security No. (Voluntary Info.)

Signature of Facility Official

LISA MASON
Printed Name of Facility Official & Title

1/23/15
Date

Original: **Business File** • **Photocopy: Resident/Representative**



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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF SPARTANBURG | ) | SEVENTH JUDICIAL CIRCUIT |
| | ) | |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES, | ) | CASE NO. 2018-CP-42-03447 |
| PLAINTIFFS, | ) | |
| vs. | ) | |
| 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, | ) | **FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO STAY** |
| DEFENDANTS. | ) | |

**COMES NOW**, Defendant Fundamental Administrative Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

## BACKGROUND FACTS

Co-Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Magnolia Manor"), entered into a valid Arbitration Agreement with Plaintiff, Barbara Owens, (the "Arbitration Agreement") prior to Ms. Owens' admission to Magnolia Manor. Per the Arbitration Agreement, Ms. Owens and Magnolia Manor agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply; rather, the

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arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the "FAA"), because the services and reimbursement thereof to be provided to Ms. Owens upon his admission to the facility affected and involved interstate commerce.

Defendant Magnolia Manor has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court's inherent power to manage its own docket, this Defendant respectfully requests that this matter be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor's pending action to Compel Arbitration, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

## ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)[1]

[1] The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See*, S.C. Code Ann. § 15-48-20(d)("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section..." (emphasis added)

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Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it "may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court's discretion. *Id.* See also, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

The Court's decision on whether to stay the pending action against this Defendant "should be motivated by the court's 'concern that litigation against a party not bound by an arbitration provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.'" *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as her claims against Magnolia Manor, a party and signatory to the

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Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Manor-Spartanburg are solely concerned with Ms. Owens' stay at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Manor, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff's allegations of liability in the Complaint assert that this Defendant exerted extensive and pervasive control over Magnolia Manor's medical treatment of Plaintiff's decedent such that this Defendant is liable for the facility's alleged medical malpractice. In no uncertain terms, Plaintiff seeks to prove that this Defendant and Magnolia Manor should be viewed as one in the same by this Court. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Magnolia Manor would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.)

Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

## CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

YOUNG CLEMENT RIVERS, LLP

By: s/ D. Jay Davis, Jr.
D. Jay Davis, Jr.
Perry M. Buckner, IV
Gaillard T. Dotterer, III
P.O. Box 993, Charleston, SC 29402
(843) 720-5406; jdavis@ycrlaw.com
Attorneys for the Defendant Fundamental Administrative Services, LLC

Charleston, South Carolina

Dated: July 23, 2019

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| 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, | ) | **THI OF SOUTH CAROINA, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO STAY** |
| DEFENDANTS. | ) | |

**COMES NOW**, Defendant THI of South Carolina, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

## BACKGROUND FACTS

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because the services and reimbursement thereof to be provided to Ms. Owens upon his admission to the facility affected and involved interstate commerce.

Defendant Magnolia Manor has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court's inherent power to manage its own docket, this Defendant respectfully requests that this matter be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor's pending action to Compel Arbitration, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

## ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)[1]

[1] The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See*, S.C. Code Ann. § 15-48-20(d)("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section..." (emphasis added)



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Citing this statutory provision, the South Carolina Court of Appeals held the "FAA clearly requires a court stay 'any suit or proceeding' pending the arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration' upon the application of one of the parties." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 612, 571 S.E.2d 711, 715 (Ct. App. 2002).

Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it "may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court's discretion. *Id.* See also, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

The Court's decision on whether to stay the pending action against this Defendant "should be motivated by the court's 'concern that litigation against a party not bound by an arbitration provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.'" *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

In the instant matter, the Plaintiff's claims against this Defendant arise out of the exact same factual underpinnings as her claims against Magnolia Manor, a party and signatory to the

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Arbitration Agreement. To be sure, the claims against both this Defendant and Magnolia Manor-Spartanburg are solely concerned with Ms. Owens' stay at Magnolia Manor and the provision of care and treatment provided to him. This Defendant is strongly in favor of staying this case pending the outcome of the arbitration. Without the issuance of a stay, disposition of the Plaintiff's claims against this Defendant may affect the disposition of the matter against Magnolia Manor, which has the power to enforce the Arbitration Agreement and has elected to enforce its contractual rights.

Plaintiff's allegations of liability in the Complaint assert that this Defendant exerted extensive and pervasive control over Magnolia Manor's medical treatment of Plaintiff's decedent such that this Defendant is liable for the facility's alleged medical malpractice. In no uncertain terms, Plaintiff seeks to prove that this Defendant and Magnolia Manor should be viewed as one in the same by this Court. If this Defendant is forced to continue with this litigation, the arbitration proceedings against Magnolia Manor could become redundant and meaningless because of the substantial overlap in factual and legal underpinnings of the cases against this Defendant and Magnolia Manor. Should discovery and the trial of this matter continue against this Defendant in this Court, the right to arbitration of Magnolia Manor would be adversely affected, which would thwart the federal and state policies favoring arbitration. See *Harvey v. Joyce*, 199 F.3d 790, 795-796 (5th Cir. 2000)(Stay granted to defendant non-signatory to arbitration agreement because continuing with litigation would adversely affect signatory's right to arbitrate.)

Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

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## CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Charleston, South Carolina

Dated: July 23, 2019

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| STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF SPARTANBURG | SEVENTH JUDICIAL CIRCUIT |
| ESTATE OF BARBARA JEAN OWENS, BY AND THROUGH HER PERSONAL REPRESENTATIVE, MARY JANE MCCRAW, INDIVIDUALLY AND ON BEHALF OF STATUTORY BENEFICIARIES,<br><br>PLAINTIFFS,<br><br>vs.<br><br>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,<br><br>DEFENDANTS. | CASE NO. 2018-CP-42-03447<br><br>**FUNDAMENTAL CLINICAL AND OPERATIONAL SERICES, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO STAY** |

**COMES NOW**, Defendant Fundamental Clinical and Operational Services, LLC (hereinafter "this Defendant"), by and through its undersigned attorneys and submits this Memorandum in Support of Motion to Stay.

## BACKGROUND FACTS

Co-Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor-Spartanburg ("Magnolia Manor"), entered into a valid Arbitration Agreement with Plaintiff, Barbara Owens, (the "Arbitration Agreement") prior to Ms. Owens' admission to Magnolia Manor-Spartanburg. Per the Arbitration Agreement, Ms. Owens and Magnolia Manor agreed that the South Carolina Uniform Arbitration Act, S.C. Code §15-48-10, et seq., would not apply;

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rather, the arbitration would be governed by the Federal Arbitration Act, 9 U.S.C. §1, et seq. (the "FAA"), because the services and reimbursement thereof to be provided to Ms. Owens upon his admission to the facility affected and involved interstate commerce.

Defendant Magnolia Manor has filed a Motion with this Court to enforce the Arbitration Agreement against the Plaintiff. *See* Motion to Dismiss and Compel Arbitration, attached as **Exhibit 1**. Per this Court's inherent power to manage its own docket, this Defendant respectfully requests that this matter be stayed as to this Defendant until such time as the Court has made a final decision regarding Magnolia Manor's pending action to Compel Arbitration, and the appellate process, if any, has been exhausted. As set forth more fully below, a stay is warranted pursuant to the express provisions of the FAA. Furthermore, such a decision would serve the interests of judicial economy, avoid duplicative litigation, and ensure consistency in adjudicating this case on its merits.

## ARGUMENT

The FAA, 9 U.S.C. § 3, entitled "Stay of proceedings where issue therein referable to arbitration," states the following:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, **the court** in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, **shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement**, providing the applicant for the stay is not in default in proceeding with such arbitration.

(Emphasis added.)[1]

[1] The South Carolina Uniform Arbitration Act likewise requires a stay in the circumstances of this case. *See*, S.C. Code Ann. § 15-48-20(d)("Any action or proceeding involving an issue subject to arbitration **shall be stayed** if an order for arbitration or **an application therefore has been made** under this section..." (emphasis added)

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Both federal and state policy favor arbitration of disputes. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007). Even when, as is the case here, a party to the lawsuit is not a party to the arbitration agreement, it "may be advisable to stay litigation among the nonarbitrating parties pending the outcome of the arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21, 103 S. Ct. 927, 939 (1983). This Court also possesses inherent authority to issue a stay, and the decision to stay a case for the non-arbitrating parties is left to this Court's discretion. *Id.* See also, *Landis v. N. Am. Co.*, 299 U.S. 248, 254-255, 57 S. Ct. 163, 166 (1936)("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

The Court's decision on whether to stay the pending action against this Defendant "should be motivated by the court's 'concern that litigation against a party not bound by an arbitration provision may impair an arbitrator's consideration of claims against a party that is compelled to arbitrate.'" *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999), citing *Kroll v. Doctor's Associates, Inc.*, 3 F.3d 1167, 1171 (7th Cir. 1993).

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Furthermore, staying this action as to this Defendant will promote the public interest in conserving judicial resources and nullify the risk of inconsistent and divergent results.

## CONCLUSION

For the foregoing reasons, this Defendant respectfully requests this Court stay this action until a final decision has been made on the validity of the Arbitration Agreement and the appellate process, if any, has been exhausted.

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Dated: July 23, 2019

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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG | ) | CASE NO. 2018-CP-42-03447 |
| ESTATE OF BARBARA OWENS, by and through her Personal Representative, MARY JANE MCCRAW, Individually and on behalf of Statutory Beneficiaries, | ) | |
| Plaintiff, | ) | |
| vs. | ) | **MOTION TO ALTER, AMEND, AND/OR RECONSIDER** |
| 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, | ) | |
| Defendants. | ) | |

TO: THE HONORABLE J. MARK HAYES, II, Presiding Judge, and GARY W. POLIAKOFF, ESQUIRE, and RAYMOND P. MULLMAN, JR., ESQUIRE, POLIAKOFF & ASSOCIATES, P.A., and PATRICK E. KNIE, ESQUIRE, PATRICK E. KNIE LAW OFFICES, Attorneys for Plaintiff

NOW COME Defendants, Fundamental Clinical and Operational Services, LLC ("FCOS"); Fundamental Administrative Services, LLC ("FAS"); THI of South Carolina, LLC ("THISC"); and THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg (the "Facility") (collectively, "Defendants"), by and through their undersigned counsel, pursuant to Rule 59(e), SCRCP, and, on the grounds set forth below, hereby move this Honorable Court to alter, amend, and/or reconsider its Order Denying THI of South Carolina at Spartanburg, LLC

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d/b/a Magnolia Manor Spartanburg's Motion to Dismiss, Compel Arbitration, and Stay Court Proceedings, filed October 25, 2019 (the "Subject Order").[1]

1. **The Subject Order erroneously states that "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings"[2] is a defendant in this case.**

The Subject Order identifies "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings" as one of the "Corporate Defendants" named in this case. (Subject Order pp. 1–2.) This is simply incorrect. "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings" is not a party to this case. (*See generally* Summons; Compl.)

2. **For all motions disposed of via the Subject Order—be that the Facility's motion to compel arbitration only or the Facility's motion to compel arbitration and FCOS, FAS, and THISC's motions to stay—<u>Defendants expressly request that the Court (re)consider and expressly rule on each and every distinct issue/argument raised in support of the motion(s) (whether raised in writing or via oral argument), all of which Defendants hereby incorporate herein by reference</u>.**

*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

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[1] The Subject Order denied the Facility's motion to compel arbitration and, it would appear, by extension, denied FCOS, FAS, and THISC's respective motions to stay this action pending the outcome of the arbitrability dispute/arbitration proceedings, too. All these motions were on the Court's roster for hearing on July 25, 2019, and given their interrelated nature, it would seem the Court intended its decision on the Facility's motion to compel arbitration to dispose of them all. *To the extent that this is not the case, however, the instant motion includes Defendants' request that the Court clarify the scope of the Subject Order.*

[2] (Subject Order p. 1.)

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reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.") (emphasis in original).

**3. Respectfully, the merger/equitable estoppel analysis in the Subject Order is erroneous.**

Re: Merger

Even though it found against merger on the particular *facts* before it, the *Coleman* Court nonetheless recognized as correct the general proposition of *law* on which the appellants' based their merger argument:

> Appellants contend that even if Sister lacked capacity to execute the AA under the Act, she is nevertheless equitably estopped to deny the AA's enforceability. The circuit court held there was no estoppel here, and we agree.
>
> Appellants' equitable estoppel argument is premised on their contention that, under state law, the admission agreements and the AAs merged. In South Carolina,
>
> > The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the documents together. The theory is that the instruments are effectively one instrument or contract.
>
> *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 88, 232 S.E.2d 20, 24 (1977).
>
> Here, *the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger.*

*Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 354–355, 755 S.E.2d 450, 455 (2014) (emphasis added).

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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 *Coleman*, as well as those that controlled the decisions in *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018), and *Thompson v. Pruitt Corp.*, 416 S.C. 43, 784 S.E.2d 679 (Ct. App. 2016), which relied on *Coleman*.

As argued previously, all the arbitration agreements at issue in *Coleman*, *Hodge*, and *Thompson* provided that they could be disclaimed or revoked within 30 days of their signing, while the corresponding admission agreements did not. There is no such disclaimer/revocation provision in the instant Arbitration Agreement. (*See* Arbitration Agreement.) Also, while the instant Admission Agreement does contain an "Entire Agreement" clause, it does not reference the Arbitration Agreement as being a separate document. (*See* Admission Agreement p. 12.) Moreover, the instant "Entire Agreement" clause expressly states that "other Admissions materials" are deemed to be a part of the Admission Agreement, i.e., it expressly contemplates a lack of its own supposed "separateness." (*Id.*) Also absent here is the type of discrepancy the *Hodge* Court pointed out with respect to the respective provisions of the admission and arbitration agreements before it as to the governing law. 422 S.C. at 562, 813 S.E.2d at 302. (*Compare* Admission Agreement p. 10 (providing, "This Agreement will be governed by and construed in accordance with applicable Federal regulations and those laws of the State in which Facility is located.") *with* Arbitration Agreement (providing, "because the services and reimbursement thereof effect a transaction involving interstate commerce, the enforcement of this Arbitration Agreement . . . shall be governed by the Federal Arbitration Action;" but also providing that arbitration shall be "as provided by the South Carolina Alternate Dispute Resolution/Mediation Rules").)

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Here, the Admission Agreement and Arbitration Agreement should be deemed merged, i.e., they should be construed together and bind Plaintiff to arbitrate the instant claims against the Facility. The agreements were executed at the same time, by the same parties (Ms. McCraw and the Facility, specifically, the Facility's agent Lisa Mason), for the same purposes, and in the course of the same transaction, the whole of which related to Ms. Owens's admission to the Facility and would not have been done at all but for her admission to the Facility. (*Compare* Admission Agreement *with* Arbitration Agreement.)

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."). The Court cites the mere fact that the admission agreement contains an "Entire Agreement" clause,[3] overlooking the fact that the actual language of that clause does not support the idea that the Arbitration Agreement is intended to be separate; indeed, the Court overlooks the fact that the instant "Entire Agreement" clause expressly states that "other Admissions materials" are deemed to be a part of the Admission Agreement. (*See* Admission Agreement p. 12.)

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

[3] (Subject Order pp. 7–8.)

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not what happened. The Arbitration Agreement was in fact executed, and it was executed under circumstances giving rise to a presumption of merger—again, same time, parties, purpose, and transaction. Unlike the Admission Agreement, however, which is capable of making sense either standing alone or, alternatively, together with the arbitration agreement, the Arbitration Agreement only makes sense together with the Admission Agreement, which is its (the Arbitrations 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. Owens's admission. In other words, Ms. McCraw could have decided not to agree to it, in which case it would not have been included in the admissions paperwork, or anywhere else, as it simply would not have existed. But she did agree to it, as part and parcel of the admissions paperwork, Ms. Owens's admission to the Facility being the express—and only—reason why the parties chose to enter into the arbitration agreement to begin with. (*See* Arbitration Agreement ("It is further understood that in the event of any controversy or dispute between the parties arising out of or relating to Facility's Admission Agreement, or breach thereof, or relating in any way to Resident's stay at Facility, or to the provisions of care or services to Resident . . . .").)

The Court also points to the fact that the Admission Agreement and the Arbitration Agreement have their own titles, are separately paginated, and separately signed. (Subject Order pp. 7–8.) 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

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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.

It is simply incorrect to say, as the Subject Order does, that "[b]y their [sic] own terms, the Admission Agreement indicated an intent that the common law doctrine of merger not apply." (Subject Order p. 8.) And to fall back on the idea that any ambiguity in this regard must be construed against the Facility as the drafter makes no sense in this context. It must be remembered that merger is the default position, i.e., it is presumed, and that this presumption arises only upon the occurrence of a specific set of circumstances, those being, as stated in the above-quoted passage from *Coleman*, where, as here, the instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction. When all of these align—same time, same parties, same purpose, same transaction—our courts *will* consider and construe the documents together *unless* there is evidence of a contrary intention. The plain language of the rule endorsed in *Coleman* is to the effect that to upset the merger presumption requires evidence "indicating [(i.e., affirmatively showing)] a contrary intention." To allow the merger presumption to be upset, as the Court has done here, based on evidence that does not even go so far as to clearly indicate a contrary intention, but at most *might* (or might not) reflect a contrary intention, is to allow the exception to devour the rule.

Re: Equitable Estoppel

The view of equitable estoppel reflected in the Subject Order misapprehends our Supreme Court's recent decision in *Wilson v. Willis*, 426 S.C. 326, 338, 827 S.E.2d 167, 174 (2019) (observing that South Carolina has recognized a number of theories that could bind nonsignatories

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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 Ms. Owens (her estate) is estopped from refusing to comply with the Arbitration Agreement here, where she received direct benefits (in the form of her admission and care/treatment at the Facility) from the Admission Agreement with which the arbitration agreement was merged. *Wilson*, 426 S.C. at 340–345, 827 S.E.2d at 175–177; *see also id.* at 340, 827 S.E.2d at 175 n.6 (while expressing no opinion on the petitioner's alternative argument based on the application of the state's "traditional" six-factor test for estoppel, which the *Wilson* Court found unpreserved for review, observing nonetheless that that test, i.e., "[t]he traditional test referenced by [the] [p]etitioners," "has been analyzed most-often in *non*-arbitration cases") (emphasis added). In other words, contrary to the Court's analysis in the Subject Order, *Wilson* supports the use of the direct benefit test to answer the question of equitable estoppel in an arbitration case like this.

Regarding the benefit to Ms. Owens, the Subject Order's statement "that any benefit of admission 'is of no moment' for the application of equitable estoppel to a separate arbitration contract"[4] is itself of no moment because, as explained, the Arbitration Agreement cannot reasonably be viewed as separate from the Admission Agreement here. Properly viewing the Admission Agreement the Arbitration Agreement as merged, Ms. Owens (who was, according to Plaintiff herself, competent and possessed contractual capacity at all relevant times) received the benefit of her admission to the Facility, including, without limitation, the room, board, care, and

[4] (Subject Order p. 11.)

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treatment she received therein. The Court's reference to the *Hodge* Court's skepticism about whether admission "was a benefit to the resident considering Complaint allegations that the nursing home's acts during the admission caused the resident's death"[5] is misplaced. To rely on this is improperly prejudge Plaintiff's allegations as true—and indeed to expand/exaggerate those allegations so as to wholly discount every single aspect of the residency (every meal, every instance of care/treatment delivered, essentially every moment at the Facility), which not even Plaintiff herself has alleged.

