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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2021-000766
Civil Action No. 2020-CP-23-04832

Debra Lynn B. Peele, as Personal Representative of the Estate of Iola Aileen
Bagwell, ...Respondent,

v.

Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living,
Reatha Connelly, Regency Hospice of Georgia, LLC, d/b/a Regency
Southerncare, Defendants,

Of whom Greenville Retirement Properties, LLC d/b/a Pendleton Manor
Assisted Living and Reatha Connelly are the Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2020-CP-23-04832
	)	
Debra Lynn B Peele, as Personal	)	
Representative of the Estate of	)	
Iola Aileen Bagwell,	)	
	)	
Plaintiff,	)	Order
v.	)	
	)	
Greenville Retirement Properties, LLC	)	
d/b/a Pendleton Manor Assisted Living,	)	
Reatha Connelly, Regency Hospice	)	
of Georgia, LLC, d/b/a Regency	)	
Southerncare,	)	
	)	
Defendants.	)	
	)	

This comes before this Court on Defendants Greenville Retirement Properties, LLC's and Reatha Connelly's Motion to Stay and Compel Arbitration. Plaintiff opposed such motion. Both parties submitted memorandums of law and attended a hearing during which this Court heard oral arguments from counsel for each party.

FINDINGS OF FACTS

On or about May 17, 2018, Aileen Bagwell entered Pendleton Manor Assisted Living¹ (hereinafter Pendleton Manor) and contemporaneously executed a lease agreement with several appendixes. Aileen Bagwell had a diagnosis of dementia and would not have understood the particulars of this transaction. However, Cindy Bagwell, her attorney-in-fact and daughter, also signed the lease and its appendixes.² One appendix was a voluntary arbitration agreement. The arbitration agreement states that signing is not a condition of admittance.

¹ Pendleton Manor is owned and operated by Defendants Greenville Retirement Properties, LLC.

² There are serious factual questions regarding the patient's capacity to sign the Durable Power of Attorney that enabled the designated person to sign the arbitration agreement and waive Iola Bagwell's rights. The FAA allows a

The arbitration agreement is very specific about who and how disputes would be arbitrated:

By signing this agreement, the resident agrees with the facility that any dispute between you and us, including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) **will be resolved by binding arbitration by the National Arbitration Forum**, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction.

However, the National Arbitration Forum (hereinafter “NAF”) has ceased performing pre-dispute “consumer cases” and is unavailable to conduct or administer the arbitration in this case. The arbitration agreement also states that if a court “finds any portion of this agreement unenforceable, that portion will not be effective, and the remainder will be effective.” Further, the agreement also states that “Information may be obtained, and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com or at P.O. Box 50191, Minneapolis, MN 55405.”

CONCLUSIONS OF LAW

A. Arbitration is a Matter of Contract.

“The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.” *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002) citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *See e.g., Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). “The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate.” *Grant v. Magnolia*

jury trial to determine factual issues, but this Court’s ruling that the arbitration is unenforceable renders this issue moot.

Manor-Greenwood, Inc., 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) citing *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). This case is governed by the Federal Arbitration Act (FAA).

To have a valid and enforceable contract, there must be a meeting of the minds between the parties about all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). “Although South Carolina Courts are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.” *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). “Our courts’ statements that the law “favors” arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions.” *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150, 152 (2021), *reh'g denied* (Apr. 20, 2021).

B. The Designation of the NAF as the Arbitral Forum is Integral to the Arbitration Agreement and the Unavailability of the NAF Mandates that Defendants’ Motion to Compel Arbitration be denied.

It is undisputed that NAF is unavailable to conduct the arbitration of claims in this case. In this case, NAF is designated as the specific arbitral forum. The entire promise to arbitrate is contained in one sentence which specifically provides that claims “will be *resolved by binding arbitration by the National Arbitration Forum* under the Code of Procedure then in effect.” (Emphasis added). This language resembles that which was the subject of *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (S.C. 2009). In *Grant*, the Supreme Court held that where an arbitration agreement requires that proceedings be “administered by” a specific arbitral forum, then such forum is an “integral part” of the arbitration agreement.

In *Deans v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 382–83, 759 S.E.2d 727, 733 (2014), the South Carolina Supreme Court reaffirmed the holding in *Grant* and provided additional guidance which reinforces its application to the current case. In *Dean*, the Supreme Court stated as follows:

Thus, in examining similar clauses, a majority of jurisdictions distinguish agreements requiring a proceeding “administered by” the named forum from those requiring a proceeding conducted “in accordance with” the named forum’s rules. In the case of proceedings “administered by” a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties’ intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid.

Id. at 382–83, 759 S.E.2d at 733 citing *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. at 131-132, 678 S.E.2d at 439; (other citations omitted). However, *Dean* was distinguishable from *Grant* in two respects. First, the arbitration agreement in *Dean* did not require the proceedings be “administered by” a specific arbitral forum but only that the proceedings be conducted “in accordance with” a specific set of rules.

Secondly, like the instant case but unlike *Grant*, the *Dean* arbitration agreement contained a severability clause. In *Dean*, the Supreme Court found that the severance provision was evidence that the arbitration forum was not integral. However, unlike *Dean*, this arbitration agreement in this case contains more than a single reference to NAF, but provides separately that a claimant must initiate the arbitration through NAF: “Information may be obtained, and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com or at P.O. Box 50191, Minneapolis, MN 55405.” Thus, the arbitration agreement at issue not only provides that NAF is the specific arbitral forum but provides that the NAF Code of Procedure should govern the proceedings and that claims should be initiated by filing with NAF. The listing

of the web address for NAF as the place for Plaintiff to obtain information about arbitration and filing claims is additional evidence that the NAF was integral to this arbitration agreement.

The Supreme Court in *Dean* cited two cases that also contained severance provisions, but those courts ultimately decided that the specified arbitral forum was integral to the agreement. *See Crossman v. Life Care Ctrs. of Am., Inc.*, 738 S.E.2d 737, 740 (N.C. Ct. App. 2013); *Rivera v. Am. Gen. Fin. Servs., Inc* 150 N.M. 398, 259 P.3d 803 (Sup. Ct. NM 2011). Like those cases, the arbitration in the instant case contains multiple references to a specific arbitral forum, the rules of the forum, and referencing the forum's address and/or website for initiating claims and obtaining additional information. This Court believes that the provisions read in their entirety reveal an intention to make NAF the arbitral forum. Accordingly, this Court concludes that NAF serving as the arbitral forum is integral to the arbitration agreement.³

Therefore, this Court denies Defendants' motion to stay this case and to compel arbitration.

IT IS SO ORDERED.

Judge R. Scott Sprouse
Court of Common Pleas

³ The Supreme Court in *Grant* did not decide whether Section 5 of the FAA permitted a court to appoint an arbitrator where a specifically designated arbitrator becomes unavailable, but the Court suggested strongly that it was inclined to follow the United States Court of Appeals for the Second Circuit which has held that Section 5 does not permit a court to appoint an arbitrator where a specifically designated arbitrator becomes unavailable. This Court does not decide this issue.



Greenville Common Pleas

Case Caption: Debra Lynn B Peele Personal Representative , plaintiff, et al vs.
Greenville Retirement Properties LLC , defendant, et al
Case Number: 2020CP2304832
Type: Order/Other

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

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STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2020-CP-23-
	)	
Debra Lynn B Peele, as Personal	)	
Representative of the Estate of	)	
Iola Aileen Bagwell,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	JURY TRIAL DEMANDED
	)	
v.	)	
	)	
Greenville Retirement Properties, LLC	)	
d/b/a Pendleton Manor Assisted Living,	)	
Reatha Connelly, and Regency Hospice	)	
of Georgia, LLC, d/b/a Regency	)	
Southerncare,	)	
	)	
Defendants.	)	
	)	

COMES NOW PLAINTIFF, by and through her counsel, W. Andrew Arnold, and files this action, and complaining would show this Court as follows:

1. This action is brought pursuant to the common law of South Carolina and the statutes of South Carolina, including, but not limited to, §15-51-10 and §15-5-90 of the Code of Laws of South Carolina (1976, as amended).