Moreover, the quote from *Thompson* that "any possible benefit emanating from the [Arbitration Agreement] alone is offset by the [Arbitration Agreement's] requirement that [the resident] waive her right to access the courts and her right to a jury trial,"[6] is plainly erroneous in that it places arbitration agreements on unequal footing from other contracts.[7] As a matter of law, it legally cannot be, the case that mutual promises constitute sufficient consideration to form a binding agreement except in the case of arbitration agreements. This is plainly improper under the FAA. Moreover, the very idea that mutual promises to arbitrate do not effect an exchange of benefits to both sides is irreconcilable with the existence of the "presumption in favor of arbitration agreements" that even the Subject Order itself acknowledges. (Subject Order p. 3.) And there is no way to square the logic of the quote from *Thompson*—which reflects an overtly hostile view of arbitration—with the undeniable policy preference in favor of arbitration under both South Carolina and federal law. The whole point of arbitration is to make use of an alternative—i.e.,

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[5] (Subject Order p. 11, n.7.)

[6] (Subject Order p. 11 (emphasis omitted).)

[7] As explained previously, as an arbitration agreement covered by the FAA, the Arbitration Agreement "must [be] place[d] . . . on equal footing with other contracts . . . and enforce[d] . . . according to [its] terms[.]" *AT&T Mobility, L.L.C. v. Concepcion*, 563 U.S. 333, 339 (2011).

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outside the traditional litigation process—form of dispute resolution. The giving up—on both sides—of this process (and all that comes along with it) is the benefit, or at the very least is a benefit that outweighs the benefits of litigation.

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

**4. Respectfully, to deny, as the Subject Order does, the Facility's request for discovery into Ms. McCraw's authority "since there is no evidence to show [she] had authority"[8] is to snare the Facility in a patently inequitable Catch-22. At a minimum, the Court should have granted the Facility limited discovery to address gaps in the evidentiary record bearing on the Arbitration Agreement's enforceability against Ms. Owens's estate.**

To rule, as the Subject Order has, that the Facility must have evidence before it can discover evidence is to endorse an unreasonable and unjust standard.

First off, there, of course, exists in every contract an implied covenant of good faith and fair deadling. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 86 (1995). The Court's ruling plainly overlooks this and unjustly rewards Ms. McCraw for her own false representations about her authority.

Moreover, the discovery the Facility sought to conduct is material (or at least stands to be) and is not apt to be cumulative to what is already available to it. As explained previously, whether an agency relationship exists (or whether the facts to support agency by estoppel or ratification exist) is a fact-intensive inquiry. Especially given Plaintiff's assurance that Ms. Owens was

[8] (Subject Order p. 1.)

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competent and possessed of contractual capacity at all relevant times, there is a good faith and material question as to whether Ms. Owens manifested consent to her daughter's acts. The true nature and extent of Ms. Owens's behavior at and about the time of her admission could further be established via limited discovery. Similarly, inquiry could be made into whether Ms. McCarn and Ms. Owens had any post-admission discussions or other interactions in regards to the documents she executed on her behalf during the admissions process, such that Ms. Owens could later have repudiated any such agreements to the extent they were not entered into by her daughter under proper authority—or conversely ratified them by not doing so. The Arbitration Agreement specifically states Ms. McCarn was representing to the Facility that she had "authority to sign on [her father's] behalf so as to bind the Resident as well as the Representative[,]"[9] and, even though agency may not be established *solely* by the actions of the agent,[10] "such declarations and conduct [by the agent] are admissible as circumstances in connection with other evidence tending to establish the agency." *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 83, 124 S.E.2d 602, 606 (1962).

Further still, it must be remembered here that the Facility moved to compel arbitration on the basis of a *facially valid* Arbitration Agreement that—without question—Ms. McCarn signed, expressly stating that she was authorized to do so on her mother's behalf. The very fact that Ms. McCarn has (thus far) been allowed to disavow this representation on the basis of her as yet *unchecked* affidavit is proof positive of a defect in the process of the Facility's effort to enforce the instant (again, facially valid) Arbitration Agreement.

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[9] (Arbitration Agreement.)

[10] *Cowburn v. Leventis*, 366 S.C. 20, 39–40, 619 S.E.2d 437, 448 (Ct. App. 2005).

Most respectfully, at a minimum, the Court has erred in denying the Facility's alternative request for limited discovery to address gaps the in evidentiary record bearing on the Arbitration Agreement's enforceability against Ms. Owens's estate.

WHEREFORE, for the foregoing reasons (and, for that matter, for all of the reasons previously advanced to the Court in support of Defendants' motions, whether in written or oral form, all of which Defendants now ask the Court to (re)consider and expressly rule upon, all of which being incorporated herein by reference), Defendants ask that the Court alter, amend, and/or reconsider the Subject Order and vacate it in favor of an order(s) granting Defendants' various motions.

PLEASE NOTE: Defendants reserve all rights to provide further support for this motion via such briefing, argument (to include oral argument), and/or additional submissions as the Court may permit or require.

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: *s/D. Jay Davis, Jr.*

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November 4, 2019



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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>**Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,**<br>**Plaintiffs,**<br><br>**v.**<br><br>**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,**<br>**Defendants.** | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-03447<br><br>**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION** |
|---|---|

**TO: THE HONORABLE J. MARK HAYES, II, PRESIDING JUDGE, AND D. JAY DAVIS, JR. AND RUSSELL HINES, ATTORNIES FOR DEFENDANTS.**

COME NOW the Plaintiffs, the Estate of Barbara Owens and her statutory beneficiaries, who submit this Memorandum of Law in opposition to Defendants' Motion for Reconsideration. In opposing this motion, Plaintiffs would show that the order originally submitted by the Court was correct as a matter of law, and does not warrant reconsideration. Notwithstanding any arguments made in this memo, the Plaintiffs reaffirm and assert all previous arguments made in this matter.

1. **Mention of Hunt Valley Holdings, LLC will be removed.**

The Plaintiffs maintain that Hunt Valley Holdings, LLC. is a corporation that exerts significant control over the Defendants listed in this current matter, but agree that since they are not named as a party to the current matter that Plaintiff will submit a revised proposed Order removing mention of them.

2. **The Court correctly applied the merger and equitable estoppel analysis.**

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Eqiuitable estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly. *See* Hirsch v. Amper Fin. Servs., LLC, 71 A.3d 849, 852 (N.J. 2013). Equitable estoppel is a contract defense for which the asserting party "bears the burden of establishing all the elements." Kelly v. Logan, Jolley & Smith, 383 S.C. 626, 638, 682 S.E.2d 1, 7 (Ct. App. 2009). Equitable estoppel requires proof that the party to be estopped (1) acted in a way amounting to a false representation; (2) intended that such conducted be acted on by the other party; and (3) had actual or constructive knowledge of the real facts. Strickland v. Strickland, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007). The party asserting estoppel must (1) lack knowledge and the means of knowledge of the truth of the facts in question; (2) rely on the conduct of the party estopped; and (3) make a prejudicial change in position in reliance on conduct of the party to be estopped. Id. Defendants briefly mention some of these elements but make no effort to apply them.

The facility cannot meet the burden of proof for equitable estoppel because no proof exists for the Defendants' side. To wit, the admission coordinator for the facility would be the one to go through the paperwork with any potential resident. Such personwould be the one that any alleged "misrepresentation" would have been made to by Plaintiff. However Lisa Mason, the admission coordinator who admitted Ms. Owens as a resident to the facility, has provided Plaintiff with a signed affidavit **(Plaintiff's Exhibit – 1)** stating that Ms. Mason has no recollection of any of the events that transpired relating to Ms. Owens' admission and recalls no representation made by any party including Plaintiff. There is no one else, logically, that Defendants could produce that would be able to support their unsubstantiated claim that Ms. Owens represented to the facility that Ms. McCraw had the apparent authority to bind Ms. Owens to the Arbitration Agreement. And, if Defendants had some other staff person who could make any such claim, they could have and

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would have produced an affidavit already. Defendants fail in meeting the burden of proof for equitable estoppel, and cannot claim its protection.

**a. Merger does not apply.**

Defendants apply the *Coleman* case to the current matter, but omitted crucial language from their case citation. Plaintiffs agree *Coleman* speaks directly on point to the matter at hand. Continuing where Defendants left off from their inset quote in their Motion for Reconsideration (p.3):

> The admission agreements contain this language in a section titled "Entirety of Agreement":
>
> This Agreement, including all Exhibits hereto, and the Arbitration Agreement between the Facility and the Resident, if the parties sign one, supersede all other agreements, either oral or in writing between the parties, and contain all of the promises and agreements between the parties. Each party to this Agreement acknowledges that no representations, inducements, or promises have been made by any party or anyone acting on behalf of any party, that are not contained in this Agreement or in the Arbitration Agreement. This Agreement may be amended only by a written agreement signed on behalf of the Facility and the Resident.
>
> On its face, this clause recognizes the "separatedness" of the AA and the admission agreement, not a merger of the two contracts. Moreover, the AA could be disclaimed within thirty days of signing while the admission agreement could not, evidencing an intention that each contract remain separate. By their own terms, the contracts between these parties indicated an intent that the common law doctrine of merger not apply. *Klutts Resort, supra.* Even if the "Entirety" clause creates an ambiguity as to merger, the law is clear that any ambiguity in such a clause is construed against the 356*356 drafter, in this case, appellants. *See Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 713 S.E.2d 799 (Ct.App.2011) fn. 4. Since there was no merger here, appellants' equitable estoppel argument was properly denied by the circuit court.

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

Similarly to *Coleman*, the Admission Agreement in this matter contains an "Entire Agreement" provision. Just as in *Coleman*, the Entire Agreement provision in the Admission

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Agreement for Ms. Owens uses similar language representing the Admission Agreement as *the entire agreement* between the two parties. At a minimum this creates an ambiguity in the documents that must be construed against the drafting the party, the Defendants. *See* Davis v. KB Home of S.C., Inc., 394 S.C. 116, 713 S.E.2d 799 (Ct. App. 2011).

Defendants further point out that the Admission Agreement does not reference the Arbitration Agreement as being a separate document. Assuming arguendo, that Defendants' interpretation is correct here, it does little to change the impact of construing the documents. Looking at the language quoted from *Coleman* above (Plaintiff's Memo Page 3) one can see that the Defendant tried to utilize the Entire Agreement clause in the Admission Agreement in *Coleman* to merge the Arbitration Agreement as one document, and ultimately failed. Additionally, the fact that the agreement does not have a 30 day opt out period is not dispositive on the issue of merger. It is merely a minor factor for the Court to consider, and is ineffectual and of minimal merit, given the other factors mentioned against merger.

The Court in Hodge and Thompson follows the reasoning set out in Coleman that in these types of cases the Admission and Arbitration Agreements are separate documents 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). Factors that were of particular interest to the Court were the fact that the agreements had separate titles at the top, separate pagination for each document, and separate signature pages for each agreement. 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. We have all those factors present in the current matter. The Admission and Arbitration Agreements are titled differently,

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have distinct pagination, and separate signature pages. There is no special factor here that would make this Arbitration Agreement any way significantly different from those the Court invalidated in Coleman, Thompson, and Hodge.

There is no same purpose between the two agreements here for the argument of merger. Defendants in their motion attempt to crudely conflate the separate purposes of the Admission Agreement and the Arbitration Agreement. The purpose of the Admission Agreement is to create a contract between the facility and a potential resident to state the responsibilities owed by each party to each other, and to allow the potential resident to be admitted to the facility. The Admission Agreement is all about the care for the resident. On the other hand, the Arbitration Agreement is not related to the care of the resident at all. The Arbitration Agreement, as its name implies, is solely meant to try strip the resident of her right to a jury trial in favor of the commercially favorable arbitration option. It is important to reemphasize that arbitration itself is not a condition of admissions, nor could it legally have been. The only relation the Arbitration Agreement has to the Admission Agreement is the facility would have no reason to impose the Arbitration Agreement on someone unless they were being admitted to the facility.

**b. The direct benefits test is not applicable in this matter.**

Defendants then turn to the direct benefits test mentioned by the Court in Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019). But before one can use the direct benefits test, one must first see if the test is applicable.

> In the arbitration context, the doctrine recognized that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contratct's arbitration clause when he has consistently

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> maintained that other provisions *of the same contract* should be enforced to benefit him.

International Paper Co. v. Schwabedissen Maschinen & Anglagen GMBH, 206 F.3d 411 (4th Cir. 2000)(emphasis added).

The Fourth Circuit's ruling in International Paper Co. preconditions the use of the direct benefits test on the fact that the arbitration clause is part of the same contract the moving party wishes to enforce. That is not the case here. The facility is not trying to enforce a clause in the Admission Agreement. By their own names, Admission Agreement and Arbitration Agreement, it is facially apparent that they are separate contracts. Plaintiff received no direct benefit from the Arbitration Agreement. The surrendering of one's Constitutional right to a jury trial is not in any way a conceivable benefit to Plaintiff. The Admission Agreement provides the benefit of care at a facility to Plaintiff. But as stated earlier, the Admission Agreement for a multitude of reasons previously stated, is a separate contract from the Arbitration Agreement. Attempting to derive the benefits from the Admission Agreement and apply them to the Arbitration Agreement makes no logical sense given their separate and distinct nature. Thus the direct benefits test does not apply in this circumstance.

Directly on point on this matter from *Wilson*, cited by the Defendants, "... direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen "but for" a contract's existence." Wilson, 426 S.C. at 343, 827 S.E.2d at 176. The *Wilson* Court goes on to cite a case supporting this rationale stating,

> When a claim depends on the contract's existence and cannot stand independently – that is, the alleged liability "arises solely from the contract or must be determined by reference to it' – equity prevents a person from avoiding the arbitration clause that was part of that agreement. But "when the substance of the

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> claim arises from general obligations imposed by state law, including statues, *torts*, and other common law duties, or federal law, "Direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not have arisen "but for" the contracts existence. (emphasis added)

Jody James Farms, JV v. Altman Grp., Inc., 547 S.W.3d 624, 637 (Tex. 2018)(emphasis added).

The current action before the Court comes from a state tort claim. The claims that Plaintiff alleges against Defendants do not depend on either contract's existence. The only way that the claim relates to either contract is the fact that one of the contracts is the Arbitration Agreement. But even then, as Plaintiff has argued and still maintains, the Arbitration Agreement was not a valid agreement entered into because, among other reasons, the Arbitration Agreement was signed by an individual with no authority to bind Ms. Owens to the Agreement. It is convincingly clear from the case law on the matter that the direct benefits test does not apply here.

The Court has already properly ruled, based on case law and a careful analysis of the facts, that there is no merger of the Admission Agreement and Arbitration Agreement here. The direct benefits test is not applicable, and equitable estoppel would be inappropriate in this instance.

3. **There is no need for further discovery regarding Ms. McCraw's lack of authority to bind Plaintiff to the Arbitration Agreement.**

Limited discovery into the validity of the Arbitration Agreement is not necessary. Even though Defendants wish to bury their heads in the sand, all the necessary facts are already present. Ms. McCraw, the daughter of Ms. Owens who signed the Arbitration Agreement without legal authority, has already provided a signed affidavit discussing the

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facts as known to her **(Plaintiff's Exhibit – 2)**, as has Defendants' own ex-admissions coordinator **(Plaintiff's Exhibit – 1)**. The facts are neither vague nor unambiguous, and as they stand on the record now paint a clear picture that does not require further discovery.

Ms. McCraw stated she made no representation about any supposed legal authority over Ms. Owens to Defendants. Nor, according to Ms. McCraw, did Ms. Owens make any statements during the admission process to Defendants about any legal authority Ms. McCraw did or did not have. Ms. McCraw did not have power of attorney, nor were there any representation made by Ms. Owens that would bring in an apparent authority argument. Defendants operate numerous skilled nursing facilities and are at least minimally proficient and knowledgeable in the admission process for an individual to a skilled nursing facility. Defendants know or should have known to look to see if Ms. McCraw had a valid power of attorney on file at a county records office in South Carolina. This is not a strange or unfamiliar practice to Defendants as many admissions into their skilled nursing facilities are typically handles through the resident's attorney-in-fact. Defendants cannot plead ignorance now simply because it is strategically advantageous to them.

Furthermore, there is no more reasonable discovery Defendants can conduct. An affidavit signed by their own ex-admissions coordinator, who admitted Ms. Owens, states that the admissions coordinator has no memory of anything surrounding Ms. Owens' admission, nor any alleged representations. **(Plaintiff's Exhibit – 1)**. The ex-admissions coordinator, by her own admission, would have been the person who went through the

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Admission Agreement and Arbitration Agreement with Ms. Owens and Ms. McCraw. Defendants simply have no other knowledgeable witness competent to testify on this issue.

With all the evidence pointing in favor of the Plaintiff, and no available evidence to support Defendants' position, there is no need to conduct limited discovery on this matter. Any limited discovery conducted would be unduly burdensome, a further delay, and highly unlikely to lead to any discoverable evidence.

**Conclusion**

For the foregoing reasons, and reasons previously argued and advanced by Plaintiff through written memorandum and oral argument, Plaintiff respectfully agrees with the Court's original ruling and asks that the Defendants' Motion to Reconsider be Denied.

Respectfully Submitted,

*/s E. John Waelde*

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*Attorneys for Plaintiffs*

Dated: January 3, 2020
Spartanburg, S.C.

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| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG<br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br>Plaintiffs,<br>v.<br>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,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br>C.A. No: 2018-CP-42-03447<br><br>**AFFIDAVIT OF LISA MASON** |

PERSONALLY appeared before me, Lisa Mason, who being competent and over the age of eighteen and duly sworn deposes and states:

1. I was the Admissions Coordinator at Magnolia Manor Spartanburg in July 2015.

2. It was in my practice to review and sign admission paperwork for resident admission.

3. It was in my practice to review and sign arbitration paperwork for resident admission.

4. I see my signature on the arbitration paperwork related to Barbara Owens, but I have no recollection of this particular signing event, nor any recollection of the attendant details.

5. I have no recollection of any of the events that transpired related Barbara Owens and her admission into the facility, and do not recall any representations by Barbara Owens, Mary Jane McCraw and/or any other family members regarding the signing of such admissions paperwork and/or any arbitration paperwork.

FURTHER AFFIFIANT SAYETH NOT.

L. Mason

Lisa Mason

SWORN to before me this

30 day of December 2019.

Notary Public for South Carolina

My Commission Expires: July 3, 2028

Amanda Rice

## Justman, Aimee

**From:** John Waelde <JWaelde@gpoliakoff.com>
**Sent:** Wednesday, July 8, 2020 10:12 AM
**To:** Hayes, J. Mark Law Clerk (Dallas Meacham); Hines, Russell; 'Ray Mullman'
**Cc:** Davis, Jay; Wakeham, Rebecca (Becky); Shelley Hogan
**Subject:** Proposed Orders in Owens v. Fundamental 2018-CP-42-03447
**Attachments:** Amended Final Order Denying MTC Arbitration - w RGH Tracked Changes as of 7-7.docx; Prop Confidentiality Order with Sharing Provision.docx

Mr. Meacham,

Attached are: 1) the Proposed Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, And/Or Reconsider, and 2) Plaintiffs' Proposed Confidentiality Order regarding discovery production. These Orders are submitted in response to the Court's Form 4 Order in the above captioned matter issued on June 25, 2020

Defense counsel has reviewed the Proposed Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, And/or Reconsider and agree to the Proposed Order, but do object to the ruling and wish to preserve their right to appeal. Defendants believe the Proposed Order is consistent with what the Court asked for in the Form 4 Order.

Defendants are okay with the Proposed Confidentiality Order except for the sharing provision contained within.