2. A substantial portion of the acts and omissions upon which this action is based occurred in Greenville County, South Carolina.

3. The Plaintiff, Debra Lynn B Peele, is a citizen and resident of the County of Greenville, State of South Carolina and is the duly appointed Personal Representative of the Estate of Iola Aileen Bagwell.

4. Prior to her death, Aileen Bagwell (hereinafter "Ms. Bagwell") was a citizen and resident of the County of Greenville.

5. The Estate of Iola Aileen Bagwell is currently being probated in the Greenville County Probate Court.

6. Upon information and belief, Greenville Retirement Properties, LLC is a duly organized Limited Liability Company organized and existing pursuant to the laws of South Carolina with its principal place of business in Greenville County, South Carolina doing business as Pendleton Manor Assisted Living which is a licensed Community Residential Care Facility providing residents with assistance with the activities of daily living with its principal place of business in Greenville County, South Carolina. Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living is hereinafter referred to as "Pendleton Manor."

7. Upon information and belief, Defendant Reatha Connelly (hereinafter "Connelly") is a citizen and resident of the County of Greenville, South Carolina and at all times alleged herein was acting as the administrator of Pendleton Manor.

8. Defendant Regency Hospice of Georgia, LLC is a Delaware limited liability company and doing business in Greenville, South Carolina as "Regency Southerncare" (hereinafter "Regency").

9. At all times alleged herein, Defendants were involved in the custody and care of Ms. Bagwell. Defendants each jointly and individually breached their duties of care in providing care and services to Ms. Bagwell as described below.

10. Pendleton Manor, by and through its agents, employees, and servants, is vicariously liable for any acts of negligence and any deviations from the accepted standard of medical care by its employees, agents, or servants who were acting within the scope and course of their employment.

Statement of Facts Entitling Plaintiff to Relief

11. On May 17, 2018, Ms. Bagwell became a resident of Pendleton Manor after having her left hip fracture surgically repaired. Ms. Bagwell had been diagnosed with dementia.

12. Ms. Bagwell's family chose Pendleton Manor based upon its representations regarding the services and quality of care made by Pendleton Manor in its marketing materials and on its website. In particular, Ms. Bagwell's family was persuaded by the representations regarding memory care for those with dementia and the promise of safety.

13. Pendleton Manor marketed itself as providing "Expert Care of the Elderly," including 24-hour supervised personal care, assistance with activities of daily living, including dressing, grooming, toileting, ambulation, eating and bathing, customized care, and managed medication assistance.

14. Pendleton Manor represented it had the finest medication management system in the area.

15. Pendleton Manor represented that it provided "highly specialized care" for those with dementia, including "around-the-clock nurses."

16. Pendleton Manor represented that it utilized the Warchol Best Abilities Care Model, which would maintain better safety and ensure that "your loved one is safe."

17. Upon admission, Dr. Glenn Brothers assessed Ms. Bagwell and determined that she would need assistance with ambulating, bathing, grooming, toileting, and transferring. Dr. Brothers also assessed that Ms. Bagwell needed assistance from staff during the night.

18. Despite the fact that Ms. Bagwell was continent, her care plan identified her as "incontinent of bowel and bladder."

19. Upon admission, Pendleton Manor advised Ms. Bagwell's family that she was eligible for hospice care, which would assist with her activities of daily living. However, Ms. Bagwell was not "terminally ill."

20. On or about March 20, 2019, Ms. Bagwell was found in bed with her left arm bruised and inability to move her arm actively or passively without grimacing.

21. On March 21, 2019, x-rays of Ms. Bagwell's left arm showed a mildly displaced fracture in the neck of the left humerus. Defendants claimed ignorance of the origin of the fracture, and even claimed that the fracture was a "pathological fracture," although the same x-ray only revealed mild osteoporosis.

22. Based upon information and belief, Ms. Bagwell's arm was fractured during care provided by Defendants.

23. Ms. Bagwell experienced pain and suffering due to the fracture of her left arm/shoulder.

24. On June 5, 2019, Pendleton Manor staff found Ms. Bagwell in bed with a bruise to the right eye and bruising on the right temple. When her right leg was moved, she cried out in pain.

25. An x-ray on June 6, 2019 revealed a displaced intertrochanteric fracture of the right femur with varus deformity.

26. It was clear that Ms. Bagwell had suffered a fall or a drop, but there was no report of such an incident and once again, Defendants claimed ignorance about the cause of the Ms. Bagwell's injuries.

27. As a result of the right femur fracture, Ms. Bagwell experienced severe pain and suffering.

28. Dr. Luke Dolan prescribed morphine to treat Ms. Bagwell's pain.

29. The staff of Pendleton Manor who was delivering care to Ms. Bagwell was not aware of the right femur fracture and had her in bed with her knees pulled up to chest.

30. Ms. Bagwell's condition quickly deteriorated.

31. On June 14, 2019, Ms. Bagwell died.

32. At the funeral home, the director notice extensive bruising and called the coroner's office.

33. Greenville County Coroner and the medical examiner investigated Ms. Bagwell's death and determined that morphine intoxication was Ms. Bagwell's cause of death.

FOR A FIRST CAUSE OF ACTION
NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANTS PENDELTON MANOR AND CONNELLY

34. Plaintiff incorporates by reference paragraphs 1 through 33 fully and completely as if contained herein.

35. Defendants Pendleton Manor and Connelly, individually and/or by and through their agents, servants, and employees, owed a duty of care to Ms. Bagwell to exercise due care and to provide care to Ms. Bagwell which met the accepted standards of care for community residential care facilities and their administrators.

36. Defendants Pendleton Manor and Connelly, individually and/or by and through their agents, servants, and employees, were negligent, negligent *per se*, careless, grossly negligent, reckless, willful, wanton, and failed to exercise due care and violated the accepted standard of care, including, but not limited to the following failures:

- A. Failing to adequately assess Ms. Bagwell's ' risk for falls on admission, post-falls, and quarterly;
- B. Failing to properly provide assistance with transferring, ambulating, toileting, changing and other activities of daily living;
- C. In failing to put forth all necessary measures to prevent falls and drops from occurring;
- D. Failing to properly assess her care needs and risks associated with her medical conditions, age, judgment, and medical history;
- E. Failing to report and investigate incidents of injury;
- F. Failure to create, comply with, or update a care plan to promote Ms. Bagwell's safety, health, and well-being;
- G. Failure to transfer her to a hospital for further evaluation and treatment when appropriate and needed;

- H. Failure to properly administer the appropriate therapeutic medications and proper dosages;
- I. Failure to evaluate the need for emergency treatment and/or services;
- J. Failure to exercise due care in supervising and training staff to provide the proper standard of care; and
- K. Failure to provide adequate staffing.

37. Based upon information and belief, Defendants' failure to exercise due care and Defendants' breaches in the standard of care were a direct and proximate result of Defendants Pendleton Manor's and Connelly's agents' and/or employees' failure to exercise due care and failure to exercise care consistent with the applicable standards of care for community residential care facilities and its administrators.

38. Defendants Pendleton Manor and Connelly failed to adhere to SC Regulation 61-84.

39. Defendants' failures to exercise due care and breach of accepted standards of care were willful, wanton, and with reckless disregard for the safety and care of Ms. Bagwell.

40. As a direct and proximate result of Defendants Pendleton Manor and Connelly's negligent and grossly negligent actions, Ms. Bagwell suffered fractured bones, experienced severe pain and suffering, emotional and mental distress.

41. Plaintiff is entitled to actual and compensatory damages against Defendants Pendleton Manor and Connelly for all harm suffered as a proximate cause of the Defendants' negligence and/or Defendants' willful, wanton, and reckless actions and failures to act.

42. Plaintiff is entitled to an award of punitive damages against these Defendants.

FOR A SECOND CAUSE OF ACTION
NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANT REGENCY

43. Plaintiff incorporates by reference paragraphs 1 through 42 fully and completely as if contained herein to the extent not consistent and then only in the alternative.

44. Defendant Regency, by and through their agents, servants, and employees, owed a duty of care to Ms. Bagwell to exercise due care and to provide care to Ms. Bagwell which met the accepted standards of care.

45. Defendant Regency, by and through their agents, servants, and employees, were negligent, negligent *per se*, careless, grossly negligent, reckless, willful, wanton, and failed to exercise due care and violated the accepted standard of care, including, but not limited to the following failures:

- A. Failing to properly provide assistance with transferring, ambulating, toileting, changing and other activities of daily living;
- B. Failing to exercise due care when bathing and/or showering Ms. Bagwell;
- C. In failing to put forth all necessary measures to prevent falls and drops from occurring;
- D. Failing to properly assess her care needs and risks associated with her medical conditions, age, judgment, and medical history;
- E. Failing to report and investigate incidents of injury;
- F. Failure to transfer her to a hospital for further evaluation and treatment when appropriate and needed;
- G. Failure to properly administer the appropriate therapeutic medications and proper dosages;
- H. Failure to evaluate the need for emergency treatment and/or services; and
- I. Failure to exercise due care in supervising and training staff to provide the proper standard of care.

46. Defendant Regency's failures to exercise due care and breaches of accepted standards of care were willful, wanton, and with reckless disregard for the safety and care of Ms. Bagwell.

47. Based upon information and belief, Defendant Regency's policies and practices require their employees and nurses to violate the South Carolina Nurse Practice Act.

48. Based upon information and belief, Defendant Regency charged and collected fees for services not rendered.

49. As a direct and proximate result of Defendant Regency's negligent and grossly negligent actions, Ms. Bagwell suffered fractured bones, experienced severe pain and suffering, emotional and mental distress.

50. Plaintiff is entitled to actual and compensatory damages against Defendant Regency for all harm suffered as a proximate cause of the Defendant's negligence and/or Defendant's willful, wanton, and reckless actions and failures to act.

51. Plaintiff is entitled to an award of punitive damages against this Defendant.

FOR A THIRD CAUSE OF ACTION
WRONGFUL DEATH
AS TO ALL DEFENDANTS

52. Plaintiff incorporates by reference paragraphs 1 through 51 fully and completely as if contained herein to the extent not consistent and then only in the alternative.

53. Defendants had a duty to exercise due care and render care and treatment consistent with the standard of care when caring for Ms. Bagwell as alleged in the prior paragraphs and prior causes of action.

54. Defendants' failure to exercise due care and render care and treatment consistent with the standard of care was the direct and proximate cause of Ms. Bagwell's death.

55. Defendants' failures to exercise due care and breaches of accepted standards of care were willful, wanton, and with reckless disregard for the safety and care of Ms. Bagwell's and proximately caused her death and deprived her children of the love, affection, and society of Ms. Bagwell resulting in mental anguish and emotional distress.

56. Plaintiff is entitled to an award of actual and compensatory damages.

57. Plaintiff is entitled to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
BREACH OF CONTRACT
AS TO DEFENDANT PENDLETON MANOR

58. Plaintiff incorporates by reference paragraphs 1 through 57 fully and completely as if contained herein to the extent not consistent and then only in the alternative.

59. Ms. Bagwell and Pendleton Manor entered into a contract for services, including memory care.

60. Ms. Bagwell paid the required monthly fee and all related fees and expenses are required by the contract between the parties.

61. The contract obligated Pendleton Manor, among other things, to provide the following:

- (A) a safe, secure, familiar and consistent environment;
- (B) assistance with activities of daily living by trained caregivers;
- (C) medication manage by trained medication technicians;
- (D) sufficient staff to care for the resident mix at any given time;
- (E) services 24 hours a day by trained medical technicians and trained caregivers; and
- (F) to assess fall risks and to take appropriate measures to prevent falls.

62. Pendleton Manor breached these obligations.

63. As a result of its breaches of contract, Pendleton Manor caused Ms. Bagwell to suffer fractures, experience severe pain and suffering, and to die.

64. Ms. Bagwell suffered monetary damages for Pendleton Manor's breaches of contract.

65. Plaintiff is entitled to an award of actual, compensatory and consequential damages.

HAVING FULLY SET FORTH HER COMPLAINT, Plaintiff prays this Court award the following relief:

- (a) actual, compensatory damages and consequential against the Defendants;
- (b) punitive damages against Defendants;
- (c) all fees and costs recoverable for such an action; and
- (d) such other and further relief as this Court deems just and equitable.

Respectfully submitted,
HORTON LAW FIRM, PA

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ATTORNEY FOR PLAINTIFF

October 19, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2020-CP-23-04832
	)	
Debra Lynn B. Peele as Personal	)	
Representative of the Estate of Iola Aileen	)	
Bagwell,	)	
Plaintiff,	)	
	)	
v.	)	DEFENDANTS GREENVILLE RETIREMENT
	)	PROPERTIES, LLC D/B/A PENDLETON
	)	MANOR ASSISTED LIVING, REATHA
	)	CONNELLY'S ANSWER TO PLAINTIFF'S
	)	COMPLAINT
Greenville Retirement Properties, LLC	)	
d/b/a Pendleton Manor Assisted Living,	)	
Reatha Connelly and Regency Hospice	)	
of Georgia, LLC d/b/a Regency	)	
Southernicare,	)	
	)	
Defendants.	)	

TO: W. ANDREW ARNOLD, ESQUIRE, ATTORNEY FOR PLAINTIFF:

Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living and Reatha Connelly by and through their undersigned attorneys, subject to and without waiving their defense answer the Complaint of the Plaintiff as follows:

1. These Defendants deny each and every allegation that is not specifically admitted herein.
2. The allegations contained in Paragraph 1 state a legal conclusion to which no response is necessary. To the extent a response is necessary, these allegations are denied.
3. These Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 2, 3, 4, and 5 of Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.
4. These Defendants admit the allegations contained in Paragraphs 6 and 7 of Plaintiff's Complaint.

5. These Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraph 8 of Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

6. These Defendants admit only so much of the allegations contained in Paragraph 9 of Plaintiff's Complaint as alleges these Defendants were involved in the care of Ms. Bagwell. These Defendants deny the remaining allegations and demand strict proof thereof.

7. These Defendants deny the allegations contained in Paragraph 10 of Plaintiff's Complaint.

8. As to the allegations contained in Paragraph 11, these Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

9. As to the allegations contained in Paragraphs 12, 13, 14, 15 and 16, these Defendants crave reference to any marketing material and deny any allegations that are inconsistent therewith.

10. As to the allegations contained in Paragraphs 17, 18, 19, 20 and 21, these Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

11. These Defendants deny the allegations contained in Paragraph 22 of Plaintiff's Complaint.

12. As to the allegations contained in Paragraphs 23, 24 and 25, these Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

13. These Defendants deny the allegations contained in Paragraph 26 of Plaintiff's Complaint.

14. As to the allegations contained in Paragraphs 27, 28 and 29, these Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

15. These Defendants deny the allegations contained in Paragraph 30 of Plaintiff's Complaint.

16. As to the allegations contained in Paragraph 31, these Defendants crave reference to the applicable medical records and deny any allegations that are inconsistent therewith.

17. These Defendants lack sufficient information to form a belief regarding the allegations set forth in Paragraphs 32 and 33 of Plaintiff's Complaint and therefore deny the same and demand strict proof thereof.

FIRST DEFENSE TO THE FIRST CAUSE OF ACTION
NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANTS PENDLETON MANOR AND CONNELLY

18. As to the allegations of Paragraph 34, these Defendants reiterate and reallege each of their previous responses as set forth fully herein.

19. These Defendants admit only so much of the allegations contained in Paragraph 35 of Plaintiff's Complaint as alleges these Defendants were required to meet the accepted standard of care. These Defendants deny the remaining allegations and demand strict proof thereof.

20. These Defendants deny the allegations contained in Paragraphs 36, 37, 38, 39, 40, 41 and 42 of Plaintiff's Complaint.

FIRST DEFENSE TO THE SECOND CAUSE OF ACTION
NEGLIGENCE/GROSS NEGLIGENCE
DEFENDANT REGENCY

21. As to the allegations of Paragraph 43, these Defendants reiterate and reallege each of their previous responses as set forth fully herein.