Please let me know if anyone has any questions or concerns.

John Waelde
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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG<br><br>Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br>Plaintiff,<br><br>v.<br><br>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,<br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>C.A. No: 2018-CP-42-03447<br><br>**ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO ALTER, AMEND, AND/OR RECONSIDER** |

This matter came before the Court on Defendants' Motion to Alter, Amend, and/or Reconsider the Order entered October 25, 2019. THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg filed their Motion to Dismiss, Compel Arbitration and Stay Court Proceedings on November 12, 2018. Fundamental Administrative Services, LLC filed their Motion to Stay on November 12, 2018. Fundamental Clinical and Operational Services, LLC filed their Motion to Stay on November 12, 2018. THI of South Carolina, LLC filed their Motion to Stay on November 12, 2018. The first hearing on all of Defendants' Motions was conducted on July 25, 2019. The Court issued a Form 4 Order denying all of Defendants' Motions and instructing Plaintiffs to draft a Proposed Order. On October 25, 2019 the Court issued its Formal Order denying all of Defendants' Motions. Defendants filed the Motion to Reconsider on November 4, 2019. A hearing was held on Defendants' Motion to Reconsider on January 6, 2020. On June 25, 2020, the Court issued a Form 4 Order denying Defendants' Motion to Reconsider in all but two respects—(1) removing and vacating any/all reference to "Hunt Valley Holdings, LLC, formerly known as Fundamental Long Term Care Holdings" ("HVH") in the Court's Prior Order filed

October 25, 2019[1] and (2) confirming that the respective Motions to Stay are denied as moot in consequence of the Court's denial of the Motion to Compel Arbitration—and indicating this Formal Order was to follow.

Now, therefore, having listened to oral arguments from counsel and reviewed the parties' legal memoranda and exhibits, the Court hereby GRANTS in part (i.e., in the two (2) respects above referenced) and DENIES in part (i.e., in all other respects) the Motion to Reconsider and, in so doing, alters its Prior Order filed October 25, 2019, in the two (2) respects above referenced, replacing that Order with the Ruling below.

For the foregoing reasons, the Motion to Dismiss and Compel Arbitration, or Alternatively, to Compel Arbitration and Stay Proceedings is **DENIED**. The claims in this case are not subject to arbitration. Therefore, the respective Motions to Stay are **DENIED** as moot. Defendants should respond to Plaintiffs' discovery requests subject to the Confidentiality Order accompanying this Order.

## FACTUAL BACKGROUND

Daughter brought this tort action asserting survival and wrongful death claims and alleging corporate negligence and nursing home neglect resulting in Barbara Owens' ("Decedent") wrongful death. Plaintiff's Complaint names as defendants the Facility as well as, Fundamental Clinical and Operational Services, LLC (which Defendants assert provided "clinical services" to the Facility), and Fundamental Administrative Services, LLC (which Defendants assert provided

[1] The Prior Order referred to HVH as one of the "Corporate Defendants" named in this case. Among the grounds raised in the Motion to Reconsider is Defendants' contention that the reference to HVH is erroneous because HVH is not a party to this case. In response to the Motion to Reconsider, Plaintiff acknowledged that HVH is not a party to the case and expressed her agreement to do away with the Prior Order's mention of HVH.

"administrative services" to the Facility), these latter entities being hereinafter referred to as the "Corporate Defendants." Plaintiff alleges that while the Corporate Defendants did not provide direct care or services to Decedent, they are proper Defendants in this matter because their control over the Facility directly affected the quality of care Ms. Owens received. The Complaint does not include a cause of action for breach of contract and the Claims are not premised on the Admission Agreement. The signing of the Arbitration Agreement was not a condition of admission. Ms. Owens was competent at the time of the admission but did not sign any of the paperwork. Her daughter, Mary McCraw, signed the admission paperwork even though she was not power of attorney and did not have any legal authority to do so. Daughter was appointed personal representative of Ms. Owens' estate on June 20, 2016.

Ms. Owens was admitted to the Facility on July 23, 2015 under the terms of the Admission Agreement governing the care Ms. Owens would receive at the Facility as well as Ms. Owens' financial obligation to pay for those services. The admission contract contains a section titled "Entire Agreement"[2] provision indicating this contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility.

Daughter signed a contract entitled "Arbitration Agreement" on July 23, 2015 after Mrs. Owens was already admitted to the facility. This contract was not part of the 12 pages comprising the Admission Agreement but was its own separate entity (labeled "Page 1 of 1") with its own signature blocks. The Arbitration Agreement, purportedly a contract between the Facility and Ms. Owens, provides for alternative dispute resolution for any claim a party may bring against another

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

arising out of Ms. Owens care at the Facility. The Facility admits that agreeing to the Arbitration Agreement was not a prerequisite or condition to admission at the Facility.

On March 1, 2018, Daughter initiated this lawsuit alleging Defendants failed to monitor and supervise Ms. Owens' safety and well-being while at the Facility. On November 12, 2018, the Facility filed a Motion to Dismiss, Compel Arbitration and Stay State Court Proceedings. On October 25, 2019 the Court issued its Order Denying Defendants' Motions to Dismiss, Compel Arbitration, and Stay. Defendants' filed their Motion to Reconsider on November 4, 2019. A hearing on Defendants' Motion to Reconsider was held on January 6, 2020.

## LEGAL STANDARD

In order to compel arbitration, the Facility bears the burden to prove a valid and enforceable arbitration contract. Not all arbitration clauses are per se enforceable. 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). Courts interpret a jury trial waiver narrowly and construe contract ambiguities against the Facility as the party that drafted the Arbitration Agreement. WDI Meredith & Co. v. Am. Telesis, Inc., 359 S.C. 474, 480, 597 S.E.2d 885 (Ct. App. 2004). Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663, 668 (2007). Whether the parties agreed to arbitrate is a question of substantive state law. In Chassereau v. Global Sun Pools, Inc., the Supreme Court stated:

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

373 S.C. 168, 644 S.E.2d 718, 720-21 (2007) (emphasis added).

While the Federal Arbitration Act ("FAA") includes a presumption favoring arbitration, it only applies *after* the court finds there is a valid, enforceable arbitration agreement. 9 U.S.C. § 4 ("The court shall make an order directing the parties to proceed to arbitration" but only "upon being satisfied that the making of the agreement...is not in issue").[3] The FAA looks to state law to decide the threshold questions of contract formation.[4] Therefore, arbitration agreements guided by the FAA are subject to the same defenses applicable to all other contracts.[5] The judicial inquiry may include an examination of contractual defects such as lack of mutual assent and want of consideration, as well as other grounds existing at law or equity, including fraud, duress, and unconscionability.[6]

## LEGAL ANALYSIS

The Facility's motion to compel arbitration is effectively a motion to enforce a contract. In the ordinary course, a nursing home resident who alleges injury would bring her claims before the Court as Plaintiff has done here and the nursing home would mount its defense in the same forum. A valid contract to arbitrate their disputes is the only way for the parties to opt out of the litigation process. The Court finds the Facility had no such contract with Ms. Owens. The "Arbitration Agreement" on which the Facility's motion relies is invalid because there can be no contract

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

[4] Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360, 364 (2001); Towles v. United Healthcare Corp., 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) ("the court should apply 'ordinary state-law principles that govern the formation of contracts.'").

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

[6] See Sydnor v. Conseco Fin. Servicing Corp., 252 F.3d.302, 205 (4th Cir.2001).

without the mutual assent of its proposed parties. Ms. Owens never assented to the Arbitration Agreement and did not empower Daughter or anyone else to assent on her behalf.

**A. Daughter Had No Legal Authority.**

The Facility concedes Ms. Owens did not sign the Arbitration Agreement but argues Daughter's signature as Ms. Owens' "representative" was sufficient to bind Ms. Owens and her estate to the Arbitration Agreement's terms. However, the Court finds Daughter lacked authority to enter an arbitration contract on Ms. Owens' behalf.

Defendant argues Daughter acted as Ms. Owens' agent when signing the Arbitration Agreement. An agency may not, however, be established solely by the declarations and conduct of an alleged agent. Cowburn v. Leventis, 366 S.C. 20, 39, 619 S.E.2d 437, 448 (Ct. App. 2005). Moreover, the Facility has failed to provide any evidence beyond Daughter's signature to suggest she was Ms. Owens' agent. The fact that Daughter signed documents enabling Ms. Owens' admission to the Facility receipt of medical care in no way indicates Ms. Owens conferred authority on Daughter for purposes of a dispute resolution contract. The Court finds Ms. Owens never manifested any form of assent establishing Daughter as her agent.

For agency situations, the legal burden is on the party asserting that an agency exists. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996). In this case, the Facility must show all necessary elements of an agency relationship are "clearly established" by the facts. Id. A party dealing with an agent has a duty to use due care to ascertain the scope of the agent's authority to act. Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 244, 473 S.E.2d 865, 867 (Ct. App. 1996).

Daughter was not Ms. Owens' power of attorney and the medical records suggest Ms. Owens was competent to sign contracts on her own behalf when she was admitted to the Facility.

Additionally, the typical case where admission and arbitration contracts are presented simultaneously, Daughter signed the arbitration agreement *after* Ms. Owens was already admitted to the facility. Our Supreme Court has held that a surrogate without proper legal authority cannot bind a person to arbitration.

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

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

Coleman is directly on point here. In Coleman, the circuit court refused to compel arbitration because the sister of a nursing home resident who signed arbitration and admission contracts lacked authority to bind the resident to the arbitration agreement. In affirming the circuit court's order, the Supreme Court found that, although the South Carolina Adult Healthcare Consent Act (S.C. Code Ann. § 44-66-10 to -80) gave the sister authority to make 'healthcare decisions' on behalf of the resident, consent for medical treatment is not the same as binding an incompetent person to a contract concerning arbitration. Coleman, 407 S.C. at 352, 755 S.E.2d at 453-54. The court reasoned that the Act extends authority to surrogates to make traditional healthcare decisions and financial decisions that arise out of those decisions. Id. Coleman compels this Court to find Daughter had no legal authority to sign the Arbitration Agreement.

**B. Equitable estoppel does not apply.**

Defendants also argue Daughter is estopped from denying authority to bind Ms. Owens to arbitration because Daughter does not deny authority to admit Ms. Owens to the Facility. Similarly, the Facility argues Ms. Owens created an agency relationship to support arbitration because she "accepted" admission. Both arguments require the admission contract and Arbitration Agreement to be interpreted as a single agreement. However, Coleman and its progeny rejected similar merger arguments. Coleman refused to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 407 S.C. at 355, 755 S.E.2d at 455. The Court of Appeals has since applied Coleman and provided further examples of factors demonstrating "separateness" and preventing merger. Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 573-74, 813 S.E.2d 292, 308 (Ct. App. 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) (refusing to apply the merger doctrine because language in the contracts "recognize[d] the 'separateness' of the admission and arbitration agreements." 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.

An admission contract with an "Entirety of Agreement" provision is separate "on its face" from an arbitration contract especially where the provision identifies the two contracts distinctly—i.e. "this [Admission] Agreement *or* in the Arbitration Agreement." Coleman, 407 S.C. at 355, 755 S.E.2d at 455 (emphasis added). In fact, when the arbitration and admission contracts have different pagination with different signature pages and the arbitration contract has "Arbitration Agreement" atop its first page, these factors further "indicate the parties' intent for it to stand by itself as an independent contract." Thompson, 416 S.C. at 53 n. 1, 784 S.E.2d at 685 n. 1; Hodge,

422 S.C. at 562-63, 813 S.E.2d at 302. Separateness is further demonstrated when the nursing home makes clear that agreeing to arbitrate is not required to gain admission to the home. Thompson, 416 S.C. at 53, 784 S.E.2d at 685; Hodge, 422 S.C. at 562-63, 813 S.E.2d at 302.

Like in Hodge, the separate contracts here have separate signature pages and separate pagination—i.e. the Admission Agreement ends with "Page 12 of 12" while the Arbitration Agreement is "Page 1 of 1." As in Thompson, the arbitration agreement announces its independence with its "Arbitration Agreement" title. The Facility was in sole control of the language chosen for these form contracts of adhesion and it was their responsibility to make merger clear if they so desired. In sum, the Facility cannot meet its burden to prove merger.

The Facility then argues Daughter should be estopped from denying the validity of the Arbitration Agreement because Ms. Owens accepted the benefits of the Admission Agreement and, therefore, should not be able to repudiate the Arbitration Agreement. However, this argument also depends on Defendant's faulty merger argument. Since the admission contract and Arbitration Agreement identify themselves as distinct contracts, they do not merge. The Admission Agreement's "Entire Agreement"[7] provision shows that one contract constituted "the entire agreement and understanding between the parties" concerning admission to the Facility and prohibited merging the two distinct agreements. By including this clause, the drafter indicated an intent that the common law doctrine of merger among the discrete documents cannot apply. Even if the "Entire Agreement" clause creates an ambiguity as to merger, any ambiguity must be construed against the Facility as the contracts' drafter. Davis v. KB Home of S.C., Inc., 394 S.C. 116, 129 n. 4, 713 S.E.2d 799, 805 n. 4 (Ct. App. 2011). Since there was no merger here,

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

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).

So long as the admission contract and Arbitration Agreement are separate documents, alleged misrepresentations made by a resident's family member when signing the contracts does not equitably estop the resident's estate from challenging the family member's authority to bind the resident (and the estate) to arbitration. A family member who signs an arbitration contract without legal authority to bind the resident acts in her individual capacity and her misrepresentations have no bearing on claims against the home by the resident's estate even if the misrepresenting family member is also the estate's representative. 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").

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

The Facility does not attempt to apply these elements to this case. Instead, the Facility suggest an alternative equitable estoppel standard and relies on federal cases. Defendants contend

their contract-based argument is subject to federal law rather than the law of South Carolina, the state where the alleged contract was signed and its alleged parties resided. This argument is at odds with U.S. Supreme Court precedent. Wilson v. Willis, 426 S.C. 326, 338, 827 S.E.2d 167, 173-74 (2019) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630-31 (2009) ("Whether an arbitration agreement may be enforced against nonsignatories, and under what circumstances, is an issue controlled by state law")). By looking past South Carolina contract law, the Facility stands in the untenable position of asking the Court to ignore the U.S. Supreme Court's interpretation of a federal statute.

Moreover, the Court finds the Facility cannot establish the elements required to prove equitable estoppel. There is no evidence Defendant lacked knowledge Daughter was not authorized to bind Ms. Owens to the Arbitration Agreement. Additionally, Daughter did not have power of attorney for Ms. Owens and the Facility did not produce evidence to suggest Daughter made any such represented to the Facility. The Facility cannot claim to have been misled and cannot rely on equitable estoppel if it, by the exercise of reasonable diligence, could have acquired knowledge to determine the truth of facts in questions. Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 70-71, 558 S.E.2d 902, 908-909 (Ct. App. 2001). Furthermore, the Facility had the ability to determine whether Daughter had authority to sign the Arbitration Agreement on Ms. Owens behalf. The Facility is a sophisticated business entity frequently interacting with residents and their families during the nursing home admission process. The Facility is familiar with the legal concepts of guardianship and powers-of-attorney and had the ability to ask Daughter for power of attorney documentation. Further, equity does not favor Defendants under the circumstances in this case. Therefore, Defendant cannot argue merger or estoppel and the Court denies Defendant's motion based on the same.

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

Unmoored from the legal tests for equitable estoppel, the Facility then makes a broader argument that it would be "manifestly inequitable" for Ms. Owens' estate to pursue a tort claim based on the Admission Agreement while denying Daughter's authority to sign the Arbitration Agreement. This argument misunderstands the legal distinction between health care and dispute resolution decisions. It is not at all unusual for a family member to have authority to admit a loved one to a nursing home while lacking authority to waive the loved one's jury trial right. That is precisely what the Adult Health Care Consent Act does. It provides statutory authority for family members to make an incapacitated loved one's "health care" decisions but leaves the conferral of authority to arbitrate for powers of attorney or other legal instruments outlined in the probate code. Coleman, 407 S.C. at 353, 755 S.E.2d at 454 (finding statutory power to make "health care" decisions limited to nursing home admission and related financial decisions). Plus, the Facility's

argument does not accurately state the estate's claims. Ms. Owens' estate is not asserting any claim based on the Admission Agreement; she alleges only common-law negligence claims. See Hodge, 422 S.C. at 563, 813 S.E.2d at 302 ("because [resident and estate] are not suing for a breach of the Admission Agreement, they are not attempting to enforce that agreement" and are not estopped from challenging the Arbitration Agreement).

In sum, the Court rejects the Facility's arguments that Daughter was Ms. Owens' agent or that Ms. Owens' estate is equitably estopped from opposing Daughter's purported authority to sign the Arbitration Agreement on Ms. Owens' behalf.

**C. The Facility's Request for Discovery is Denied.**

The Facility argued in its filings and at the hearing that the Court should order or sanction limited discovery on factual issues bearing on the presentment and signing of the Arbitration Agreement. The Court denies this request for two reasons. First, the Facility could have chosen to conduct discovery before it affirmatively brought this issue to the Court's attention by filing its motion. See 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). Second, the Court finds the discovery requested, including Daughter's deposition, would not affect the legal arguments concerning agency at issue in this motion. Citing long-standing South Carolina law, Hodge held this type of deposition was not required to rule on a family member's apparent authority to sign an arbitration contract because agency may not be formed by the purported agent's representations on their own. Id. at 577, 813 S.E.2d at 310 (quoting Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996)).

## CONCLUSION

For the foregoing reasons, the Motion to Reconsider is GRANTED in part and DENIED in part, and the Motion to Dismiss and Compel Arbitration, or alternatively, to Compel Arbitration and Stay Proceedings is **DENIED** and the respective Motions to Stay are **DENIED** as moot.

IT IS SO ORDERED!

_____

Honorable J. Mark Hayes, II
Circuit Court Judge, Seventh Judicial Circuit
July ___, 2020

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF SPARTANBURG | ) | IN THE COURT OF COMMON PLEAS |
| Estate of Barbara Owens, by and through her Personal Representative, Mary Jane McCraw, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiffs,<br><br>vs.<br><br>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,<br><br>Defendants. | ) | C. A No. 2018-CP-42-03447<br><br>**CONFIDENTIALITY ORDER** |

WHEREAS the parties hereto have been and may be requested to produce or disclose through discovery certain materials and information that they maintain contains privileged trade secrets, proprietary information, other confidential commercial information and/or financial or personal information and the parties agree to the following:

1. **Scope.** All confidential documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the bottom of the document in a manner

which will not interfere with the legibility of the document and which will permit complete removal of the Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney[1] who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. Information or documents which are available in the public sector may not be designated as confidential.

4. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

5. **Protection of Confidential Material.**

a. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons identified below (¶ 6.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation).

[1] The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the Bar of South Carolina.

b. **Limited Third Party Disclosures.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;
(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed;
(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;
(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit; and
(5) other attorneys involved in similar litigation against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by this Order (See attached).

c. **Control of Documents.** Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

d. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies"), of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

6. **Filing of Confidential Materials.** In the event a party seeks to file any material that is subject to protection under this Order with the Court, that party shall take appropriate action to insure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential; (2) where appropriate (e.g. in relation to discovery and evidentiary motions), submitting the documents solely for in camera review; or (3) where the preceding measures are not adequate, seeking permission to file the document as to such other rule or procedure as may apply in the relevant jurisdiction. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to allow any document be filed under seal. The parties understand that documents may be filed under seal only with the permission of the Court after proper motion.

7. **Greater Protection of Specific Documents.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

8. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;
(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 9.b. above; or
(3) the Court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

9. **Treatment on Conclusion of Litigation.**

a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

b. **Return/Retention of CONFIDENTIAL Documents.** The Parties to this litigation may keep documents designated confidential at the conclusion of the litigation so long as the parties and their counsel agree to be bond by the terms of this Order until such time as the documents are returned or destroyed.

This provision does not apply to HIPAA sensitive documents. Any documents protected from future disclosure pursuant to HIPAA must be returned to the providing party within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal.

10. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

11. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection or otherwise until such time as a document-specific ruling shall have been made.

13. **Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; (2) their respective clients; and (3) any person referred in Paragraph 5 (b)(6).

14. **Production of Privileged or Otherwise Protected Documents or Materials.** The Parties agree that the inadvertent production of information subject to a privilege shall not constitute a waiver of the privilege.

**AND IT IS SO ORDERED!**

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Honorable J. Mark Hayes
Judge for the 7th Judicial Circuit
Court of Common Pleas

July _, 2020.

## Justman, Aimee

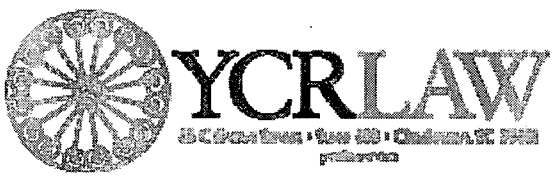
**From:** Hines, Russell
**Sent:** Wednesday, July 8, 2020 11:56 AM
**To:** John Waelde; Hayes, J. Mark Law Clerk (Dallas Meacham); 'Ray Mullman'
**Cc:** Davis, Jay; Wakeham, Rebecca (Becky); Shelley Hogan
**Subject:** RE: Proposed Orders in Owens v. Fundamental 2018-CP-42-03447
**Attachments:** Signed 7-8-20 -- Defs.' Mem. in Opp'n to Proposed Confidentiality Order.pdf; Ex. A - Stnd. Fed. Conf. Order (minus reading room).pdf

Mr. Meacham,

Re: Plaintiff's proposed Confidentiality Order, there is some nuance to Defendants' position that I need to make the Court aware of. Both sides are in agreement that there is good cause to enter a confidentiality order in this case, and Plaintiff's counsel is correct that the primary dispute between the parties is over the so-called "sharing provision," which dispute includes, in Defendants' counsel's mind at least, the related matter of non-return, i.e., the question of whether confidential materials have to be returned after this case is over. In short, the dispute is that Plaintiff wants the confidentiality order to include a "sharing provision" (with return of confidential material not required), while Defendants want the confidentiality order to not include a "sharing provision" (and to require the return of the confidential material when the case is over). And but for the parties' disagreement in this regard, I'm certain we could find a way to reach agreement on the terms of an appropriate confidentiality order. Given, however, that we are at loggerheads on this point, and thus have to involve the Court in deciding the matter, Defendants preference would be for the Court to enter a confidentiality order that follows the Standard Federal Confidentiality Order (minus the reading room). To this end, Defendants' competing proposed order is attached as Exhibit A. But again, the main point of contention between the parties relates to the "sharing provision," and even if the Court is inclined to enter Plaintiff's proposed Confidentiality Order, Defendants ask that the Court revise that order to omit the "sharing provision" (and, along with it, the allowance for non-return, i.e., to revise the order as necessary to return confidential material when the case is over). In support of Defendants' position I have attached a memo of law (to which is attached Ex. A, i.e., Defendants' competing proposed order), which was e-filed just a short while ago.

If the Court has any questions or needs anything further from Defendants' counsel, please just let me know.

Russell G. Hines
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www.ycrlaw.com
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
Phone: (843) 720-5488
Fax: (843) 579-1327
Email: rhines@ycrlaw.com




**From:** John Waelde
**Sent:** Wednesday, July 8, 2020 10:12 AM

**To:** Hayes, J. Mark Law Clerk (Dallas Meacham) ; Hines, Russell ; 'Ray Mullman'
**Cc:** Davis, Jay ; Wakeham, Rebecca (Becky) ; Shelley Hogan
**Subject:** Proposed Orders in Owens v. Fundamental 2018-CP-42-03447

Mr. Meacham,

Attached are: 1) the Proposed Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, And/Or Reconsider, and 2) Plaintiffs' Proposed Confidentiality Order regarding discovery production. These Orders are submitted in response to the Court's Form 4 Order in the above captioned matter issued on June 25, 2020.

Defense counsel has reviewed the Proposed Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, And/or Reconsider and agree to the Proposed Order, but do object to the ruling and wish to preserve their right to appeal. Defendants believe the Proposed Order is consistent with what the Court asked for in the Form 4 Order.

Defendants are okay with the Proposed Confidentiality Order except for the sharing provision contained within.

Please let me know if anyone has any questions or concerns.

John Waelde
Poliakoff & Associates
864-582-5472
215 Magnolia St.
Spartanburg, SC 29306

CONFIDENTIALITY NOTICE: The contents of this email message and any attachments are intended solely for the addressee(s) and may contain confidential and/or privileged information and may be legally protected from disclosure. If you are not the intended recipient of this message or their agent, or if this message has been addressed to you in error, please immediately alert the sender by reply email and then delete this message and any attachments. If you are not the intended recipient, you are hereby notified that any use, dissemination, copying, or storage of this message or its attachments is strictly prohibited.

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| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG | ) | IN THE COURT OF COMMON PLEAS<br>SEVENTH JUDICIAL CIRCUIT<br>CASE NO. 2018-CP-42-03447 |
| ESTATE OF BARBARA OWENS, by and through her Personal Representative, MARY JANE McCRAW, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiff,<br><br>vs.<br><br>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,<br><br>Defendants. | ) | **DEFENDANTS' MEMO IN OPPOSITION TO PLAINTIFF'S PROPOSED CONFIDENTIALITY ORDER** |

Defendants, Fundamental Clinical and Operational Services, LLC ("FCOS"); Fundamental Administrative Services, LLC ("FAS"); THI of South Carolina, LLC ("THISC"); and THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg (the "Facility") (collectively, "Defendants"), by and through their undersigned counsel, *subject to and without waiving the rights asserted in their respect motions to compel arbitration and for a stay*, submit this memo in opposition to Plaintiff's proposed Confidentiality Order—in particular, in opposition to the "sharing provision" contained therein (*see* Pl.'s Proposed Confidentiality Order ¶ 5). To be clear, *Defendants agree there is good cause for entry of a confidentiality order in this lawsuit and do not oppose entry of an appropriate order*. Indeed, Defendants request entry of the Standard Federal Confidentiality Order (minus reading room provision(s)). Defendants, however, must object to entry of any confidentiality order containing a "sharing provision."

Defendants oppose Plaintiff's proposed Confidentiality Order with a "sharing provision" because it would: (1) violate Defendants' due process rights, (2) set improper limitations on the scope of information that can be designated as "Confidential," (3) violate Defendants' respective ownership, possessory, and/or privacy rights in their proprietary or otherwise valuable or sensitive confidential information, (4) eliminate Defendants' right and ability to evaluate these documents for relevancy prior to production in all future cases nationwide, (5) increase the burden on this Court by making it the "nationwide gatekeeper" of all issues as to these confidential documents, (6) violate notions of jurisdiction and comity between and among state and federal courts, (7) allow Plaintiff's counsel, Poliakoff & Associates, P.A. ("Poliakoff Law Firm"), to be the sole arbiter of relevancy and dissemination of confidential documents without any involvement or protection for the owners of these documents or this Court prior to production, and (8) permit Poliakoff Law Firm to retain confidential materials produced in this lawsuit for its own use in other future, unknown lawsuits. Plaintiffs have not satisfied—and cannot satisfy—their burden to prove that their proposed confidentiality order is "reasonable and necessary" to the prosecution of *this* lawsuit. Therefore, as further explained below, Defendants respectfully request that the Court deny the motion to enter Plaintiffs' proposed Confidentiality Order (in so doing, prohibiting or otherwise enjoining the undue dissemination/disclosure of Defendants' confidential information) and, instead, enter the Standard Federal Confidentiality Order, attached hereto as Exhibit A—and at a minimum, even if the Court is inclined to enter Plaintiff's proposed Confidentiality Order, to revise that order so as to omit the "sharing provision."

## BACKGROUND

This lawsuit is a wrongful death and survival action premised on allegations of negligence with respect to the care and treatment rendered to Barbara Owens ("Ms. Owens") during her residency at the Facility, a skilled nursing facility.

Plaintiff alleges various failures and deficiencies in the hands-on, clinical care provided to Ms. Owens during her residency. Plaintiff also alleges wrongdoing in respect of business decisions by/involving other entities, the so-called "Corporate Defendants" (FCOS, FAS, and THISC), which are said to be causally related to the alleged failures/deficiencies in Ms. Owens's care/treatment while at the Facility. The defense contests Plaintiffs' allegations on all fronts—clinical and otherwise.

Through discovery, Plaintiff seeks access to sensitive business and financial information, ultimately from all Defendants. Plaintiffs has served extensive requests for financial documentation/information including operating budgets, financial statements, subleases, loan agreements, business communications, staffing methods and analytical data, policies and procedures, employee rosters, personnel files, and commercial contracts with non-parties (the "Confidential Materials"). The Confidential Materials should not be shared because they contain private, financially sensitive, personally sensitive, health-related or proprietary commercial information.[1] **The Confidential Materials that are relevant to Ms. Owens's care/treatment, her health considerations, the time period of her stay and Plaintiff's particular allegations and that have been/will be produced in this matter are of such a particularized nature that**

[1] To be clear, Defendants are in no way seeking to prevent Plaintiff from making full and fair use of relevant, Confidential Materials in Plaintiff's prosecution of *this* particular lawsuit; however, such materials should only be used in *this* lawsuit. That is the *only* legitimate use to which such Confidential Materials can be used.

**the only legitimate use of this information is by *this Plaintiff* for *this lawsuit.*** [2] *See, e.g.,* Lonnie Hampton v. The Raymond Corp., No. 1:18-cv-0008-RWS, 2018 WL8642616 (N.D. Ga.) (April 13, 2018) (denying a sharing provision applicable to *other current, known lawsuits* on the grounds that each such lawsuit involving a Raymond forklift involved an injury that occurred as the result of that particular plaintiff's independent operation of a particular Raymond forklift at a particular workplace under particular circumstances).

However, Plaintiff's effort to limit the scope of what can be labeled confidential and to add a "sharing provision" in the proposed Confidentiality Order confer no benefit on Plaintiff in *this* lawsuit. The request would significantly prejudice Defendants by exposing their confidential information to unilateral sharing by the Poliakoff Law Firm with lawyers across the country. This request is simply not needed and does not actually benefit the Plaintiff in this case, though it does clearly benefit the Poliakoff Law Firm. They have multiple active cases. The clear reason for this request is simply to build a "library of confidential documents" for themselves and other lawyers that may choose to sue any of these Defendants in any jurisdiction. Additionally, there is no public interest to be considered at all in this request that could outweigh the Defendants' rights and

[2] There is no "public harm" or "public safety" interest in this lawsuit to be served by the "sharing provision." This lawsuit is distinguishable from products liability litigation involving nationwide distribution of an allegedly defective product where sharing provisions have been occasionally entered. Any future litigation—which is wholly speculative and unknown—against any of these Defendants has its own set of particularized facts due to the nature of skilled nursing facility events and there simply is no "public harm" to even consider which justifies the entry of a "sharing provision." The Facility is a skilled nursing facility regulated by various South Carolina regulatory bodies, including DHEC, and any issues of true "public safety" are most appropriately addressed through their oversight rather than the ability to share discovery information in future, unknown litigation.

interest in protecting their confidential information from use and dissemination without control by the Poliakoff Law Firm beyond this lawsuit.[3]

## LEGAL STANDARDS

A court may issue an order "for good cause shown" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense, including ... (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way". *See* SCRCP, Rule 26(c)(7). The party seeking a protective order bears the burden of showing good cause for it. *See Id; see also* Biazari v. DB Industries, LLC, Civil Action No. 5:16-cv-49, 2017 WL 1498122, *1 (W.D.W.Va. April 26, 2017)(citing In re Deutsche Bank Tr. Co. Ams., 605 F.3d 1373, 1378 (Fed. Cir. 2010)).

The proponent must show that the information is confidential and that its disclosure would create a risk of harm to the party's interests. *See* Id. (citing In re Violation of Rule 28(D), 635 F.3d 1352, 1357-58 (Fed. Cir. 2011))(emphasis added). "If a court finds that such a risk exists, it must balance the risk against the potential harm **to the opposing party's case** from the restrictions placed on the information." *See* Id. at *1(citing to Deutsche Bank, 605 F.3d at 1373 and Pfizer, Inc. v. Apotex, Inc., 744 F. Supp. 2d 758, 762 (N.D. Ill. 2010))(emphasis added); *accord generally* Lafitte v. Bridgestone Corp., 381 S.C. 460, 74 S.E.2d 154 (2009). In determining whether the information sought to be discovered should be "subject to a protective order under [SCRCP,] Rule

[3] In addition, there is no presumption of public access to *unfiled* discovery. *See, e.g.,* In re GlaxoSmithKline PLC, 699 N.W.2d 749, 755 (Minn. 2005) ("[D]ocuments produced as discovery are not presumed to be public.") The presumption of public access attaches to the adjudicatory process itself and does not attach to unfiled pleadings or to discovery materials filed as attachments to a discovery motion. *See, e.g.,* Hammock v. Hoffmann-LaRoche, Inc., 662 A.2d 546, 558 (N.J. 1995) ("[T]here is no presumptive right-of-public-access to discovery motions filed with the trial court."). This is consistent with the express language of SCRCP Rule 5(d) and Rule 26(g)(1), which excepts discovery from public filing requirements.

26(c)(7), federal and state courts typically apply a balancing test that incorporates a 'relevant and necessary' standard for the party seeking to discover" the protected information. Lafitte, 381 S.C. at 473, 474 S.E.2d at 162.

## ARGUMENT

### I. PLAINTIFFS' PROPOSED CONFIDENTIALITY ORDER VERSUS THE STANDARD FEDERAL CONFIDENTIALITY ORDER

While Plaintiff's counsel has utilized the Standard Federal Confidentiality Order as the "base" of the proposed Confidentiality Order, the proposed order does *not* actually protect Defendants' confidential information from disclosure. It does quite the opposite.

There are *several very significant revisions* in the Proposed Order that would: (1) undermine any meaningful notion of confidentiality, (2) prejudice the Defendants in multiple ways, and (3) do not benefit Plaintiff in the prosecution of their individual case at bar. Entry of the Proposed Order by this Court would effectively preclude each of the Defendants from protecting confidential information, and would eviscerate any meaningful protection of the "Confidential" designation, and leave all future relevancy determinations to this one firm and not this Court. As this Court knows, the Standard Federal Confidentiality Order is the preferred protective order among courts throughout the country and the defense submits it is more than adequate and appropriate for entry in this matter.

#### A. The Proposed Order Severely limits the protections of the Federal Order.

##### *1. Plaintiff has severely limited the Scope to only Confidential Documents.*

The Federal Order by its express terms applies to "all documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery." (*See* Ex. A - Standard Federal Order, ¶1). Further, the Standard Federal Order permits a party to designate documents as "Confidential"

if an attorney has reviewed and determined that such documents "contain information protected from disclosure by statute, trade secrets or confidential research, development or commercial information." (*See* Ex. A – Standard Federal Order, ¶3).[4]

The Proposed Confidentiality Order eliminates from the order this language: "***all responses to discovery requests and all deposition testimony and exhibits, and any other materials which may be subject to discovery.***" This limitation in essence means that there is no mechanism available to protect these items as they are not within the scope of the confidentiality order. (*See* Pl.'s Proposed Confidentiality Order ¶1). Plaintiff's proposed Confidentiality Order by its express terminology would apply to *only* "confidential documents produced in the course of discovery." This limitation should be rejected.

***2. Plaintiff has improperly added a requirement of showing economic harm to label a document confidential.***

Plaintiff now seeks to force each Defendant to prove "economic harm" in conjunction with a designation of confidential by adding that only such documents that "contain information protected from disclosure by statute, trade secrets, or confidential research, development, or commercial information ***that will cause economic harm if made public***" would be able to be designated "Confidential".[5] (*See* Pl.'s Proposed Confidentiality Order, ¶3) (emphasis added). Of course, economic harm from the improper dissemination of these documents is what the Defendants are trying to avoid and requiring proof of harm prior to disclosure would be unwieldly

[4] Such language in the Standard Federal Order tracks both Fed. R. Civ. P. Rule 26(c)(1)(G) and SCRCP Rule 26(c)(7), which are identical to each other.

[5] It appears that Plaintiff's counsel has proposed the same procedure for challenging a "Confidential" designation as is provided in the Standard Federal Order. However, Plaintiff's counsel has limited the sphere of documents that even are capable of being designated as "Confidential" through the terms of their Proposed Order.

and further complicate the litigation. This "economic harm" element is inconsistent with the Standard Federal Order and the express language of SCRCP, Rule 26(c)(7), **which does not contain that additional – and arbitrary - "economic harm" qualifier.**

The significantly limited scope of Plaintiff's Proposed Confidentiality Order would permit Plaintiff and Poliakoff Law Firm to disclose the Defendants' private, proprietary and sensitive information if it is either: (a) discovered in this case by means other than through document production (*i.e.* deposition exhibits, discovery responses, etc.); or (b) may not be able to be tied to "economic harm" from its disclosure (*e.g.* personnel files, private information of other individual persons, tax returns, staffing information, employee rosters, financial statements, business communications, etc.).[6] Neither SCRCP, Rule 26(c)(7) nor the Standard Federal Order require that a party seeking a confidentiality order to demonstrate "economic harm" if the categories of information listed therein were to be disclosed, and this Court should reject and not approve this limitation either.

### *3. The Federal Court Order Contains No Sharing Provisions.*

The Standard Federal Order prohibits Confidential Materials from being used or disclosed by the parties or their counsel for any purposes other than preparing for and conducting the subject lawsuit. (*See* Ex. A – Standard Federal Order, ¶6(b)). In addition, the Standard Federal Order permits very limited third party disclosures to: (1) counsel and employees of counsel who have responsibility for the preparation and trial of the lawsuit; (2) parties and employees of a party to the Order, upon certification that such person's assistance is necessary to the subject lawsuit; (3)

[6] Defendants believe strongly that disclosure of such information beyond this lawsuit would indeed cause "economic harm." The point here, however, is that there is private, proprietary and sensitive information that is worthy of protection regardless of express economic harm (e.g., competitive disadvantage).

court reports and those persons engaged for the limited purpose of photocopying; (4) consultants, investigators, or experts employed to assist the parties in the preparation and trial of the subject lawsuit; and (5) other persons only upon consent of the producing party or upon order of the courts. (*See* Ex. A – Standard Federal Order, ¶6(b)).

Plaintiff's Proposed Confidentiality Order permits third party disclosures to the same persons listed in Paragraph 6(b) of the Standard Federal Order plus "other attorneys involved in ***similar litigation*** which is undefined against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by the Court's jurisdiction and this Order". (Pl.'s Proposed Confidentiality Order, ¶5(b)(5) (emphasis added)). "Similar litigation" is not a defined term. Also, where the Confidential Documents go is apparently left up to the sole discretion of Poliakoff Law Firm – an amazing ask of this Court.