22. The allegations contained in Paragraphs 44, 45, 46, 47, 48, 49, 50 and 51 do not apply to these Defendants. Therefore, no response is necessary. To the extent a response is necessary, these allegations are denied.

**FIRST DEFENSE TO THE THIRD CAUSE OF ACTION
WRONGFUL DEATH AS TO ALL DEFENDANTS**

23. As to the allegations of Paragraph 52, these Defendants reiterate and reallege each of their previous responses as set forth fully herein.

24. These Defendants deny the allegations contained in Paragraphs 53, 54, 55, 56 and 57 of Plaintiff's Complaint.

**FIRST DEFENSE TO THE FOURTH CAUSE OF ACTION
BREACH OF CONTRACT AS TO DEFENDANT PENDLETON MANOR**

25. As to the allegations of Paragraph 58, these Defendants reiterate and reallege each of their previous responses as set forth fully herein.

26. These Defendants crave reference to any contact regarding the allegations contained in Paragraphs 59, 60 and 61. These Defendants deny any allegations that are inconsistent.

27. These Defendants deny the allegations contained in Paragraphs 62, 63, 64 and 65 of Plaintiff's Complaint.

FOR A SECOND DEFENSE

28. **FURTHER ANSWERING THE COMPLAINT AND AS A SECOND DEFENSE**, these Defendants allege the Complaint fails in whole or in part to state facts sufficient to constitute a cause of action and, therefore, this action should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

29. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRD DEFENSE**, these Defendants would show that the care and treatment of Plaintiff was within the standard of care required of providers in the field, for which reason these Defendants are not liable to Plaintiff in any sum whatsoever.

FOR A FOURTH DEFENSE

30. **FURTHER ANSWERING THE COMPLAINT AND AS A FOURTH DEFENSE**, any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint were due to and caused by the Plaintiff's physical and medical health infirmities and disease process, and these Defendants plead such physical and medical health infirmities and disease process as a complete bar to this action.

FOR A FIFTH DEFENSE

31. **FURTHER ANSWERING THE COMPLAINT AND AS A FIFTH DEFENSE**, these Defendants submit the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the intervening negligence, recklessness, willfulness, wantonness, and fault of a party or parties other than these Defendants. Such intervening negligence, recklessness, willfulness, wantonness, and fault were the sole cause of the injuries and damages for which Plaintiff seeks recovery and, therefore, Plaintiff may not recover against these Defendants.

FOR A SIXTH DEFENSE

32. **FURTHER ANSWERING THE COMPLAINT AND AS A SIXTH DEFENSE**, these Defendants allege the injuries and damages for which Plaintiff seeks recovery were due to and proximately caused by the sole negligence, recklessness, willfulness, wantonness, and fault of third parties for whom these Defendants are not liable. Therefore, the

acts or fault of third parties are the real, efficient and proximate cause of the injuries for which Plaintiff seeks recovery, and, therefore, Plaintiff cannot recover against these Defendants.

FOR A SEVENTH DEFENSE

33. **FURTHER ANSWERING THE COMPLAINT AND AS A SEVENTH DEFENSE**, these Defendants allege any injuries or damages sustained by the Plaintiff were due to and caused by the negligence, gross negligence, carelessness, recklessness, willfulness and wantonness (“negligence”) of the Plaintiff, combining, concurring and contributing with the negligence of these Defendants, if any, without which contributory negligence, the Plaintiff’s alleged injuries and damages would not have been incurred or sustained. Should the negligence of the Plaintiff be determined to be greater than that of these Defendants if any, the Plaintiff is entitled to no recovery. If the negligence of the Plaintiff be determined to be not greater than that of these Defendants, if any, the Plaintiff’s recovery is to be reduced by the percentage of Plaintiff’s fault.

FOR AN EIGHTH DEFENSE

34. **FURTHER ANSWERING THE COMPLAINT AND AS AN EIGHTH DEFENSE**, these Defendants plead the applicable provisions of the South Carolina Non Economic Damage Awards Act of 2005 (§15 32 200, et seq.) and §15 38 15, as such provisions may be applicable in this case.

FOR A NINTH DEFENSE

35. **FURTHER ANSWERING THE COMPLAINT AND AS A NINTH DEFENSE**, these Defendants allege that any award of punitive damages to Plaintiff would violate the constitutional safeguards provided to these Defendants by the Due Process Clause of the Fourteenth Amendment of the Unites States Constitution and under the Due Process Clause of Article I, Section 3 of the South Carolina Constitution because the determination of punitive

damages does not bear any reasonable relationship to the amount of actual damages, if any, suffered by or awarded to Plaintiff.

FOR A TENTH DEFENSE

36. **FURTHER ANSWERING THE COMPLAINT AND AS A TENTH DEFENSE**, any injury or damage sustained by the Plaintiff as a result of the matters alleged in the Complaint could not be avoided, and these Defendants plead an unavoidable accident as a complete bar to this action.

FOR AN ELEVENTH DEFENSE

37. **FURTHER ANSWERING THE COMPLAINT AND AS AN ELEVENTH DEFENSE**, these Defendants reserve any additional and further defenses as may be revealed by additional information during the course of discovery and investigation, and as is consistent with the South Carolina Rules of Civil Procedure.

FOR A TWELFTH DEFENSE

38. **FURTHER ANSWERING THE COMPLAINT AND AS A TWELFTH DEFENSE**, these Defendants plead the procedures and limitations of punitive damages as provided in S.C. Code Ann. § 15-32-520.

FOR A THIRTEENTH DEFENSE

39. **FURTHER ANSWERING THE COMPLAINT AND AS A THIRTEENTH DEFENSE**, these Defendants allege that this matter is subject to binding arbitration.

WHEREFORE, having fully answered Plaintiff's Complaint, these Defendants pray that the same be dismissed with costs and for such other and further relief as this Court may deem to be just and proper.

TURNER PADGET GRAHAM & LANEY P.A.

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**ATTORNEY FOR DEFENDANTS
GREENVILLE RETIREMENT PROPERTIES,
LLC D/B/A PENDLETON MANOR ASSISTED
LIVING, REATHA CONNELLY**

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2020-CP-23-04832
	)	
Debra Lynn B. Peele as Personal Representative of the Estate of Iola Aileen Bagwell,	)	
Plaintiff,	)	
	)	
v.	)	MOTION OF DEFENDANTS GREENVILLE RETIREMENT PROPERTIES, LLC D/B/A PENDLETON MANOR ASSISTED LIVING AND REATHA CONNELLY TO STAY AND TO COMPEL ARBITRATION
	)	
Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living, Reatha Connelly and Regency Hospice of Georgia, LLC d/b/a Regency Southerncare,	)	
	)	
Defendants.	)	
	)	

Defendants Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living (“Pendleton Manor”) and Reatha Connelly (“Connelly”) (collectively “Defendants”) hereby move the Court to stay further proceedings in this action and to compel arbitration of Plaintiff’s claims. This motion is made pursuant to the South Carolina Rules of Civil Procedure; the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*; the Lease Agreement, attached hereto as Exhibit A, specifically the Arbitration attached as an Appendix to the Lease Agreement; applicable Federal and South Carolina jurisprudence; and the memorandum of law and oral argument to be presented at a later date.

As grounds for the motion, Defendants assert the following:

1. Plaintiff initiated these proceedings with the filing of her Summons and Complaint in the Court of Common Pleas for Greenville County on or about October 20, 2020.
2. In her Complaint, Plaintiff alleges she is the duly appointed Personal Representative of the Estate of Iola Aileen Bagwell (“Bagwell”). Pl.’s Compl. at ¶ 3. She further

alleges Bagwell, who had been diagnosed with dementia, became a resident at Pendleton Manor on May 17, 2018, following surgical repair of a left hip fracture. *Id.* at ¶ 11. Plaintiff also alleges that while she was a resident at Pendleton Manor, Bagwell sustained injuries, that her condition “quickly deteriorated,” and that she died June 14, 2019. *Id.* ¶¶ 20-31. Her Complaint sets forth causes of action for negligence/gross negligence, wrongful death, and breach of contract stemming from Bagwell’s care and treatment while a resident at Pendleton Manor. Plaintiff’s Complaint also includes a prayer for the recovery of actual and punitive damages, fees and costs, and other relief the Court may deem appropriate.