Additionally, Plaintiff's Proposed Confidentiality Order includes a "non-return" provision such that the parties would have a right to keep Confidential Materials *indefinitely*. The effect of the foregoing provisions of Plaintiffs' Proposed Confidentiality Order is to create, in effect, an "unlimited sharing provision," whereby Plaintiffs' counsel – Poliakoff Law Firm – can share Confidential Materials *beyond this lawsuit* in any jurisdiction and with attorneys in *currently unknown, future "similar" (as determined in their eyes only) litigation* for an *indefinite period of time*. This bold request must be rejected as a blanket violation of due process that will result in irreparable harm.

## II. THE PROPOSED CONFIDENTIALITY ORDER SHOULD BE REJECTED, AS PLAINTIFF HAS FAILED TO SATISFY HER BURDEN TO PROVE SHARING IS WARRANTED.

The Proposed Confidentiality Order should be denied because it expressly permits the disclosure of the Defendants' confidential information: (1) *beyond this lawsuit (2) to unknown*

*parties, and (3) in other jurisdictions* in violation of the Defendants' right to protect its commercially sensitive or otherwise confidential information and to their substantive due process rights. *See* Rule 26(c)(7), SCRCP. Moreover, the denial of the sharing provision (*i.e. for use and/or sharing in unknown unrelated litigation with unknown lawyers by Poliakoff Law Firm*) does not harm Plaintiff's prosecution of her lawsuit in any way and, in fact, the entry of the Proposed Confidentiality Order benefits only the law firm.

To be clear, Plaintiff's motion for entry of the Proposed Confidentiality Order is no ordinary discovery motion. Indeed, it is not really a "discovery" motion at all; nor, for that matter, is it really even "Plaintiff's" motion. By its own terms, the "sharing provision" has literally *nothing to do with adjudicating this case*. The dispute over the "sharing provision" is not a dispute about the scope or methods or use of discovery or of anything else *within the context of this case*, only *outside* of it. In other words, for all intents and purposes, the "sharing provision," by its very nature, is in fact a non-issue *within* the context of *this case* and of zero practical significance to *Plaintiff's herself.*

Insofar as the "sharing provision" is concerned, the instant motion is "Plaintiff's" in name only; it is asked for in her name, but she is not really the one who wants it. Although embedded within a motion for entry of a confidentiality order in this case, in substance, the request for the "sharing provision" is the separate and independent request of a non-party, Poliakoff Law Firm, made for its own sake, as well as on behalf of other vaguely identified non-parties (generic litigants from parts unknown who may at some point meet Poliakoff Law Firm's definition of "similarly positioned"), for relief that (a) is not aimed at protecting Plaintiff's confidential information but rather disclosing Defendants' and (b) is wholly disconnected from any actual need in *this case*, the grant of which relief would necessarily affect a substantial right(s) of Defendants' in respect of

their "confidential" information/materials. The nature and effect of the relief sought by request for the "sharing provision" is such that it constitutes an action or cause of action/claim unto itself for decision on its merits, in the nature of a request for a declaratory judgment or special remedy,[7] and Defendants' opposition thereto is effectively a countervailing request for a form of injunctive relief to protect them from the prospect of irreparable harm, if not permanently, at least on such a temporary basis as may be necessary to ensure that Defendants are afforded a meaningful opportunity to pursue any/all available legal avenues (to include, without limitation, any/all rights to appeal or seek discretionary review) to try to protect their property, rights, and/or interests.[8]

**A. <u>Plaintiff cannot show that the Standard Federal Order would prevent her from securing "relevant and necessary" information for their client in this lawsuit.</u>**

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[7] *See Blakely & Copeland v. Frazier*, 11 S.C. 122, 134 (1878) ("The term 'merits' is not very clearly defined. *It certainly embraces more than the questions of law and fact, constituting the cause of action or defen[s]e.*") (emphasis added); Rule 2, SCRCP, Official Note ("This Rule . . . abolishes the mostly cosmetic differences between 'actions' and 'special proceedings'. A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc.").

[8] The sole purpose of a temporary injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). The party seeking an must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). The relief Plaintiffs' counsel seeks here (a license to keep for themselves and give to others Defendants' valuable property) is of exactly the sort irreparable harm is made of. And, assuming, *arguendo*, the Court may be inclined to enter Plaintiffs' proposed order with the "sharing provision," Plaintiffs' counsel having shoehorned their request for this relief into this action in the guise of a "discovery" motion, at a minimum, operation any such "sharing" should be enjoined unless and until Defendants have had been afforded a full and complete opportunity to pursue to conclusion all lawful means of review of this matter. To do otherwise, would plainly do irreparable/irredeemable harm to (effecting a de facto involuntary waiver of) Defendants' legal rights. *Cf.* Jean Hoefer Toal et al. *Appellate Practice in South Carolina* p. 154 (3d ed. 2016) ("If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity.").

Plaintiff has not shown she would directly benefit in this case from or the inclusion of a sharing provision in this case. (*see*, Pl.'s Proposed Confidentiality Order, ¶¶ 5(a), 5(b)(5) and 9). Plaintiff will have access to confidential documents regardless of whether she can share them with other lawyers.. *See* Biazari, 2017 WL 1498122, at *3; see also Steede v. Gen. Motors, LLC, No. 11-2351, 2012 WL 2089761, at *4 (W.D. Tenn. June 8, 2012)("For her part Plaintiff has not shown how entry of a 'non-sharing' protective order results in hardship for her case," as this restriction did not "prejudice[ ] her ability to obtain discovery in support of her own claims."); *see also* Gil, 2007 WL 2580792, at *5 (noting that plaintiff "will not be precluded in any way from receiving discovery due to the non-sharing protective order"). Plaintiff has to show that that their case would be harmed if the Defendants' information were not discoverable as they propose. Biazari, WL 1498122, *1 (citing to Deutsche Bank, 605 F.3d at 1373 and Pfizer, Inc. v. Apotex, Inc., 744 F. Supp. 2d 758, 762 (N.D. Ill. 2010)). Plaintiff's case will not be harmed because the provisions at issue concern solely the ability to use and share the Defendants' confidential information discovered in this lawsuit ***beyond this lawsuit.*** See Id. The parties, their experts, and their consultants all will have access in this case regardless of the existence of a sharing provision. They just have to return the confidential documents. Accordingly, Plaintiff is not able to demonstrate that the proposed sharing of documents would benefit her in this lawsuit or, in the alternative, that denial of the sharing provision would harm them in litigating their pending claims. Plaintiff is well protected in this case by a Standard Federal Order, see Lafitte, 381 S.C. at 473, 474 S.E.2d at 162.

**B. "Sharing provisions" as to confidential documents are disfavored and should be rejected in the absence of a legitimate public interest.**

***In the absence of a consent order by the parties agreeing to a sharing provision, courts are nearly unanimous in opposing the unrestricted sharing of discovery documents with lawyers***

***from other jurisdictions***. See In Re Remington Co., 952 F.2d 1029, 1033 (8th Cir. 1991) ("use of discovered information should be limited to the *particular lawsuit* in which it has shown to be both relevant and necessary to the prosecution of the action.") (emphasis added); Scott v. Monsanto Co., 868 F.2d 786, 792 (5th Cir. 1989) ("although Plaintiff's claim harm from the inability to share and compare information with other litigants in other cases, no prejudice has been shown); Williams v. Taser Int'l, Inc., 2006 WL 1835437 (N.D. Ga. 2006) ("the Court declines to allow Plaintiffs to either retain confidential documents upon the conclusion of this litigation, or to share confidential documents with other attorneys or experts involved in litigation against [Defendants]"); Blanchard & Co. v. Barrick Gold Corp., 2004 WL 737485 (E.D. La. Apr. 5, 2004) (rejecting discovery sharing given "challenges driven by attorneys not involved in this case"); see also Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297 (N.D. Ill. 1993); Massachusetts v. Mylan Labs, Inc., 246 F.R.D. 87, 90–91 (D. Mass. 2007); and see Biazari v. DB Industries, LLC, 2017 WL 1498122, *1 (W.D.W.Va. April 26, 2017).

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

**C. Judicial Economy will not be served by Plaintiff's Proposed Order.**

The "judicial economy" argument advanced by Plaintiff is simply a red herring. Plaintiff's counsel undoubtedly wants to eliminate any analysis of relevancy by this Court or defense counsel in future cases and completely remove the discovery process in their future cases. That is not judicial economy, it is simply unjust. It is the plaintiff's lawyers' economy. This "economy" would be at the expense of due process rights of these defendants. Tempting as it may be to approve shared discovery to relieve this Court and courts elsewhere from discovery disputes (which of course nobody likes), the state and federal constitution will not allow it.

### 1. *This Court cannot and should not become the National Clearing house for all disputes related to these confidential documents.*

Under the Proposed Confidentiality Order, the third party lawyer receiving Confidential Materials pursuant to the "sharing provision" would have to ***consent to jurisdiction*** here to the extent they consent to such jurisdiction (*See* Pl.'s Proposed Confidentiality Order, ¶5(b)(5)). However, it is not clear that this Court would even be able to enforce its own order against lawyers, witness, experts, or parties in other jurisdictions. *See* Wisconsin v. Amgen, Case No. 2004-CV-001709, Slip. Op. at 3 (Wis. Cir. Ct. Dane Co. Nov. 29, 2005) ("***Almost three decades at this job have shown me the futility and frustration of trying to apply contempt powers beyond state lines.***"). Moreover, it is wholly uncertain whether this Court would have any jurisdiction (or more practically the law enforcement resources) over such other parties to enforce a contempt order across state lines against third party lawyers' clients, their partners, legal assistants, consultants, experts, and other lawyers that secured copies from these lawyers in light of principles of comity and federalism.

### 2. *Plaintiff's Order will increase the burden on this Court.*

The proposed process of having lawyers in other jurisdictions consent to the Proposed Confidentiality Order and consent to the jurisdiction of this Court actually would INCREASE the

burden on this Court's docket – either through enforcement thereof, resolving disputes related thereto, after the fact relevancy fights, or even litigation as to the validity of this Court's jurisdiction in other courts.[9] If Plaintiff's counsel has its way, lawyers from Los Angeles to New York (and everywhere in between) could obtain confidential documents produced under the Proposed Confidentiality Order here simply by "agreeing to be bound" by such order. Even if these outside parties could simply submit themselves to the Court's jurisdiction, ***Plaintiff's counsel is asking this Court to become the national "clearing house" to settle confidentiality disputes arising all across the country.*** A request that is offensive to states' rights and federal jurisdiction.

Even more significantly, the parties actually needing the order's protections – the Defendants - are left with no assurance that another court would enforce the foreign order as intended or that it would even be capable of doing so. The mechanism for enforcement of the Proposed Confidentiality Order against "downstream" recipients of the Confidential Materials is simply not a viable procedure for ensuring that this Court maintains jurisdictions over all parties supposed to be "bound." *See e.g.,* Culinary Foods, 151 F.R.D. at 307 (noting that information wrongfully disseminated by other litigants, in other jurisdictions, may not be subject to protection by the forum court). A simple example would be that after this case is over there would be no pending action in which to file anything seeking relief in South Carolina and a new suit or action of some nature would need to be filed.

Finally, even if this Court were vested with such authority as to all "downstream" recipients of the Confidential Materials, it would become a "lightening rod" for discovery disputes by

[9] Whether the consent to the jurisdiction of this Court by the third party lawyers who receive Confidential Materials from Poliakoff Law Firm would be upheld involves issues of comity, federalism and other legal principles that would very likely result in further litigation in this jurisdiction.

inviting parties from far and wide to come to before it to litigate their discovery issues. *See* Williams, 2006 WL 1835437 ("[T]he Court recognizes that the more widely confidential documents are disseminated, it becomes both more likely that those documents will be released, and more difficult for the Court to enforce the terms of its protective order. In this case, the Court finds the risk to [Defendants] posed by the release of its confidential information, and the difficulties of enforcing a protective order when confidential documents are widely disseminated, outweigh Plaintiff's interest in sharing that information among various plaintiffs' counsel and experts.") The lack of real enforcement power exemplifies the inherent dangers of the "sharing" provision Plaintiff's counsel urges. For the above reasons, Plaintiff's counsels arguments that the sharing provision aids "judicial economy" is actually a baseless and is not a legitimate reason to enter Plaintiff's Proposed Confidentiality Order over the legitimate objections of the Defendants.

## III. THE PROPOSED CONFIDENTIALITY ORDER WOULD VIOLATE DEFENDANTS' DUE PROCESS RIGHT TO PROTECT THE DISSEMINATION OF CONFIDENTIAL INFORMATION BEYOND THIS LAWSUIT.

Plaintiff has conceded that there is "good cause" for a confidentiality order in this case to protect commercially sensitive material from disclosure to the public. (*See* Pl.'s Proposed Confidentiality Order at ¶3); SCRCP, Rule 26(c)(7). Accordingly, the dispute here is not about whether a confidentiality order should be entered - but about the order's terms. Thus, the only matter before the Court on Plaintiff's Motion is whether Poliakoff Law Firm may use and/or share such confidential information discovered in this lawsuit *beyond this lawsuit* in its SOLE discretion. **Unilaterally deciding how to use and and/or share Confidential Materials produced by the Defendants *beyond this lawsuit* and in *currently unknown but "similar" future litigation* would undoubtedly eviscerate the procedural and substantive due process rights of these defendants as the documents will be shared as determined by this firm with unknown**

**lawyers, unknown experts, unknown consultants, in unkown cases, about unkown residents with absolutely no chance to object.**

It is undisputed that the Defendants have an interest in preventing the disclosure of commercially sensitive and otherwise confidential material to the public and its competitors (even if they disagree as to whether any such disclosure must cause "economic harm"). It is no stretch to reach the same conclusion in this case as other Courts, in that "*as a matter of simple probability, the risk of such disclosure (whether intentional or inadvertent) increases as more individuals gain access to this material.*" Biazari, 2017 WL 1498122 at *4. Both the "upfront sharing provision" and a limited scope of confidentiality protection under the Proposed Confidentiality dramatically increase the risk of inappropriate disclosure to the Defendants' detriment. See Id. (rejecting a confidentiality order with a limited scope of protection and an "upfront sharing provision" on the basis that these features increase the likelihood of inappropriate disclosure and harm to the defendant). The likelihood of inappropriate disclosure in violation of the Defendants due process tights is made even more likely by the fact that the Proposed Confidentiality Order would permit each unrelated third party recipient of the Defendants' confidential information to likewise share such information with additional unknown, future litigants *indefinitely*.

### A. Adoption of Plaintiff's order would create a universal ruling that these confidential documents are relevant in all "similar litigation" regardless of plaintiff, regardless of facts, and regardless of jurisdiction.

Through its Proposed Confidentiality Order, the reality of what Plaintiff's counsel desires is stark: a ruling in favor of confidential production in the instant case over objection of the Defendants that would be a ***de facto and universal ruling that such confidential production is relevant to and appropriate for use in all future, unknown cases against any of the Defendants.*** This drastic and unprecedented concept would undermine the rules of discovery, the jurisdiction of this Court, issues of comity and federalism, undermine Defendants' own discovery rights, and

defy the very core purpose and function of confidentiality and the rules of civil procedure. Indeed, adopting a sharing provision would violate the Defendants' respective substantive due process rights to defend themselves in a separate, unknown future lawsuit brought in a different jurisdiction. Any purported "expedited discovery process" that Plaintiff's counsel argues would be achieved through entry of the proposed sharing provision (but which, in the first place, is not really a legitimate reason to adopt a sharing provision in skilled nursing negligence cases due to the *particular and varied health conditions and clinical care at issue* between skilled nursing malpractice cases) is far outweighed by the prejudice to the Defendants' respective rights to defend that different, unknown litigation in a different jurisdiction, subject to different rules of discovery than in South Carolina.

One of the many rationales that courts have adopted in *rejecting* such "sharing provisions" is that they allow outside parties in unrelated cases and foreign jurisdictions to ***effectively circumvent the rules of discovery***. Under Plaintiff's counsel's proposal, Plaintiff's counsel is empowered with ***unlimited and unilateral*** discretion to determine when the Confidential Material might be relevant for another matter and where it might be relevant without any regard for a jurisdiction's discovery rules or the facts of that particular case. As such, Plaintiff's counsel's subjective determination will control the relevancy of the Confidential Material to other cases without the aid and oversight of any court whatsoever. See Wal-Mart Stores East, L.P. v. Endicott, 81 So.3d 486 (Fla. 1st. DCA 2011). It is very difficult to believe that any law firm who regularly litigates in this industry would (or even could ethically could given the adverse nature of the relationship) conduct such analysis.

This is problematic and in violation of the Defendants' rights when the collateral litigants are unknown, and the owner of the information and the Court is taken out of the equation in future

cases. See Id. ("The collateral litigants are unknown, and the only affirmations as to their need to view confidential information are the assertions of [Plainitff's] counsel. As noted in Cordis, a trial court must engage in a balancing test and that cannot be done when there is no established collateral litigant.") (citing Cordis Corp. v. O'Shea, 988 So.2d 1163 (Fla. 4th DCA 2008)); Bertetto v. Eon Labs, Inc., 2008 WL 2522571 *2 (D. N.M. May 29th, 2008) ("The Plaintiffs are preemptively seeking discovery for potential ALL future plaintiffs, and no collateral party even exists yet. Under the information-sharing provision, the court would be abdicating its role in approving future discovery (as well as potentially usurping a collateral court's role in managing discovery in a collateral case) rather than deliberately choosing to modify an existing agreement."). Plaintiff's counsel's proposed sharing provision would undermine every other Court's prospective authority and permit even one single plaintiff's attorney to conclusively determine other parties' needs for the Confidential Material. Indeed, the Defendants' own substantive due process rights and litigation interests would be summarily ignored and discarded if the Proposed Confidentiality Order is entered. Therefore, the Proposed Confidentiality Order should be denied and the Standard Federal Order should be entered.

**B. Trying to enforce Plaintiff's order in other jurisdictions would be expensive and questionable at best.**

Once there has been a violation of a protective order by an unrelated third party, the Court's range of options to remedy violations of a protective order is necessarily diminished when the violations are committed by nonparties – which is what an "upfront sharing provision" invites. See Id.; see also Williams v. Taser Int'l, Inc., No 1:06-CV-oo51, 2006 WL 1835437 at *2 (N.D. Ga. June 30, 2006)("[T]he Court recognizes that the more widely confidential documents are disseminated, it becomes both more likely that those documents will be released, and more difficult for the Court to enforce the terms of its protective order."). Of course, these remedies will vary

by jurisdiction – state and federal. In order to even assess if any such remedy for violation of a state order in federal court or other state courts would require a nationwide canvasing to determine how those laws and rules may impact my clients' due process rights.

**C. Plaintiff's Order invites further litigation inside and outside of South Carolina and disregards choice of law and comity among various state and federal courts.**

Any claims by Plaintiff's counsel that their Proposed Order "expedites the discovery process" for litigants in "similar litigation" should be rejected. This argument should fail because a "lawyer's convenience" does not outweigh the Defendants' substantive and procedural due process rights to defend itself in litigation, produce documents only deemed relevant to that individual case. If signed, this order would infringe on the rights of other state courts to determine relevancy and confidentiality under there on rules and case law. Moreover, the Proposed Confidentiality Order does not further "judicial economy." In fact, the mechanics for sharing the Defendants' information beyond this lawsuit would create an additional burden on this Court's docket and in other court's dockets.