3. On or about June 18, 2014, Bagwell executed and recorded a Durable Unlimited Power of Attorney, with immediate effect, in favor of her attorney-in-fact, Cindy Bagwell. This Durable Unlimited Power of Attorney specifically vested her agent, Cynthia Bagwell, with broad authority to perform any and all acts “relating to any and all of my financial transactions and/or business affairs including all banking and financial institution transactions, all real estate or personal property transactions, all insurance or annuity transactions, *all claims and litigation*, and any and all business transactions.” *See* Durable Unlimited Power of Attorney, attached as Exhibit B (emphasis added).

4. At approximately the same time, on or about June 14, 2014, Bagwell executed a Health Care Power of Attorney Appointment of Health Care Agent and Proxy, attached hereto as Exhibit C. This broadly-worded health care power of attorney vested her attorney-in-fact and health care agent, also Cynthia Bagwell, with authority to place the resident in any health care facility or institution.

5. As of May 17, 2018, Bagwell, her duly appointed representative and attorney-in-fact for legal and medical decision making Cynthia Bagwell, and Pendleton Manor entered into

the Assisted Living Lease Agreement regarding the continued residency of Bagwell at Pendleton Manor. *See* Lease Agreement, attached as Exhibit A. Included as an Appendix to the Lease Agreement, and also signed by Bagwell and her duly appointed representative, was the Arbitration Agreement (“the Agreement”) between the parties. (*See* Appendix to Ex. A). The Agreement provides that “[b]y signing this agreement, the resident agrees with the facility that any dispute between you and us . . . arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute . . . will be resolved by binding arbitration. . . .” Further, the Agreement provided a fourteen-day window of time within which Bagwell and her representative could withdraw consent to arbitrate any and all claims; however, such revocation did not occur. Finally, in bold font, the Agreement provides:

The resident understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the facility and its employees and agents, cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

Id. (Emphasis in the original).

6. There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999).

7. Here, the parties to the Lease Agreement agreed and stipulated to the applicability of the mandatory arbitration provisions set forth in the Agreement, and nothing in those arbitration provisions would render the Agreement unconscionable or otherwise unenforceable.

8. As such, the matters brought forth by Plaintiff are governed by the Agreement and should be resolved accordingly; not through this litigation.

For these reasons, Defendants move this Court to stay this proceeding and to compel arbitration in accordance with the arbitration provisions of the Agreement. This motion is based upon the pleadings, relevant statutes and authorities, the attachments to this Motion, and any supporting memoranda, oral argument, or other materials that may be hereafter submitted.

TURNER PADGET GRAHAM & LANEY P.A.

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**ATTORNEY FOR DEFENDANTS
GREENVILLE RETIREMENT PROPERTIES,
LLC D/B/A PENDLETON MANOR ASSISTED
LIVING, REATHA CONNELLY**



PENDLETON MANOR

ASSISTED LIVING AND MEMORY CARE

Lease Agreement



PENDLETON MANOR ASSISTED LIVING AND MEMORY CARE
414 Summit Drive
Greenville, South Carolina 29609



Page 1 of 19

Pendleton Manor 05/17/2018

BAGWELL- PENDLETON MANOR 02569

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PENDLETON MANOR

ASSISTED LIVING LEASE AGREEMENT

THIS ASSISTED LIVING LEASE AGREEMENT (the "Lease Agreement") entered into this 17 Day of May, 2018 by and between Pendleton Manor (the "Operator"), and Aileen Bagwell (the "Resident") and Cynthia Bagwell (responsible party).

Resident desires to reside in apartment number 405 (the "Apartment") at Pendleton Manor 414 Summit Drive Greenville SC, 29615 (the Community"), and have the right, in common with others, to use the common areas of the Community and to the services as described in the attached Service Addendum.

FOR CONSIDERATION RECEIVED, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. TERM: The term of this Lease Agreement is one (1) month (the Initial Term), unless earlier terminated as provided herein, and commencing 5-16-2018 (original date of occupancy) as the Date of Occupancy".
2. NON-REFUNDABLE INITIAL SERVICE FEE: A Non-Refundable Initial Service Fee of 1000.00 is required with the acceptance of this lease.
- BASIC SERVICES FEE: Resident agrees to pay to the Operator, a Basic Services Fee during the term of this Lease Agreement, which is currently the sum of \$3800.00/month of the Basic Services Fee will entitle the Resident to the use of the Apartment during the term of this Lease Agreement and the services and accommodations described in the Service Addendum. The Basic Services Fee will remain in effect during the absence of a Resident from the Community due to hospitalization or other reason in order to hold the Apartment for the Resident. The Operator may increase the Basic Services Fee once each calendar year pursuant to Paragraph 6, below. All other services not included on the Service Addendum ("Ancillary Services") shall be charged separately in accordance with the fee schedule published and made available to Resident by the Operator, which shall be subject to change with a prior notice. Examples of Ancillary Services include, but are not limited to, services such as beauty and barber, unscheduled transportation, apartment upgrades, guest meals, and special activities away from the Community. Additionally, furniture is available if the Resident does not provide his/her own. There will be a nominal charge to the Resident for the furniture. The Resident may furnish his/her own room. The Operator reserves the right of final approval with regards to health, safety, and appearance decisions. Furniture provided by the Resident shall be the responsibility of the Resident to maintain and insure. At a minimum, the Resident Room shall have a single bed with moisture-proof mattress and linens including sheets, blankets, bedspread, pillow and pillowcases; a closet or wardrobe and bedside table; and a comfortable chair.

3. **PAYMENT OF FEES:** The Resident agrees to pay all prorated charges from the initial Date of Occupancy, along with the first full month's Basic Services Fee on or before the date of move-in. Thereafter, the monthly Basic Services Fee shall be payable in advance on the first (1st) day of each month for the balance of the Term of this Lease Agreement. The Basic Services Fee shall be payable at the business office located at the Community. A late fee of five percent (5%) per month of any unpaid amount shall immediately and automatically be due if not paid prior to the tenth (10th) day of the month, unless otherwise approved in advance and in writing by the Operator.
4. **MONTH-TO-MONTH:** At the end of the Initial Term, this Lease Agreement shall continue on a month-to-month basis, unless either party notifies the other of termination, pursuant to Sections 8 or 9 hereof.
5. **BASIC SERVICE FEE ADJUSTMENT:** The Operator shall have the right to adjust the amount of the Basic Services Fee once during each calendar year, on the anniversary date of this Lease Agreement. A written notice of the adjusted Basic Services Fee shall be sent to Resident no less than thirty (30) days prior to the effective date of any increase.
6. **RESIDENTS LIABILITY:** Resident is financially responsible for all damages to the Apartment, which, in the Operator's opinion, exceeds normal usage. The Operator shall provide Resident with an itemized accounting of any damages assessed, and Resident must pay the Operator for damages within (10) ten days of an invoice. Resident may keep a pet at the Residence pursuant to the Pet Addendum.
7. **TERMINATION BY OPERATOR AND OTHER REMEDIES:** If Resident (i) becomes physically or mentally ill so as to jeopardize his/her safety or to jeopardize the health, comfort, or peace of other residents or employees; (ii) no longer meets any applicable governmental regulations concerning admission; (iii) does not comply with any one or more of the policies, procedures, or house rules of the Community as outlined in the Resident Handbook and the Admission and Discharge Criteria; (iv) refuses to pay any of the Community's charges; or (v) breaches this Lease Agreement, the Operator shall have the right to terminate this Lease Agreement upon fourteen (14) days written notice, not to exceed thirty (30) days.
 - a. The right to terminate this Lease Agreement is not the only right of the Operator upon occurrence of any of the above events, and the Operator retains all other rights and remedies provided for under this Lease Agreement or by law. In the event of Resident's breach of this Lease Agreement, Resident shall be responsible for the Operator's costs and expenses in connection with such breach, including without limitation, reasonable attorney's fees and court costs incurred by the Operator.
 - b. In the event of the death of the Resident or a medical emergency, as determined by the Operator, this Lease Agreement will terminate upon the occurrence of both the receipt by the Operator of notice of Resident's death or medical emergency as applicable and the removal of the Resident's belongings from the Apartment.
 - c. The Operator may immediately transfer or discharge Resident from the Community for health or safety reasons or in the event of an emergency, as determined in the sole discretion of the Operator and in accordance with State regulations. Such transfer or discharge will not be considered a breach, termination, or notice of

termination of this Lease Agreement. The Operator shall discuss the reason for such discharge or transfer with the Resident and/or the personal representative.