## CONCLUSION

Through the terms of the Proposed Confidentiality Order, Poliakoff Law Firm seeks to effectively *take* the Defendants' rights in their own private, proprietary and/or sensitive confidential information and provide it in perpetuity to the Poliakoff Law Firm's and then the other plaintiffs firms who sign on for "free access to this confidential information" with respect to *unknown, future litigation.* Indeed, Plaintiffs' Proposed Order designates Poliakoff Law Firm as the "confidential information gatekeeper" of the Defendants' own information and, in so doing, imbues in Poliakoff Law Firm a right it can – and likely will - seek to capitalize on through the

association with other plaintiffs' lawyers nationwide in future, unknown lawsuits against these Defendants.

The very fact that retention and use/sharing of the Defendant's information operates *after* the Confidential Material ceases to be of any use to Plaintiff *in this litigation* demonstrates conclusively that Plaintiff's counsel seeks the Proposed Confidentiality Order for their own interests. Indeed, granting Poliakoff Law Firm this responsibility in the face of its own *pecuniary interest* in sharing the Defendants' own confidential information would do permanent and irreparable harm to these defendants is inequitable and would be unjust.

The Defendants merely ask this Court to give confidential document production the treatment that any objective definition of "confidentiality" requires: that such production not be shared with others or used beyond this lawsuit and that it be returned upon the conclusion of the case as happens in Federal Court every day. The Defendants have consented to the Standard Federal Confidentiality Order (minus reading room) being applicable for all confidential production because it satisfies the interests of both Plaintiff (*i.e.* access to such confidential discovery information reasonably necessary to litigate their case) and Defendants (*i.e.* does not violate their rights) and does not imbue Plaintiff's counsel with rights that belong to the Defendants. Therefore, this Court should deny the Proposed Confidentiality Order and enter the Standard Federal Order.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: *s/D. Jay Davis, Jr.*

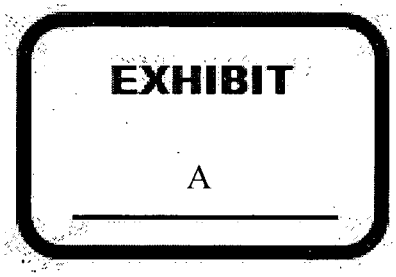
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*Attorneys for Defendants*

Charleston, South Carolina

July 8, 2020

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG | ) | CASE NO. 2018-CP-42-03447 |
| ESTATE OF BARBARA OWENS, by and through her Personal Representative, MARY JANE McCRAW, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiff,<br><br>vs.<br><br>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,<br><br>Defendants. | ) | **CONFIDENTIALITY ORDER** |




Whereas, the parties to this Consent Confidentiality Order ("parties"), have stipulated that certain discovery material is and should be treated as confidential, and have agreed to the terms of this order; accordingly, it is this _____ day of _____, 20_____, ORDERED:

1. **Scope.** All documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not interfere with the legibility of the document and which will permit complete removal of the

Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney[1] who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. The certification shall be made concurrently with the disclosure of the documents, using the form attached hereto at Attachment A which shall be executed subject to the standards of Rule 11 of the Federal Rules of Civil Procedure. Information or documents which are available in the public sector may not be designated as confidential.

4. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

5. **Protection of Confidential Material.**

a. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons

[1] The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the Bar of at least one state but need not be admitted to practice in the District of South Carolina and need not apply for *pro hac vice* admission. By signing the certification, counsel submits to the jurisdiction of this court in regard to the certification.

identified below (¶ 5.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation). The parties shall not disclose documents designated as confidential to putative class members not named as plaintiffs in putative class litigation unless and until one or more classes have been certified.

b. **Limited Third Party Disclosures.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment (in the form set forth at Attachment B hereto), that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;

(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed[2];

[2] At or prior to the time such party or employee completes his or her acknowledgment of review of this Order and agreement to be bound by it (Attachment B hereto), counsel shall complete a certification in the form shown at Attachment C hereto. Counsel shall retain the certification together with the form signed by the party or employee.

(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;

(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit; and

(5) other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered.

c. **Control of Documents.** Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

d. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies"), of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

6. **Filing of Confidential Materials.** In the event a party seeks to file any material that is subject to protection under this Order with the court, that party shall take appropriate action to ensure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential;

(2) where appropriate (*e.g.* in relation to discovery and evidentiary motions), submitting the documents solely for *in camera* review; or (3) where the preceding measures are not adequate, seeking permission to file the document under seal pursuant to the procedural steps set forth in Local Civil Rule 5.03, DSC, or such other rule or procedure as may apply in the relevant jurisdiction. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to the Clerk of Court to allow any document be filed under seal. The parties understand that documents may be filed under seal only with the permission of the court after proper motion pursuant to Local Civil Rule 5.03.

7. **Greater Protection of Specific Documents.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

8. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall

have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;

(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 8.b. above; or

(3) the court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

9. **Treatment on Conclusion of Litigation.**

a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

b. **Return of CONFIDENTIAL Documents.** Within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal, all documents treated as confidential under this Order, including copies as defined above (¶5.d.) shall be returned to the producing party unless: (1) the document has been entered as evidence or filed (unless introduced or filed under seal); (2) the parties stipulate to destruction in lieu of return; or (3) as to documents containing the notations, summations, or other mental impressions of the receiving party, that party elects destruction. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product including an index which refers or relates to information designated CONFIDENTIAL so long as that work product does not duplicate verbatim substantial portions of the text of confidential documents. This work product continues to be Confidential under the terms of this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose the confidential documents.

10. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

11. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection under Rule 26(c)

of the Federal Rules of Civil Procedure or otherwise until such time as a document-specific ruling shall have been made.

12. **Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; and (2) their respective clients.

IT IS SO ORDERED.

_____
J. MARK HAYES, Circuit Judge

_____, 20_____

_____, South Carolina

## Justman, Aimee

**From:** Hayes, J. Mark Law Clerk (Dallas Meacham) <mhayeslc@sccourts.org>
**Sent:** Thursday, July 9, 2020 8:59 AM
**To:** Hines, Russell; John Waelde; 'Ray Mullman'
**Cc:** Davis, Jay; Wakeham, Rebecca (Becky); Shelley Hogan
**Subject:** RE: Proposed Orders in Owens v. Fundamental 2018-CP-42-03447

Judge Hayes has reviewed the orders and believes that Plaintiff's orders looks acceptable. He asks that plaintiff's counsel proceed with e-filing them so that he can sign them electronically.

As to the "sharing" provision, he notes that he is okay with the manner it is written. He believes that the better approach is for him to sign the order so that discovery can move forward. If further objection need to be made, they can be heard when needed.

Dallas Meacham
Law Clerk to the Honorable J. Mark Hayes
180 Magnolia St.
Spartanburg, SC 29306
mhayeslc@sccourts.org
Office: (864) 562-4146

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**From:** Hines, Russell
**Sent:** Wednesday, July 8, 2020 11:56 AM
**To:** John Waelde ; Hayes, J. Mark Law Clerk (Dallas Meacham) ; 'Ray Mullman'
**Cc:** Davis, Jay ; Wakeham, Rebecca (Becky) ; Shelley Hogan
**Subject:** RE: Proposed Orders in Owens v. Fundamental 2018-CP-42-03447

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Mr. Meacham,

Re: Plaintiff's proposed Confidentiality Order, there is some nuance to Defendants' position that I need to make the Court aware of. Both sides are in agreement that there is good cause to enter a confidentiality order in this case, and Plaintiff's counsel is correct that the primary dispute between the parties is over the so-called "sharing provision," which dispute includes, in Defendants' counsel's mind at least, the related matter of non-return, i.e., the question of whether confidential materials have to be returned after this case is over. In short, the dispute is that Plaintiff wants the confidentiality order to include a "sharing provision" (with return of confidential material not required), while Defendants want the confidentiality order to not include a "sharing provision" (and to require the return of the confidential material when the case is over). And but for the parties' disagreement in this regard, I'm certain we could find a way to reach agreement on the terms of an appropriate confidentiality order. Given, however, that we are at loggerheads on this point, and thus have to involve the Court in deciding the matter, Defendants preference would be for the Court to enter a confidentiality order that follows the Standard Federal Confidentiality Order (minus the reading room). To this end, Defendants' competing proposed order is attached as Exhibit A. But again, the main point of contention between the parties relates to the "sharing provision," and even if the Court is inclined to enter Plaintiff's

proposed Confidentiality Order, Defendants ask that the Court revise that order to omit the "sharing provision" (and, along with it, the allowance for non-return, i.e., to revise the order as necessary to return confidential material when the case is over). In support of Defendants' position I have attached a memo of law (to which is attached Ex. A, i.e., Defendants' competing proposed order), which was e-filed just a short while ago.

If the Court has any questions or needs anything further from Defendants' counsel, please just let me know.

Russell G. Hines
YOUNG CLEMENT RIVERS, LLP
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Charleston, South Carolina 29401
P.O. Box 993 (29402)
Phone: (843) 720-5488
Fax: (843) 579-1327
Email: rhines@ycrlaw.com




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**From:** John Waelde <JWaelde@gpoliakoff.com>
**Sent:** Wednesday, July 8, 2020 10:12 AM
**To:** Hayes, J. Mark Law Clerk (Dallas Meacham) <mhayeslc@sccourts.org>; Hines, Russell <RHines@ycrlaw.com>; 'Ray Mullman' <rmullmanjr@gmail.com>
**Cc:** Davis, Jay <jdavis@ycrlaw.com>; Wakeham, Rebecca (Becky) <bwakeham@ycrlaw.com>; Shelley Hogan <shelley@gpoliakoff.com>
**Subject:** Proposed Orders in Owens v. Fundamental 2018-CP-42-03447

Mr. Meacham,

Attached are: 1) the Proposed Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, And/Or Reconsider, and 2) Plaintiffs' Proposed Confidentiality Order regarding discovery production. These Orders are submitted in response to the Court's Form 4 Order in the above captioned matter issued on June 25, 2020

Defense counsel has reviewed the Proposed Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, And/or Reconsider and agree to the Proposed Order, but do object to the ruling and wish to preserve their right to appeal. Defendants believe the Proposed Order is consistent with what the Court asked for in the Form 4 Order.

Defendants are okay with the Proposed Confidentiality Order except for the sharing provision contained within.

Please let me know if anyone has any questions or concerns.

John Waelde
Poliakoff & Associates
864-582-5472
215 Magnolia St.
Spartanburg, SC 29306

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In view of current conditions and for the foreseeable future, YCR will be operating pursuant to its plan for continuous business services. With the imperative of safety in mind, our attorneys and staff will be working remotely as well as in our offices. In any event, we expect and intend to be able to respond in a timely manner to the needs and the requirements of clients, courts, colleagues, and friends. Thank you.

Young Clement Rivers, LLP
http://www.ycrlaw.com
Charleston: (843) 577-4000

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ELECTRONICALLY FILED - 2020 Jul 08 11:35 AM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

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|---|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF SPARTANBURG | ) | IN THE COURT OF COMMON PLEAS<br>SEVENTH JUDICIAL CIRCUIT<br>CASE NO. 2018-CP-42-03447 |
| ESTATE OF BARBARA OWENS, by and through her Personal Representative, MARY JANE McCRAW, Individually and on behalf of Statutory Beneficiaries,<br><br>Plaintiff,<br><br>vs.<br><br>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,<br><br>Defendants. | ) | **DEFENDANTS' MEMO IN OPPOSITION TO PLAINTIFF'S PROPOSED CONFIDENTIALITY ORDER** |

Defendants, Fundamental Clinical and Operational Services, LLC ("FCOS"); Fundamental Administrative Services, LLC ("FAS"); THI of South Carolina, LLC ("THISC"); and THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor – Spartanburg (the "Facility") (collectively, "Defendants"), by and through their undersigned counsel, *subject to and without waiving the rights asserted in their respect motions to compel arbitration and for a stay*, submit this memo in opposition to Plaintiff's proposed Confidentiality Order—in particular, in opposition to the "sharing provision" contained therein (*see* Pl.'s Proposed Confidentiality Order ¶ 5). To be clear, *Defendants agree there is good cause for entry of a confidentiality order in this lawsuit and do not oppose entry of an appropriate order*. Indeed, Defendants request entry of the Standard Federal Confidentiality Order (minus reading room provision(s)). Defendants, however, must object to entry of any confidentiality order containing a "sharing provision."

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Defendants oppose Plaintiff's proposed Confidentiality Order with a "sharing provision" because it would: (1) violate Defendants' due process rights, (2) set improper limitations on the scope of information that can be designated as "Confidential," (3) violate Defendants' respective ownership, possessory, and/or privacy rights in their proprietary or otherwise valuable or sensitive confidential information, (4) eliminate Defendants' right and ability to evaluate these documents for relevancy prior to production in all future cases nationwide, (5) increase the burden on this Court by making it the "nationwide gatekeeper" of all issues as to these confidential documents, (6) violate notions of jurisdiction and comity between and among state and federal courts, (7) allow Plaintiff's counsel, Poliakoff & Associates, P.A. ("Poliakoff Law Firm"), to be the sole arbiter of relevancy and dissemination of confidential documents without any involvement or protection for the owners of these documents or this Court prior to production, and (8) permit Poliakoff Law Firm to retain confidential materials produced in this lawsuit for its own use in other future, unknown lawsuits. Plaintiffs have not satisfied—and cannot satisfy—their burden to prove that their proposed confidentiality order is "reasonable and necessary" to the prosecution of *this* lawsuit. Therefore, as further explained below, Defendants respectfully request that the Court deny the motion to enter Plaintiffs' proposed Confidentiality Order (in so doing, prohibiting or otherwise enjoining the undue dissemination/disclosure of Defendants' confidential information) and, instead, enter the Standard Federal Confidentiality Order, attached hereto as Exhibit A—and at a minimum, even if the Court is inclined to enter Plaintiff's proposed Confidentiality Order, to revise that order so as to omit the "sharing provision."

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## BACKGROUND

This lawsuit is a wrongful death and survival action premised on allegations of negligence with respect to the care and treatment rendered to Barbara Owens ("Ms. Owens") during her residency at the Facility, a skilled nursing facility.

Plaintiff alleges various failures and deficiencies in the hands-on, clinical care provided to Ms. Owens during her residency. Plaintiff also alleges wrongdoing in respect of business decisions by/involving other entities, the so-called "Corporate Defendants" (FCOS, FAS, and THISC), which are said to be causally related to the alleged failures/deficiencies in Ms. Owens's care/treatment while at the Facility. The defense contests Plaintiffs' allegations on all fronts—clinical and otherwise.

Through discovery, Plaintiff seeks access to sensitive business and financial information, ultimately from all Defendants. Plaintiffs has served extensive requests for financial documentation/information including operating budgets, financial statements, subleases, loan agreements, business communications, staffing methods and analytical data, policies and procedures, employee rosters, personnel files, and commercial contracts with non-parties (the "Confidential Materials"). The Confidential Materials should not be shared because they contain private, financially sensitive, personally sensitive, health-related or proprietary commercial information.[1] **The Confidential Materials that are relevant to Ms. Owens's care/treatment, her health considerations, the time period of her stay and Plaintiff's particular allegations and that have been/will be produced in this matter are of such a particularized nature that**

[1] To be clear, Defendants are in no way seeking to prevent Plaintiff from making full and fair use of relevant, Confidential Materials in Plaintiff's prosecution of *this* particular lawsuit; however, such materials should only be used in *this* lawsuit. That is the *only* legitimate use to which such Confidential Materials can be used.

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**the only legitimate use of this information is by *this Plaintiff* for *this lawsuit.*** [2] *See, e.g.,* Lonnie Hampton v. The Raymond Corp., No. 1:18-cv-0008-RWS, 2018 WL8642616 (N.D. Ga.) (April 13, 2018) (denying a sharing provision applicable to *other current, known lawsuits* on the grounds that each such lawsuit involving a Raymond forklift involved an injury that occurred as the result of that particular plaintiff's independent operation of a particular Raymond forklift at a particular workplace under particular circumstances).

However, Plaintiff's effort to limit the scope of what can be labeled confidential and to add a "sharing provision" in the proposed Confidentiality Order confer no benefit on Plaintiff in *this* lawsuit. The request would significantly prejudice Defendants by exposing their confidential information to unilateral sharing by the Poliakoff Law Firm with lawyers across the country. This request is simply not needed and does not actually benefit the Plaintiff in this case, though it does clearly benefit the Poliakoff Law Firm. They have multiple active cases. The clear reason for this request is simply to build a "library of confidential documents" for themselves and other lawyers that may choose to sue any of these Defendants in any jurisdiction. Additionally, there is no public interest to be considered at all in this request that could outweigh the Defendants' rights and

[2] There is no "public harm" or "public safety" interest in this lawsuit to be served by the "sharing provision." This lawsuit is distinguishable from products liability litigation involving nationwide distribution of an allegedly defective product where sharing provisions have been occasionally entered. Any future litigation—which is wholly speculative and unknown—against any of these Defendants has its own set of particularized facts due to the nature of skilled nursing facility events and there simply is no "public harm" to even consider which justifies the entry of a "sharing provision." The Facility is a skilled nursing facility regulated by various South Carolina regulatory bodies, including DHEC, and any issues of true "public safety" are most appropriately addressed through their oversight rather than the ability to share discovery information in future, unknown litigation.

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interest in protecting their confidential information from use and dissemination without control by the Poliakoff Law Firm beyond this lawsuit.[3]

## LEGAL STANDARDS

A court may issue an order "for good cause shown" to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense, including ... (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way". *See* SCRCP, Rule 26(c)(7). The party seeking a protective order bears the burden of showing good cause for it. *See Id; see also* Biazari v. DB Industries, LLC, Civil Action No. 5:16-cv-49, 2017 WL 1498122, *1 (W.D.W.Va. April 26, 2017)(citing In re Deutsche Bank Tr. Co. Ams., 605 F.3d 1373, 1378 (Fed. Cir. 2010)).

The proponent must show that the information is confidential and that its disclosure would create a risk of harm to the party's interests. *See* Id. (citing In re Violation of Rule 28(D), 635 F.3d 1352, 1357-58 (Fed. Cir. 2011))(emphasis added). "If a court finds that such a risk exists, it must balance the risk against the potential harm **to the opposing party's case** from the restrictions placed on the information." *See* Id. at *1(citing to Deutsche Bank, 605 F.3d at 1373 and Pfizer, Inc. v. Apotex, Inc., 744 F. Supp. 2d 758, 762 (N.D. Ill. 2010))(emphasis added); *accord generally* Lafitte v. Bridgestone Corp., 381 S.C. 460, 74 S.E.2d 154 (2009). In determining whether the information sought to be discovered should be "subject to a protective order under [SCRCP,] Rule

[3] In addition, there is no presumption of public access to *unfiled* discovery. *See, e.g.,* In re GlaxoSmithKline PLC, 699 N.W.2d 749, 755 (Minn. 2005) ("[D]ocuments produced as discovery are not presumed to be public.") The presumption of public access attaches to the adjudicatory process itself and does not attach to unfiled pleadings or to discovery materials filed as attachments to a discovery motion. *See, e.g.,* Hammock v. Hoffmann-LaRoche, Inc., 662 A.2d 546, 558 (N.J. 1995) ("[T]here is no presumptive right-of-public-access to discovery motions filed with the trial court."). This is consistent with the express language of SCRCP Rule 5(d) and Rule 26(g)(1), which excepts discovery from public filing requirements.

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26(c)(7), federal and state courts typically apply a balancing test that incorporates a 'relevant and necessary' standard for the party seeking to discover" the protected information. Lafitte, 381 S.C. at 473, 474 S.E.2d at 162.