- d. If at any time the Operator determines that Resident's mental or physical condition requires or is likely to require another party to assist Resident in making decisions and in handling Resident's personal affairs (including those relating to Resident's occupancy of the Apartment), the Operator may require Resident to provide to the Operator, as a condition of Resident's continued occupancy of the Apartment, an agreement in form and substance, and from a party satisfactory to the Operator, to provide such assistance to Resident.

- 8. **TERMINATION BY RESIDENT AND REFUND POLICY:** Resident may terminate this Lease Agreement without cause prior to its expiration date by giving written notice to the Operator or its agent. The Operator requires a 14 day notice. Resident must pay to the Operator all fees due to the Termination Date. Termination Date is the date that Resident and all Resident's personal belongings have been removed from the Community. If the Termination Date falls on other than the last day of any month, the charges due for such last month shall be prorated from the first day of such month to the Termination Date. Any refund due Resident will be paid within thirty (30) days after the Termination Date.

- 9. **USE OF PREMISES:** The Apartment shall be used and occupied as a personal residence and for no other purpose.

- 10. **SERVICES AND AMENITIES / POLICIES AND PROCEDURES:**

- a. Refer to the Resident Handbook for a summary of services and amenities, and policies and procedures of the Community. The Resident Handbook and Policies and Procedures are made a part of this Lease Agreement, and Resident shall comply with all such policies and procedures as the same may be amended from time to time by the Operator in its sole discretion.
- b. This Lease Agreement includes the Resident Care Plan. A Functional Assessment of Resident's Activities of Daily Living (ADL's), completed at the time of admission, will specifically outline the assistance to be provided to Resident. Resident shall be re-assessed after thirty (30) days and thereafter on a quarterly basis or at any acute change of condition, or as needed to determine the need for changes in the level of assistance needed. At any time a change is observed a new Resident Care Plan will be initiated and will replace the previous Resident Care Plan.

- 11. **MEDICAL RELEASE OF INFORMATION:** The Resident authorizes providers of medical, nursing and pharmacy services to release information to the Operator as needed.

- 12. **AUTHORIZATION TO RELEASE INFORMATION:** Resident hereby authorizes and consents to the release of any and all admissions records and medical documents currently on file with the Community. The Operator is hereby authorized and directed to release the information and health records concerning Resident to other medical and health care facilities, insurance companies, federal, state and local agencies and regulatory bodies to the extent necessary to obtain payments and otherwise comply with applicable laws and regulations.

13. **INSURANCE: LIABILITY AND RELEASE:** It shall be Resident's obligation to insure any personal property which may be contained in the Apartment or in storage within the Community, and it shall also be Resident's obligation to insure any personal vehicle belonging to Resident which is parked on the Community's premises.

Resident agrees that the Operator will not be liable to Resident for any personal injury or property damage (including without limitation, damage to or loss or theft of, automobiles or personal property of Resident) suffered by Resident or Resident's agents, guests, or invitees, unless the injury or damage is caused by the gross negligence of the Operator or its employees or agents. Resident hereby releases the Operator from any liability for personal injury or property damage suffered by Resident or Resident's agents, guests or invitees, unless caused by the gross negligence of the Operator or its employees or agents. The Operator shall not be liable to Resident as a result of the criminal acts of any other party.

Notwithstanding anything contained in this Lease Agreement to the contrary, no personal liability shall accrue against the owner of the Community, management company, or any agent, subsidiary, or affiliate of the owner or management company or any individual, officer, director, member, partner, or fiduciary of the owner or management company, or any heirs, personal representative, successor or assign of the foregoing, or shall their respective personally owned property be realized against for the satisfaction of any claims. It being expressly understood and agreed that Resident shall look solely to the Operator's interest in the Community for the satisfaction of any and all claims arising out of or relating to this Lease Agreement or Resident's use and occupation of the Community.

Because of the delay and expense of the court systems, the Operator and Resident agree to use confidential binding arbitration, instead of going to court, for any controversy or claims that arise between the Resident and the Operator, or owner, or the management company, and/or their related companies. This includes any claims concerning this Lease Agreement, resident rights, resident care, resident services and policies and procedures. Before arbitration, Resident agrees first to present any claims in writing and in full detail to the Operator and next, to cooperate with any internal review process by the management company. Such review shall be conducted and completed within ten (10) days of Resident's notice to the Operator. In any arbitration, the then-prevailing rules of the American Arbitration Association shall apply.

14. **MAINTENANCE AND REPAIRS:** The Resident shall, during the term of this Lease Agreement and at Resident's sole expense, keep the interior of the Apartment in as good order and repair as it was at the date of commencement of this Lease Agreement, and further agrees that upon vacating the Apartment, Resident shall remove any and all rubbish and other refuse from the Apartment.
15. **ASSIGNMENT:** Resident shall not assign, mortgage, pledge or encumber this Lease Agreement of the Apartment in whole or in part, nor sublease nor otherwise transfer any interest in the Apartment or any part thereof, without prior written consent of the Operator.
16. **COVENANTS OF RESIDENTS:** Resident covenants that he/she is of good moral character. Resident further agrees that he/she will notify the Operator in the event of any change in his/her financial status, which would affect his/her ability to meet ordinary and

customary living expenses. Furthermore, Resident will notify the Operator of any changes in his/her health status, which affect his/her ability to live at the Community in compliance with the policies outlined in this lease agreement.

17. COVENANTS OF RESIDENCE: The Operator covenants that there are no restrictions as to race, creed, national origin, color, or religion.

18. ACCESS TO APARTMENT: The Operator and its agents may enter the Apartment to carry out the Operator's obligations under this Lease Agreement, to respond to any emergency situation or other indication that Resident may require assistance. The Operator agrees to make its presence known (except in emergencies) when entering the Apartment and will schedule the entry in advance whenever possible. For Resident's safety in cases of emergency, Resident will not use any private locks or locking devices on the door to the Apartment other than those provided with the Apartment.

19. TERMINOLOGY AND SECTION HEADINGS: All personal pronouns in this Lease Agreement, whether used in a masculine, feminine or neutral gender, shall include all other genders, the singular shall include the plural and the plural shall include the singular. Titles of Sections in this Lease Agreement are for convenience only and neither limits nor amplifies the provisions of the Lease Agreement.

20. SUBORDINATION: This Lease Agreement and Resident's rights under this Lease Agreement are subject and subordinate to the rights of any holder of the obligations secured by any mortgage, deed of trust or other encumbrance, together with any renewals, extensions, modifications, consolidations and replacements of them, that now or at any subsequent time may affect the Community or the Operator's or the owner's interest therein. This provision shall be self-operative and no further instrument of subordination will be required in order to effectuate it. If the holder succeeds to the interest of the owner of the Community, the holder in its discretion may 1) require Resident to attorn to the holder so that this Lease Agreement remains in full force and effect between Resident and such holder upon the terms and conditions stated herein, or 2) terminate this Lease Agreement. This Lease Agreement and Resident's interest in the Apartment are subject and subordinate to the owner's lease of the Community to the Operator.

21. AMENDMENT: This Lease Agreement constitutes the complete and entire agreement with respect to the subject matter addressed herein and shall not be modified or amended except by written agreement, signed by the parties hereto. The Operator will be neither liable for, nor bound by, any statements made by any person representing or purporting to represent the Operator unless such statements are described in this Lease Agreement.

22. No provisions of this Lease Agreement shall supercede Federal, State or local laws.

IN WITNESS THEREOF, the parties have executed this Lease Agreement as indicated below.
By signing below Resident acknowledges receipt of the Resident Handbook.