## ARGUMENT

### I. PLAINTIFFS' PROPOSED CONFIDENTIALITY ORDER VERSUS THE STANDARD FEDERAL CONFIDENTIALITY ORDER

While Plaintiff's counsel has utilized the Standard Federal Confidentiality Order as the "base" of the proposed Confidentiality Order, the proposed order does *not* actually protect Defendants' confidential information from disclosure. It does quite the opposite.

There are *several very significant revisions* in the Proposed Order that would: (1) undermine any meaningful notion of confidentiality, (2) prejudice the Defendants in multiple ways, and (3) do not benefit Plaintiff in the prosecution of their individual case at bar. Entry of the Proposed Order by this Court would effectively preclude each of the Defendants from protecting confidential information, and would eviscerate any meaningful protection of the "Confidential" designation, and leave all future relevancy determinations to this one firm and not this Court. As this Court knows, the Standard Federal Confidentiality Order is the preferred protective order among courts throughout the country and the defense submits it is more than adequate and appropriate for entry in this matter.

#### A. The Proposed Order Severely limits the protections of the Federal Order.

##### *1. Plaintiff has severely limited the Scope to only Confidential Documents.*

The Federal Order by its express terms applies to "all documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery." (*See* Ex. A - Standard Federal Order, ¶1). Further, the Standard Federal Order permits a party to designate documents as "Confidential"

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if an attorney has reviewed and determined that such documents "contain information protected from disclosure by statute, trade secrets or confidential research, development or commercial information." (*See* Ex. A – Standard Federal Order, ¶3).[4]

The Proposed Confidentiality Order eliminates from the order this language: "***all responses to discovery requests and all deposition testimony and exhibits, and any other materials which may be subject to discovery.***" This limitation in essence means that there is no mechanism available to protect these items as they are not within the scope of the confidentiality order. (*See* Pl.'s Proposed Confidentiality Order ¶1). Plaintiff's proposed Confidentiality Order by its express terminology would apply to *only* "confidential documents produced in the course of discovery." This limitation should be rejected.

***2. Plaintiff has improperly added a requirement of showing economic harm to label a document confidential.***

Plaintiff now seeks to force each Defendant to prove "economic harm" in conjunction with a designation of confidential by adding that only such documents that "contain information protected from disclosure by statute, trade secrets, or confidential research, development, or commercial information ***that will cause economic harm if made public***" would be able to be designated "Confidential".[5] (*See* Pl.'s Proposed Confidentiality Order, ¶3) (emphasis added). Of course, economic harm from the improper dissemination of these documents is what the Defendants are trying to avoid and requiring proof of harm prior to disclosure would be unwieldly

[4] Such language in the Standard Federal Order tracks both Fed. R. Civ. P. Rule 26(c)(1)(G) and SCRCP Rule 26(c)(7), which are identical to each other.

[5] It appears that Plaintiff's counsel has proposed the same procedure for challenging a "Confidential" designation as is provided in the Standard Federal Order. However, Plaintiff's counsel has limited the sphere of documents that even are capable of being designated as "Confidential" through the terms of their Proposed Order.

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and further complicate the litigation. This "economic harm" element is inconsistent with the Standard Federal Order and the express language of SCRCP, Rule 26(c)(7), **which does not contain that additional – and arbitrary - "economic harm" qualifier.**

The significantly limited scope of Plaintiff's Proposed Confidentiality Order would permit Plaintiff and Poliakoff Law Firm to disclose the Defendants' private, proprietary and sensitive information if it is either: (a) discovered in this case by means other than through document production (*i.e.* deposition exhibits, discovery responses, etc.); or (b) may not be able to be tied to "economic harm" from its disclosure (*e.g.* personnel files, private information of other individual persons, tax returns, staffing information, employee rosters, financial statements, business communications, etc.).[6] Neither SCRCP, Rule 26(c)(7) nor the Standard Federal Order require that a party seeking a confidentiality order to demonstrate "economic harm" if the categories of information listed therein were to be disclosed, and this Court should reject and not approve this limitation either.

### *3. The Federal Court Order Contains No Sharing Provisions.*

The Standard Federal Order prohibits Confidential Materials from being used or disclosed by the parties or their counsel for any purposes other than preparing for and conducting the subject lawsuit. (*See* Ex. A – Standard Federal Order, ¶6(b)). In addition, the Standard Federal Order permits very limited third party disclosures to: (1) counsel and employees of counsel who have responsibility for the preparation and trial of the lawsuit; (2) parties and employees of a party to the Order, upon certification that such person's assistance is necessary to the subject lawsuit; (3)

[6] Defendants believe strongly that disclosure of such information beyond this lawsuit would indeed cause "economic harm." The point here, however, is that there is private, proprietary and sensitive information that is worthy of protection regardless of express economic harm (e.g., competitive disadvantage).

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court reports and those persons engaged for the limited purpose of photocopying; (4) consultants, investigators, or experts employed to assist the parties in the preparation and trial of the subject lawsuit; and (5) other persons only upon consent of the producing party or upon order of the courts. (*See* Ex. A – Standard Federal Order, ¶6(b)).

Plaintiff's Proposed Confidentiality Order permits third party disclosures to the same persons listed in Paragraph 6(b) of the Standard Federal Order plus "other attorneys involved in ***similar litigation*** which is undefined against the same parties so long as the receiving attorney first signs an acknowledgement of agreement to be bound by the Court's jurisdiction and this Order". (Pl.'s Proposed Confidentiality Order, ¶5(b)(5) (emphasis added)). "Similar litigation" is not a defined term. Also, where the Confidential Documents go is apparently left up to the sole discretion of Poliakoff Law Firm – an amazing ask of this Court.

Additionally, Plaintiff's Proposed Confidentiality Order includes a "non-return" provision such that the parties would have a right to keep Confidential Materials *indefinitely*. The effect of the foregoing provisions of Plaintiffs' Proposed Confidentiality Order is to create, in effect, an "unlimited sharing provision," whereby Plaintiffs' counsel – Poliakoff Law Firm – can share Confidential Materials *beyond this lawsuit* in any jurisdiction and with attorneys in *currently unknown, future "similar" (as determined in their eyes only) litigation* for an *indefinite period of time*. This bold request must be rejected as a blanket violation of due process that will result in irreparable harm.

## II. THE PROPOSED CONFIDENTIALITY ORDER SHOULD BE REJECTED, AS PLAINTIFF HAS FAILED TO SATISFY HER BURDEN TO PROVE SHARING IS WARRANTED.

The Proposed Confidentiality Order should be denied because it expressly permits the disclosure of the Defendants' confidential information: (1) *beyond this lawsuit (2) to unknown*

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*parties and (3) in other jurisdictions* in violation of the Defendants' right to protect its commercially sensitive or otherwise confidential information and to their substantive due process rights. *See* Rule 26(c)(7), SCRCP. Moreover, the denial of the sharing provision (*i.e. for use and/or sharing in unknown unrelated litigation with unknown lawyers by Poliakoff Law Firm*) does not harm Plaintiff's prosecution of her lawsuit in any way and, in fact, the entry of the Proposed Confidentiality Order benefits only the law firm.

To be clear, Plaintiff's motion for entry of the Proposed Confidentiality Order is no ordinary discovery motion. Indeed, it is not really a "discovery" motion at all; nor, for that matter, is it really even "Plaintiff's" motion. By its own terms, the "sharing provision" has literally *nothing to do with adjudicating this case*. The dispute over the "sharing provision" is not a dispute about the scope or methods or use of discovery or of anything else *within the context of this case*, only *outside* of it. In other words, for all intents and purposes, the "sharing provision," by its very nature, is in fact a non-issue *within* the context of *this case* and of zero practical significance to *Plaintiff's herself.*

Insofar as the "sharing provision" is concerned, the instant motion is "Plaintiff's" in name only; it is asked for in her name, but she is not really the one who wants it. Although embedded within a motion for entry of a confidentiality order in this case, in substance, the request for the "sharing provision" is the separate and independent request of a non-party, Poliakoff Law Firm, made for its own sake, as well as on behalf of other vaguely identified non-parties (generic litigants from parts unknown who may at some point meet Poliakoff Law Firm's definition of "similarly positioned"), for relief that (a) is not aimed at protecting Plaintiff's confidential information but rather disclosing Defendants' and (b) is wholly disconnected from any actual need in *this case*, the grant of which relief would necessarily affect a substantial right(s) of Defendants' in respect of

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their "confidential" information/materials. The nature and effect of the relief sought by request for the "sharing provision" is such that it constitutes an action or cause of action/claim unto itself for decision on its merits, in the nature of a request for a declaratory judgment or special remedy,[7] and Defendants' opposition thereto is effectively a countervailing request for a form of injunctive relief to protect them from the prospect of irreparable harm, if not permanently, at least on such a temporary basis as may be necessary to ensure that Defendants are afforded a meaningful opportunity to pursue any/all available legal avenues (to include, without limitation, any/all rights to appeal or seek discretionary review) to try to protect their property, rights, and/or interests.[8]

**A. <u>Plaintiff cannot show that the Standard Federal Order would prevent her from securing "relevant and necessary" information for their client in this lawsuit.</u>**

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[7] *See Blakely & Copeland v. Frazier*, 11 S.C. 122, 134 (1878) ("The term 'merits' is not very clearly defined. *It certainly embraces more than the questions of law and fact, constituting the cause of action or defen[s]e.*") (emphasis added); Rule 2, SCRCP, Official Note ("This Rule . . . abolishes the mostly cosmetic differences between 'actions' and 'special proceedings'. A special proceeding is really only a civil action in which some special remedy is sought; i.e., writ of mandamus, writ of habeas corpus, etc.").

[8] The sole purpose of a temporary injunction is to preserve the status quo to avoid potential irreparable injury to the aggrieved party pending litigation. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). The party seeking an must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). The relief Plaintiffs' counsel seeks here (a license to keep for themselves and give to others Defendants' valuable property) is of exactly the sort irreparable harm is made of. And, assuming, *arguendo*, the Court may be inclined to enter Plaintiffs' proposed order with the "sharing provision," Plaintiffs' counsel having shoehorned their request for this relief into this action in the guise of a "discovery" motion, at a minimum, operation any such "sharing" should be enjoined unless and until Defendants have had been afforded a full and complete opportunity to pursue to conclusion all lawful means of review of this matter. To do otherwise, would plainly do irreparable/irredeemable harm to (effecting a de facto involuntary waiver of) Defendants' legal rights. *Cf.* Jean Hoefer Toal et al. *Appellate Practice in South Carolina* p. 154 (3d ed. 2016) ("If an order requires a party to turn over documents that the party feels are privileged or contain proprietary or confidential matters, and the party does not have a right to an immediate appeal, compliance renders the protections afforded by the privilege or confidentiality a nullity.").

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Plaintiff has not shown she would directly benefit in this case from or the inclusion of a sharing provision in this case. (*see*, Pl.'s Proposed Confidentiality Order, ¶¶ 5(a), 5(b)(5) and 9). Plaintiff will have access to confidential documents regardless of whether she can share them with other lawyers. *See* Biazari, 2017 WL 1498122, at *3; see also Steede v. Gen. Motors, LLC, No. 11-2351, 2012 WL 2089761, at *4 (W.D. Tenn. June 8, 2012)("For her part Plaintiff has not shown how entry of a 'non-sharing' protective order results in hardship for her case," as this restriction did not "prejudice[ ] her ability to obtain discovery in support of her own claims."); *see also* Gil, 2007 WL 2580792, at *5 (noting that plaintiff "will not be precluded in any way from receiving discovery due to the non-sharing protective order"). Plaintiff has to show that that their case would be harmed if the Defendants' information were not discoverable as they propose. Biazari, WL 1498122, *1 (citing to Deutsche Bank, 605 F.3d at 1373 and Pfizer, Inc. v. Apotex, Inc., 744 F. Supp. 2d 758, 762 (N.D. Ill. 2010)). Plaintiff's case will not be harmed because the provisions at issue concern solely the ability to use and share the Defendants' confidential information discovered in this lawsuit ***beyond this lawsuit.*** See Id. The parties, their experts, and their consultants all will have access in this case regardless of the existence of a sharing provision. They just have to return the confidential documents. Accordingly, Plaintiff is not able to demonstrate that the proposed sharing of documents would benefit her in this lawsuit or, in the alternative, that denial of the sharing provision would harm them in litigating their pending claims. Plaintiff is well protected in this case by a Standard Federal Order, see Lafitte, 381 S.C. at 473, 474 S.E.2d at 162.

**B. "Sharing provisions" as to confidential documents are disfavored and should be rejected in the absence of a legitimate public interest.**

***In the absence of a consent order by the parties agreeing to a sharing provision, courts are nearly unanimous in opposing the unrestricted sharing of discovery documents with lawyers***

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***from other jurisdictions***. See In Re Remington Co., 952 F.2d 1029, 1033 (8th Cir. 1991) ("use of discovered information should be limited to the *particular lawsuit* in which it has shown to be both relevant and necessary to the prosecution of the action.") (emphasis added); Scott v. Monsanto Co., 868 F.2d 786, 792 (5th Cir. 1989) ("although Plaintiff's claim harm from the inability to share and compare information with other litigants in other cases, no prejudice has been shown); Williams v. Taser Int'l, Inc., 2006 WL 1835437 (N.D. Ga. 2006) ("the Court declines to allow Plaintiffs to either retain confidential documents upon the conclusion of this litigation, or to share confidential documents with other attorneys or experts involved in litigation against [Defendants]"); Blanchard & Co. v. Barrick Gold Corp., 2004 WL 737485 (E.D. La. Apr. 5, 2004) (rejecting discovery sharing given "challenges driven by attorneys not involved in this case"); see also Culinary Foods, Inc. v. Raychem Corp., 151 F.R.D. 297 (N.D. Ill. 1993); Massachusetts v. Mylan Labs, Inc., 246 F.R.D. 87, 90–91 (D. Mass. 2007); and see Biazari v. DB Industries, LLC, 2017 WL 1498122, *1 (W.D.W.Va. April 26, 2017).

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

**C. Judicial Economy will not be served by Plaintiff's Proposed Order.**

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The "judicial economy" argument advanced by Plaintiff is simply a red herring. Plaintiff's counsel undoubtedly wants to eliminate any analysis of relevancy by this Court or defense counsel in future cases and completely remove the discovery process in their future cases. That is not judicial economy, it is simply unjust. It is the plaintiff's lawyers' economy. This "economy" would be at the expense of due process rights of these defendants. Tempting as it may be to approve shared discovery to relieve this Court and courts elsewhere from discovery disputes (which of course nobody likes), the state and federal constitution will not allow it.

***1. This Court cannot and should not become the National Clearing house for all disputes related to these confidential documents.***

Under the Proposed Confidentiality Order, the third party lawyer receiving Confidential Materials pursuant to the "sharing provision" would have to ***consent to jurisdiction*** here to the extent they consent to such jurisdiction (*See* Pl.'s Proposed Confidentiality Order, ¶5(b)(5)). However, it is not clear that this Court would even be able to enforce its own order against lawyers, witness, experts, or parties in other jurisdictions. *See* Wisconsin v. Amgen, Case No. 2004-CV-001709, Slip. Op. at 3 (Wis. Cir. Ct. Dane Co. Nov. 29, 2005) ("***Almost three decades at this job have shown me the futility and frustration of trying to apply contempt powers beyond state lines.***"). Moreover, it is wholly uncertain whether this Court would have any jurisdiction (or more practically the law enforcement resources) over such other parties to enforce a contempt order across state lines against third party lawyers' clients, their partners, legal assistants, consultants, experts, and other lawyers that secured copies from these lawyers in light of principles of comity and federalism.

***2. Plaintiff's Order will increase the burden on this Court.***

The proposed process of having lawyers in other jurisdictions consent to the Proposed Confidentiality Order and consent to the jurisdiction of this Court actually would INCREASE the

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burden on this Court's docket – either through enforcement thereof, resolving disputes related thereto, after the fact relevancy fights, or even litigation as to the validity of this Court's jurisdiction in other courts.[9] If Plaintiff's counsel has its way, lawyers from Los Angeles to New York (and everywhere in between) could obtain confidential documents produced under the Proposed Confidentiality Order here simply by "agreeing to be bound" by such order. Even if these outside parties could simply submit themselves to the Court's jurisdiction, ***Plaintiff's counsel is asking this Court to become the national "clearing house" to settle confidentiality disputes arising all across the country.*** A request that is offensive to states' rights and federal jurisdiction.

Even more significantly, the parties actually needing the order's protections – the Defendants - are left with no assurance that another court would enforce the foreign order as intended or that it would even be capable of doing so. The mechanism for enforcement of the Proposed Confidentiality Order against "downstream" recipients of the Confidential Materials is simply not a viable procedure for ensuring that this Court maintains jurisdictions over all parties supposed to be "bound." *See e.g.,* Culinary Foods, 151 F.R.D. at 307 (noting that information wrongfully disseminated by other litigants, in other jurisdictions, may not be subject to protection by the forum court). A simple example would be that after this case is over there would be no pending action in which to file anything seeking relief in South Carolina and a new suit or action of some nature would need to be filed.

Finally, even if this Court were vested with such authority as to all "downstream" recipients of the Confidential Materials, it would become a "lightening rod" for discovery disputes by

[9] Whether the consent to the jurisdiction of this Court by the third party lawyers who receive Confidential Materials from Poliakoff Law Firm would be upheld involves issues of comity, federalism and other legal principles that would very likely result in further litigation in this jurisdiction.

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inviting parties from far and wide to come to before it to litigate their discovery issues. *See* Williams, 2006 WL 1835437 ("[T]he Court recognizes that the more widely confidential documents are disseminated, it becomes both more likely that those documents will be released, and more difficult for the Court to enforce the terms of its protective order. In this case, the Court finds the risk to [Defendants] posed by the release of its confidential information, and the difficulties of enforcing a protective order when confidential documents are widely disseminated, outweigh Plaintiff's interest in sharing that information among various plaintiffs' counsel and experts.") The lack of real enforcement power exemplifies the inherent dangers of the "sharing" provision Plaintiff's counsel urges. For the above reasons, Plaintiff's counsels arguments that the sharing provision aids "judicial economy" is actually a baseless and is not a legitimate reason to enter Plaintiff's Proposed Confidentiality Order over the legitimate objections of the Defendants.

## III. THE PROPOSED CONFIDENTIALITY ORDER WOULD VIOLATE DEFENDANTS' DUE PROCESS RIGHT TO PROTECT THE DISSEMINATION OF CONFIDENTIAL INFORMATION BEYOND THIS LAWSUIT.

Plaintiff has conceded that there is "good cause" for a confidentiality order in this case to protect commercially sensitive material from disclosure to the public. (*See* Pl.'s Proposed Confidentiality Order at ¶3); SCRCP, Rule 26(c)(7). Accordingly, the dispute here is not about whether a confidentiality order should be entered - but about the order's terms. Thus, the only matter before the Court on Plaintiff's Motion is whether Poliakoff Law Firm may use and/or share such confidential information discovered in this lawsuit *beyond this lawsuit* in its SOLE discretion. **Unilaterally deciding how to use and and/or share Confidential Materials produced by the Defendants *beyond this lawsuit* and in *currently unknown but "similar" future litigation* would undoubtedly eviscerate the procedural and substantive due process rights of these defendants as the documents will be shared as determined by this firm with unknown**

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**lawyers, unknown experts, unknown consultants, in unkown cases, about unkown residents with absolutely no chance to object.**

It is undisputed that the Defendants have an interest in preventing the disclosure of commercially sensitive and otherwise confidential material to the public and its competitors (even if they disagree as to whether any such disclosure must cause "economic harm"). It is no stretch to reach the same conclusion in this case as other Courts, in that "*as a matter of simple probability, the risk of such disclosure (whether intentional or inadvertent) increases as more individuals gain access to this material.*" Biazari, 2017 WL 1498122 at *4. Both the "upfront sharing provision" and a limited scope of confidentiality protection under the Proposed Confidentiality dramatically increase the risk of inappropriate disclosure to the Defendants' detriment. See Id. (rejecting a confidentiality order with a limited scope of protection and an "upfront sharing provision" on the basis that these features increase the likelihood of inappropriate disclosure and harm to the defendant). The likelihood of inappropriate disclosure in violation of the Defendants due process tights is made even more likely by the fact that the Proposed Confidentiality Order would permit each unrelated third party recipient of the Defendants' confidential information to likewise share such information with additional unknown, future litigants *indefinitely*.