54520 RONAN NOTETPEND -T7EAGDVB
ELECTRONICALLY FILED - 2021 Apr 06 2:48 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2304832
8102/21/50 Ronan Notetpend
61 Jo L. Boyd

By:

Susan S Blair

Executive Director

5-17-18

Date

Aiken Bagwell
Cynthia Bagwell (ROA)

Resident

5-17-18

Date

Responsible party acknowledges that he/she has read and understands the foregoing Lease Agreement and agrees to perform Resident's obligations under the Lease Agreement.

Cynthia Bagwell

Name of Responsible Party

5-17-18

Date

FEE SCHEDULE FOR 2018

Fee for Room and Care Services	Private room - \$3700
For Assisted Living	
Memory Care	Private room - \$3800
Shared Space	Shared suite - \$ 3200
One Time Non-refundable	\$1000
Community Fee	
Incontinence Products	Ordered if requested and invoiced to family
Guest Meals	Guest Meals are \$5 per person. Please try to give our kitchen a 4-hour notice if the resident will be having guests for any meal.
Transportation	The facility will assist with the coordination of local (Greenville) medical appointments as needed.

Miscellaneous Items:

Room Furnishings	provided by resident or family
Supplies	per invoice billed by store or vendor
Dietary Supplies	per invoice billed by store or vendor
Medications	Ordered by community from Contract Pharmacy
Safety Equipment	per invoice billed by store or vendor
Personal Care Products	provided by family
Linens, Towels, or Bedding	provided by family
Beauty Shop	per invoice billed by store or vendor

Cynthia Bagwell
 Printed Name of Resident or Responsible Party

5-17-18
 Date

Cynthia Bagwell
 Signature of Resident or Responsible Party

Shirley S. Blair
 Executive Director Signature

APPENDIX

Arbitration Agreement

Arbitration is a cost effective and time saving method of resolving disputes without involving the courts. In arbitration proceedings, the disputes are heard and decided by a private individual called an arbitrator. Neither the Community nor the Resident is waiving their right to sue or obtain statutory and/or contractual remedies by agreeing to arbitrate disputes within the scope of this Arbitration Agreement. However, the dispute will not be heard or decided by a judge or jury, as both the Community and the Resident desire and expressly agree that any dispute between them be resolved outside of the court system.

By signing this agreement, the resident agrees with the facility that any dispute between you and us, including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) will be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion will not be effective and the remainder of the agreement will remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com, or at P.O. Box 50191, Minneapolis, MN 55405. This agreement will be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the facility including any spouse or heirs of the resident.

This provision for arbitration may be revoked by written notice delivered to the facility within 14 days of signature.

The resident understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the facility and its employees and agents, cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

The resident also understands that nothing in this agreement prevents him/her from contacting regulatory or administrative agencies in relation to services provided by the facility, and that, once admitted, the resident cannot be discharged for refusing this agreement.

<u>Aileen Bagwell</u>	5-17-18	<u>Cynthia Bagwell</u>	5-17-18
Signature of Resident	(Date)	Signature of Resident's Legal Representative	(Date)
<u>Susan S. Blair</u>			
Signature of Community Representative		(Date)	

BAGWELL- PENDLETON MANOR 02578

APPENDIX - A

RESPONSIBLE PARTY AGREEMENT

Aileen Bagwell (the "Resident"), Cynthia Bagwell (the "Responsible Party"), and Pendleton Manor.

WHEREAS, the Resident desires to live in the apartment referenced in Pendleton Manor Lease Agreement to which this Agreement is attached: and

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

WHEREAS, the Responsible Party has agreed to provide such assistance and to pay such obligations if and as necessary.

In consideration of the foregoing, the receipt and sufficiency of all of which is hereby acknowledged, the parties agree as follows:

1. In the event that the conditions of the Resident makes such assistance necessary or advisable, the Responsible Party, upon the request of Pendleton Manor, will:
 - a. Participate as needed with Pendleton Manor staff in evaluating the Resident's needs and in planning and implementing an appropriate plan for the Resident's care;
 - b. Assist the Resident as necessary to maintain the Resident's welfare and to fulfill the Resident's obligations under the Lease Agreement;
 - c. Assist the Resident in transferring to a hospital, nursing home or other medical residence in the event that the Resident's needs can no longer be met by Pendleton Manor.
 - d. Assist in removing the Resident's personal property from the Apartment when the Resident leaves the Residence;
 - e. Make necessary arrangements or assist the legally responsible person in making necessary arrangements for funeral services and burial in the event of death.
2. In the event that the Resident fails to pay any amount or amounts due to Pendleton Manor under the Lease Agreement, the Responsible Party hereby agrees to pay Pendleton Manor all amounts due from the Resident under the Lease Agreement as it may be amended from time to time, including any amounts resulting from increases in fees or charges authorized by the Lease Agreement or attachments. The Responsible Party agrees to pay Pendleton Manor within thirty (30) days of receiving each notice from Pendleton Manor of non-payment by the Resident. Responsible Party agrees that recourse may be had against Responsible Party hereunder without recourse first having been had against Resident or the assets of Resident.
3. The Responsible Party acknowledges that he/she has reviewed a copy of the Lease Agreement, and has had an opportunity to ask any questions the Responsible Party may have.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement, or have caused this Agreement to be duly executed on their behalf, as of the day and year first above written.

RESIDENT		RESPONSIBLE PARTY	
<u>A. Bagwell</u>	<u>5-17-18</u>	<u>Cynthia Bagwell</u>	<u>5-17-18</u>
Signature	Date	Signature	Date
<u>Aileen Bagwell</u>	<u>5-17-18</u>	<u>Cynthia Bagwell</u>	<u>5-17-18</u>
Printed Name	Date	Printed Name	Date
<u>Susan S. Blair</u>	<u>5-17-18</u>		
Executive Director			

APPENDIX - B

PET AGREEMENT

1. Resident accepts full responsibility for the bird, dog or cat (hereby referred to as "pet") and its actions. All liabilities of the pet are the sole responsibility of the Resident and not Pendleton Manor.
2. The pet must be on a leash or in a cage at all times when entering or leaving the Residence. Pets are not allowed in the common areas of the facility with exception of pets that provide assistance to the Resident, such as a seeing-eye dog.
3. Weight of pets is limited to twenty (20) pounds and under, unless the pet provides assistance to the Resident, such as a seeing-eye dog.
4. All pets must be spayed/neutered; cats de-clawed and be indoor cats only. No exceptions. Cat litter must be disposed of properly and not dumped into toilets.
5. A non-refundable \$500.00 pet fee for each pet shall be paid prior to move-in and held to cover the cost of any necessary repairs due to damage caused by the pet.
6. When taking pets outside, the designated outer perimeter (away from the building) must be used. All droppings must be cleaned up and disposed of in appropriate trash receptacles. Care must be taken not to kill grass or plantings in landscaped areas.
7. This Addendum is applicable solely to the pet, which is in possession at the time the signing of the Lease Agreement.
8. For the safety of the Resident, staff and pet, the pet shall be on a leash with the owner present or, in a crate during the times a Pendleton Manor staff member is performing a service in the Residents apartment (i.e., housekeeping, maintenance, etc). The housekeeping staff has the right to enter the apartment to clean any unsanitary conditions resulting from the pet which is not handled by the resident.
9. All pets must have, and maintain, a current health certificate, a copy of which must be provided to the Residence.
10. Pendleton Manor reserves the right to request that the Resident or Responsible Party make other housing arrangements for an existing pet, if it is deemed by the Executive Director that the Resident cannot adequately care for the pet, or if having a pet poses a risk to the Resident or to other residents of Pendleton Manor, or a nuisance to others.
11. Ongoing discretion will be exercised by the Executive Director with regard to residents and staff, noise, cleanliness and procedures in caring for the pet.
12. Pendleton Manor has the right to remove the pet at Residents/Responsible Party's expense if the Resident/Responsible Party refuses to do so.
13. Pet Fee in the amount \$ 0 received on .