**A. Adoption of Plaintiff's order would create a universal ruling that these confidential documents are relevant in all "similar litigation" regardless of plaintiff, regardless of facts, and regardless of jurisdiction.**

Through its Proposed Confidentiality Order, the reality of what Plaintiff's counsel desires is stark: a ruling in favor of confidential production in the instant case over objection of the Defendants that would be a ***de facto and universal ruling that such confidential production is relevant to and appropriate for use in all future, unknown cases against any of the Defendants.*** This drastic and unprecedented concept would undermine the rules of discovery, the jurisdiction of this Court, issues of comity and federalism, undermine Defendants' own discovery rights, and

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defy the very core purpose and function of confidentiality and the rules of civil procedure. Indeed, adopting a sharing provision would violate the Defendants' respective substantive due process rights to defend themselves in a separate, unknown future lawsuit brought in a different jurisdiction. Any purported "expedited discovery process" that Plaintiff's counsel argues would be achieved through entry of the proposed sharing provision (but which, in the first place, is not really a legitimate reason to adopt a sharing provision in skilled nursing negligence cases due to the *particular and varied health conditions and clinical care at issue* between skilled nursing malpractice cases) is far outweighed by the prejudice to the Defendants' respective rights to defend that different, unknown litigation in a different jurisdiction, subject to different rules of discovery than in South Carolina.

One of the many rationales that courts have adopted in *rejecting* such "sharing provisions" is that they allow outside parties in unrelated cases and foreign jurisdictions to ***effectively circumvent the rules of discovery***. Under Plaintiff's counsel's proposal, Plaintiff's counsel is empowered with ***unlimited and unilateral*** discretion to determine when the Confidential Material might be relevant for another matter and where it might be relevant without any regard for a jurisdiction's discovery rules or the facts of that particular case. As such, Plaintiff's counsel's subjective determination will control the relevancy of the Confidential Material to other cases without the aid and oversight of any court whatsoever. See Wal-Mart Stores East, L.P. v. Endicott, 81 So.3d 486 (Fla. 1st. DCA 2011). It is very difficult to believe that any law firm who regularly litigates in this industry would (or even could ethically could given the adverse nature of the relationship) conduct such analysis.

This is problematic and in violation of the Defendants' rights when the collateral litigants are unknown, and the owner of the information and the Court is taken out of the equation in future

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cases. See Id. ("The collateral litigants are unknown, and the only affirmations as to their need to view confidential information are the assertions of [Plainitff's] counsel. As noted in Cordis, a trial court must engage in a balancing test and that cannot be done when there is no established collateral litigant.") (citing Cordis Corp. v. O'Shea, 988 So.2d 1163 (Fla. 4th DCA 2008)); Bertetto v. Eon Labs, Inc., 2008 WL 2522571 *2 (D. N.M. May 29th, 2008) ("The Plaintiffs are preemptively seeking discovery for potential ALL future plaintiffs, and no collateral party even exists yet. Under the information-sharing provision, the court would be abdicating its role in approving future discovery (as well as potentially usurping a collateral court's role in managing discovery in a collateral case) rather than deliberately choosing to modify an existing agreement."). Plaintiff's counsel's proposed sharing provision would undermine every other Court's prospective authority and permit even one single plaintiff's attorney to conclusively determine other parties' needs for the Confidential Material. Indeed, the Defendants' own substantive due process rights and litigation interests would be summarily ignored and discarded if the Proposed Confidentiality Order is entered. Therefore, the Proposed Confidentiality Order should be denied and the Standard Federal Order should be entered.

**B. Trying to enforce Plaintiff's order in other jurisdictions would be expensive and questionable at best.**

Once there has been a violation of a protective order by an unrelated third party, the Court's range of options to remedy violations of a protective order is necessarily diminished when the violations are committed by nonparties – which is what an "upfront sharing provision" invites. See Id.; see also Williams v. Taser Int'l, Inc., No 1:06-CV-oo51, 2006 WL 1835437 at *2 (N.D. Ga. June 30, 2006)("[T]he Court recognizes that the more widely confidential documents are disseminated, it becomes both more likely that those documents will be released, and more difficult for the Court to enforce the terms of its protective order."). Of course, these remedies will vary

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by jurisdiction – state and federal. In order to even assess if any such remedy for violation of a state order in federal court or other state courts would require a nationwide canvasing to determine how those laws and rules may impact my clients' due process rights.

**C. Plaintiff's Order invites further litigation inside and outside of South Carolina and disregards choice of law and comity among various state and federal courts.**

Any claims by Plaintiff's counsel that their Proposed Order "expedites the discovery process" for litigants in "similar litigation" should be rejected. This argument should fail because a "lawyer's convenience" does not outweigh the Defendants' substantive and procedural due process rights to defend itself in litigation, produce documents only deemed relevant to that individual case. If signed, this order would infringe on the rights of other state courts to determine relevancy and confidentiality under there on rules and case law. Moreover, the Proposed Confidentiality Order does not further "judicial economy." In fact, the mechanics for sharing the Defendants' information beyond this lawsuit would create an additional burden on this Court's docket and in other court's dockets.

## CONCLUSION

Through the terms of the Proposed Confidentiality Order, Poliakoff Law Firm seeks to effectively *take* the Defendants' rights in their own private, proprietary and/or sensitive confidential information and provide it in perpetuity to the Poliakoff Law Firm's and then the other plaintiffs firms who sign on for "free access to this confidential information" with respect to *unknown, future litigation.* Indeed, Plaintiffs' Proposed Order designates Poliakoff Law Firm as the "confidential information gatekeeper" of the Defendants' own information and, in so doing, imbues in Poliakoff Law Firm a right it can – and likely will - seek to capitalize on through the

association with other plaintiffs' lawyers nationwide in future, unknown lawsuits against these Defendants.

The very fact that retention and use/sharing of the Defendant's information operates *after* the Confidential Material ceases to be of any use to Plaintiff *in this litigation* demonstrates conclusively that Plaintiff's counsel seeks the Proposed Confidentiality Order for their own interests. Indeed, granting Poliakoff Law Firm this responsibility in the face of its own *pecuniary interest* in sharing the Defendants' own confidential information would do permanent and irreparable harm to these defendants is inequitable and would be unjust.

The Defendants merely ask this Court to give confidential document production the treatment that any objective definition of "confidentiality" requires: that such production not be shared with others or used beyond this lawsuit and that it be returned upon the conclusion of the case as happens in Federal Court every day. The Defendants have consented to the Standard Federal Confidentiality Order (minus reading room) being applicable for all confidential production because it satisfies the interests of both Plaintiff (*i.e.* access to such confidential discovery information reasonably necessary to litigate their case) and Defendants (*i.e.* does not violate their rights) and does not imbue Plaintiff's counsel with rights that belong to the Defendants. Therefore, this Court should deny the Proposed Confidentiality Order and enter the Standard Federal Order.



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Respectfully submitted,

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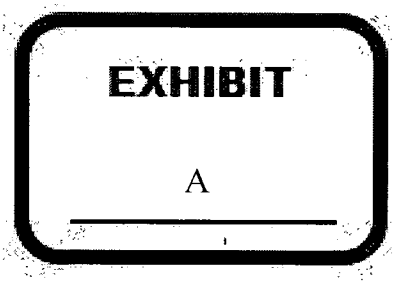
July 8, 2020



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| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | SEVENTH JUDICIAL CIRCUIT |
| COUNTY OF SPARTANBURG | ) | CASE NO. 2018-CP-42-03447 |
| ESTATE OF BARBARA OWENS, by and through her Personal Representative, MARY JANE McCRAW, Individually and on behalf of Statutory Beneficiaries, | ) | |
| Plaintiff, | ) | |
| vs. | ) | **CONFIDENTIALITY ORDER** |
| 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, | ) | |
| Defendants. | ) | |




Whereas, the parties to this Consent Confidentiality Order ("parties"), have stipulated that certain discovery material is and should be treated as confidential, and have agreed to the terms of this order; accordingly, it is this _____ day of _____, 20_____, ORDERED:

1. **Scope.** All documents produced in the course of discovery, all responses to discovery requests and all deposition testimony and deposition exhibits and any other materials which may be subject to discovery (hereinafter collectively "documents") shall be subject to this Order concerning confidential information as set forth below.

2. **Form and Timing of Designation.** Confidential documents shall be so designated by placing or affixing the word "CONFIDENTIAL" on the document in a manner which will not interfere with the legibility of the document and which will permit complete removal of the

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Confidential designation. Documents shall be designated CONFIDENTIAL prior to, or contemporaneously with, the production or disclosure of the documents. Inadvertent or unintentional production of documents without prior designation as confidential shall not be deemed a waiver, in whole or in part, of the right to designate documents as confidential as otherwise allowed by this Order.

3. **Documents Which May be Designated Confidential.** Any party may designate documents as confidential but only after review of the documents by an attorney[1] who has, in good faith, determined that the documents contain information protected from disclosure by statute, sensitive personal information, trade secrets, or confidential research, development, or commercial information. The certification shall be made concurrently with the disclosure of the documents, using the form attached hereto at Attachment A which shall be executed subject to the standards of Rule 11 of the Federal Rules of Civil Procedure. Information or documents which are available in the public sector may not be designated as confidential.

4. **Depositions.** Portions of depositions shall be deemed confidential only if designated as such when the deposition is taken or within seven business days after receipt of the transcript. Such designation shall be specific as to the portions to be protected.

5. **Protection of Confidential Material.**

a. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties or counsel for the parties or any other persons

[1] The attorney who reviews the documents and certifies them to be CONFIDENTIAL must be admitted to the Bar of at least one state but need not be admitted to practice in the District of South Carolina and need not apply for *pro hac vice* admission. By signing the certification, counsel submits to the jurisdiction of this court in regard to the certification.

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identified below (¶ 5.b.) for any purposes whatsoever other than preparing for and conducting the litigation in which the documents were disclosed (including any appeal of that litigation). The parties shall not disclose documents designated as confidential to putative class members not named as plaintiffs in putative class litigation unless and until one or more classes have been certified.

b. **Limited Third Party Disclosures.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment (in the form set forth at Attachment B hereto), that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL pursuant to this Order:

(1) counsel and employees of counsel for the parties who have responsibility for the preparation and trial of the lawsuit;

(2) parties and employees of a party to this Order but only to the extent counsel shall certify that the specifically named individual party or employee's assistance is necessary to the conduct of the litigation in which the information is disclosed[2];

[2] At or prior to the time such party or employee completes his or her acknowledgment of review of this Order and agreement to be bound by it (Attachment B hereto), counsel shall complete a certification in the form shown at Attachment C hereto. Counsel shall retain the certification together with the form signed by the party or employee.

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(3) court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents;

(4) consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of the lawsuit; and

(5) other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered.

c. **Control of Documents.** Counsel for the parties shall take reasonable efforts to prevent unauthorized disclosure of documents designated as Confidential pursuant to the terms of this order. Counsel shall maintain a record of those persons, including employees of counsel, who have reviewed or been given access to the documents along with the originals of the forms signed by those persons acknowledging their obligations under this Order.

d. **Copies.** All copies, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies"), of documents designated as Confidential under this Order or any portion of such a document, shall be immediately affixed with the designation "CONFIDENTIAL" if the word does not already appear on the copy. All such copies shall be afforded the full protection of this Order.

6. **Filing of Confidential Materials.** In the event a party seeks to file any material that is subject to protection under this Order with the court, that party shall take appropriate action to ensure that the documents receive proper protection from public disclosure including: (1) filing a redacted document with the consent of the party who designated the document as confidential;

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(2) where appropriate (*e.g.* in relation to discovery and evidentiary motions), submitting the documents solely for *in camera* review; or (3) where the preceding measures are not adequate, seeking permission to file the document under seal pursuant to the procedural steps set forth in Local Civil Rule 5.03, DSC, or such other rule or procedure as may apply in the relevant jurisdiction. Absent extraordinary circumstances making prior consultation impractical or inappropriate, the party seeking to submit the document to the court shall first consult with counsel for the party who designated the document as confidential to determine if some measure less restrictive than filing the document under seal may serve to provide adequate protection. This duty exists irrespective of the duty to consult on the underlying motion. Nothing in this Order shall be construed as a prior directive to the Clerk of Court to allow any document be filed under seal. The parties understand that documents may be filed under seal only with the permission of the court after proper motion pursuant to Local Civil Rule 5.03.

7. **Greater Protection of Specific Documents.** No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an Order providing such special protection.

8. **Challenges to Designation as Confidential.** Any CONFIDENTIAL designation is subject to challenge. The following procedures shall apply to any such challenge.

a. The burden of proving the necessity of a Confidential designation remains with the party asserting confidentiality.

b. A party who contends that documents designated CONFIDENTIAL are not entitled to confidential treatment shall give written notice to the party who affixed the designation of the specific basis for the challenge. The party who so designated the documents shall

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have fifteen (15) days from service of the written notice to determine if the dispute can be resolved without judicial intervention and, if not, to move for an Order confirming the Confidential designation.

c. Notwithstanding any challenge to the designation of documents as confidential, all material previously designated CONFIDENTIAL shall continue to be treated as subject to the full protections of this Order until one of the following occurs:

(1) the party who claims that the documents are confidential withdraws such designation in writing;

(2) the party who claims that the documents are confidential fails to move timely for an Order designating the documents as confidential as set forth in paragraph 8.b. above; or

(3) the court rules that the documents should no longer be designated as confidential information.

d. Challenges to the confidentiality of documents may be made at any time and are not waived by the failure to raise the challenge at the time of initial disclosure or designation.

9. **Treatment on Conclusion of Litigation.**

a. **Order Remains in Effect.** All provisions of this Order restricting the use of documents designated CONFIDENTIAL shall continue to be binding after the conclusion of the litigation unless otherwise agreed or ordered.

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b. **Return of CONFIDENTIAL Documents.** Within thirty (30) days after the conclusion of the litigation, including conclusion of any appeal, all documents treated as confidential under this Order, including copies as defined above (¶5.d.) shall be returned to the producing party unless: (1) the document has been entered as evidence or filed (unless introduced or filed under seal); (2) the parties stipulate to destruction in lieu of return; or (3) as to documents containing the notations, summations, or other mental impressions of the receiving party, that party elects destruction. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product including an index which refers or relates to information designated CONFIDENTIAL so long as that work product does not duplicate verbatim substantial portions of the text of confidential documents. This work product continues to be Confidential under the terms of this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose the confidential documents.

10. **Order Subject to Modification.** This Order shall be subject to modification on motion of any party or any other person who may show an adequate interest in the matter to intervene for purposes of addressing the scope and terms of this Order. The Order shall not, however, be modified until the parties shall have been given notice and an opportunity to be heard on the proposed modification.

11. **No Judicial Determination.** This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any specific document or item of information designated as CONFIDENTIAL by counsel is subject to protection under Rule 26(c)

of the Federal Rules of Civil Procedure or otherwise until such time as a document-specific ruling shall have been made.

12. **Persons Bound.** This Order shall take effect when entered and shall be binding upon: (1) counsel who signed below and their respective law firms; and (2) their respective clients.

IT IS SO ORDERED.

_____
J. MARK HAYES, Circuit Judge

_____, 20_____

_____, South Carolina

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ELECTRONICALLY FILED - 2020 Aug 12 10:18 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

**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-
Case No. 2018-CP-42-03447

---

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.

---

# NOTICE OF APPEAL

---

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Russell G. Hines (SC Bar No. 72100)
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**Other Counsel of Record:**

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ELECTRONICALLY FILED - 2020 Aug 12 10:18 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

Defendants, 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 (collectively, "Appellants"), hereby appeal the following orders of the Honorable J. Mark Hayes, II, Circuit Court Judge:

- Form 4 Order filed August 23, 2019;
- Order Denying Defendant THI of South Carolina at Spartanburg, LLC d/b/a Magnolia Manor Spartanburg's Motion to Dismiss, Compel Arbitration and Stay Proceedings, filed October 25, 2019;
- Form 4 Order filed June 25, 2020;
- Order Granting in Part and Denying in Part Defendants' Motion to Alter, Amend, and/or Reconsider, filed July 13, 2020; and
- Confidentiality Order, filed July 13, 2020.

Copies of the appealed orders are attached hereto and incorporated herein by reference. Appellants received written notice of entry of the most recent order on July 13, 2020.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____

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*Attorneys for Appellants*

Charleston, South Carolina

Dated: 8/12/20

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

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Appeal from Spartanburg County
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

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

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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.

---

**PROOF OF SERVICE**

---

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*Attorneys for Appellants*

ELECTRONICALLY FILED - 2020 Aug 12 10:18 PM - SPARTANBURG - COMMON PLEAS - CASE#2018CP4203447

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for the Appellants above named, do hereby certify that I have served the **NOTICE OF APPEAL** on the above-named Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on August 12, 2020, addressed as follows to Respondent's counsel (as well as via email to atty@gpoliakoff.com, rmullmanjr@gpoliakoff.com, jwaelde@gpoliakoff.com, and pknie@knielaw.com (see attached copy of the sent email) and via E-filing the Notice of Appeal in the lower court, which will also effect service of the Notice of Appeal on Respondent's counsel):

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*and*

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YOUNG CLEMENT RIVERS, LLP

By: _____
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*Attorneys for Appellants*

Charleston, South Carolina

Dated: 8/12/20

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**From:** Hines, Russell
**To:** Jwaelde@gpoliakoff.com; atty@gpoliakoff.com; RMullmanjr@gmail.com; "Pat Knie"
**Cc:** cary@gpoliakoff.com; cary@gpoliakoff.com; Amanda@gpoliakoff.com; Bell, Pollyana (Polly); Bell, Pollyana (Polly)
**Subject:** Estate of Barbara Owens v. Fundamental (Case No. 2018-CP-42-03447) -- Notice of Appeal
**Date:** Wednesday, August 12, 2020 7:23:00 PM
**Attachments:** Owens v. Fundamental - Notice of Appeal.pdf
2019 8-23 -- Form 4 re MTCA.pdf
2019 10-25 -- Order Denying MTCA.pdf
2020 6-26 -- Form 4 re MTR.pdf
2020 7-13 -- Order Granting in Part - Denying in Part MTR.pdf
2020 7-13 -- Confidentiality Order.pdf
image002.png

Attached please find a Notice of Appeal with respect to the above-referenced matter and copies of the appealed orders.

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## Certificate of Counsel

The undersigned counsel for Appellants certifies that, in accordance with Rule 210(c), SCACR, this **Record on Appeal** contains all material proposed to be included by any party that was presented to the lower court and not any other material. The undersigned also certifies that this **Record on Appeal** complies with the Supreme Court of South Carolina's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings issued April 15, 2014.

RECEIVED
JUN 08 2021
SC Court of Appeals

Respectfully submitted,

CLEMENT RIVERS, LLC

By: _____

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Charleston, South Carolina
June 1, 2021