Resident/Responsible Party Signature: C. Bagwell
 Printed Name: Gynthia Bagwell No Pets
 Date: 5-11-18

APPENDIX – C

ALZHEIMER'S DISCLOSURE STATEMENT

Mission

It is the mission of the Pendleton Manor Reflections Program is to provide a safe, secure, familiar and consistent environment that allows residents to move about freely in the community. A structured but flexible lifestyle will be provided for all residents by developing an individual plan of care, including activities suitable for each resident's needs. Each resident's care plan will stress maintaining the resident's present abilities and promote the highest possible level of physical and mental functioning possible.

We believe in maintaining each resident's dignity through the design of our physical environment. The community design allows ample space for physical exercise, ample space for planned and spontaneous social activities. Assistance with activities of daily living is provided by trained caregivers. Medication management for each resident is provided by Trained Medication Technicians. We also provide each resident with proper nutritious meals.

Disclosure Statement**Process and Criteria for Admission, Transfer or Discharge:**

1. Prior to admission, residents must have a physician's report of examination (physician's history and physical) completed within 30 days prior to admission to the community. The physical examination may reflect that the resident has a diagnosis of probable Alzheimer's Disease or other dementias, a description of any behavioral, personality and physical symptoms, and treatment plan and has symptoms which demonstrate a need for placement in the secured community. Other related dementias may include, but not limited to, Lewy body Disease, Vascular Dementia, Parkinson's Disease, etc. Physical examinations will be completed at least annually.
2. The Executive Director or Director of Resident Care shall specify the appropriateness of the individual's placement by completing an assessment prior to admission. This assessment helps to determine the care needs of the residents and services to be provided. The facility bases admission decisions on the facility's ability to meet the individual's needs, state licensure limitations on the facility's level of care, and the availability of licensed nursing staff to provide care. Any resident needing hospitalization, nursing home care, has a contagious disease or requires continuous medical or nursing supervision will not be admitted.
3. The assessment includes but is not limited to a social history; family supports; level of activities of daily living, physical functioning; cognitive level; behavioral impairment; and nutritional status, including weight and nutritional requirements. This assessment will help to determine significant behavioral manifestations of dementia or cognitive impairment observed by the family member or health care professional e.g., significant confusion and disorientation, pacing and wandering (especially at night), attempts to elope or has eloped, social isolation, agitation, aggression, inappropriate social or sexual behavior, eating/feeding difficulties and communications disabilities. Residents that are admitted have been screened, assessed and approved by a physician to determine appropriateness. Residents' service and care needs will be identified by completing this functional assessment. Services will be provided 24-hours a day and will be provided by a trained

Medication Technicians and trained caregivers. These services include activities of daily living, basic first aid and medication administration.

4. If non-continuous (intermittent) skilled services are needed, these services will be provided by Home Health or Hospice.
5. If a resident is exhibiting uncontrolled behaviors and current interventions can not manage the behaviors, the resident may be immediately transferred for treatment in an acute hospital or other behavioral setting. The family must be involved in this process.
6. If the level of care exceeds the facility license or if a resident has become injurious to self or others and treatment in an acute hospital or other setting does not improve the resident's condition, discharge may be necessary. If the resident's financial status changes and they are no longer able to pay, the community will work with the family to find payment (and give notice). Families are informed and involved regarding decisions related to discharge. When a change of condition is identified, communication begins with the family immediately. Any new assessments are shared with POA/the family.
7. The family member/ responsible party/Power of Attorney (POA) seeking admission of a resident into the facility shall be provided with a copy of this disclosure statement and a copy of the admission agreement.
8. This secured unit may also provide services to and care for residents without a dementia diagnosis, but desires to live in the unit. The resident would waive his or her right to live in a less restrictive environment.

Care Planning Process:

1. Residents are assessed with 72 hours of admission, 30-days after admission, quarterly and upon change of condition.
2. The Individualized Care Plan (ICP) is developed by the administrator (or designee) and Resident/POA within seven days of admission, quarterly and upon change of condition.
3. The ICP will address: The needs of the resident, including the activities of daily living for which the resident requires assistance, what assistance, how much, who will provide the assistance, how often, and when. It will address transportation arrangements for visits to physicians or other health providers, advanced care directives/healthcare power-of-attorney, recreational and social activities which are suitable, desirable for the resident and the resident's dietary needs.
4. The ICP will indicate objective measurable goals, interventions, the responsible person in the facility to help meet the needs of the resident and the expected achievement dates.
5. The facility will maintain a copy of the written plan of care for the Resident which has been developed by the community.

Staffing Patterns:

1. The number and qualifications of staff members will be determined by the number and condition of the residents, including those with Alzheimer's disease and/or related dementia in an Alzheimer's special care unit or program.
2. The minimum number of staff members that will be one staff member for each eight residents on duty during all periods of peak hours. During nighttime (non-peak) hours, there shall be at least one staff member on duty for each 30 residents.

3. Since there will be residents whose cognitive/physical impairments prevent them from safely evacuating the facility independently, a staff member shall be awake and dressed during nighttime hours.

Staff Training:

Prior to resident contact and at least annually, staff will be in-serviced on the following.

- Basic first-aid to include emergency procedures as well as procedures to manage/care for minor accidents or injuries;
- Procedures for checking and recording vital signs (for designated staff members);
- Management/care of persons with contagious and/or communicable disease, such as hepatitis, tuberculosis, HIV infection;
- Medication management including storage, administration, receiving orders, securing medications, interactions, and adverse reactions;
- Care of persons specific to the physical/mental condition being cared for in the facility, *e.g.*, Alzheimer's Disease and/or related dementia, cognitive disability, *etc.*, to include communication techniques (cueing and mirroring), understanding and coping with behaviors, safety, activities, *etc.* Ten (10) hours of this specialized Alzheimer's/dementia care training will be conducted within the first 30 days of hire into the memory care unit and again annually.
- Use of restraints in accordance with the provisions of Section 905. This facility does not use restraints or side rails.
- OSHA standards regarding blood-borne pathogens;
- Cardiopulmonary resuscitation for designated staff members/volunteers to insure that there is a certified staff member/volunteer present whenever residents are in the facility;
- Confidentiality of resident information and records and the protecting of resident rights (review of Bill of Rights for Long-Term Care Facilities (Resident's Bill of Rights), *etc.*);
- Fire response training within 24 hours of their first day on the job in the facility;
- Emergency procedures/disaster preparedness within 24 hours of their first day on the job in the facility.

Physical Environment and Safety Management:

The Neighborhood environments you create play a key role in making Reflections an acceptable alternative for families in giving residents feelings of validation and security. The four factors in creating the best environments are Customized Wellness, Safety Management, Alarm Systems and Risk Management Tools.

Customized Wellness:

Our customized wellness for our Reflections residents includes the Mini Mental or Reflections Profile Assessment. This is designed for the Coordinator/Lead to document abilities with activities of daily living, cognitive abilities and behaviors exhibited. This provides for individualized and meaningful assistance in maintaining resident independence and/or compensation for losses. This does not replace the current Vitals assessments.

Safety Management:

Our safety program is designed to provide a secure environment for our residents. It includes alarm system response and operation and risk management assessment tools.

Alarm Systems:

All Reflections Neighborhoods are equipped with an alarm system to assist in assuring the security of our Neighborhoods. All Neighborhoods have exterior door alarms to alert staff that residents may be attempting to leave the secured area. This allows staff members to intercede as necessary. All courtyards and patios are enclosed and secured as well.

Risk Management Tools:

There are two documentation tools that will be used to proactively consider the potential for a negative outcome to develop and to allow an intervention plan to be initiated. These include Elopement Assessment and Fall Risk Assessment.

1. Elopement Assessment

Residents often have a desire to leave the secured area of the community which puts them at serious risk or harm. The Elopement Assessment Tool provides the means of identifying those residents who are more likely to attempt elopement. The assessment is completed for residents that are exit seeking and are triggered by the Care Vitals Assessment. It may be completed by the Director of Resident Care or designee upon admission and quarterly thereafter. Written interventions are reviewed and approved by the Director of Resident Care and the responsible party and are included on the care plan.

2. Falls Assessment

The resident with Dementia is at an increased risk to fall. The increased risk is due to decreased activity, decreased safety awareness and physical problems. The Fall Assessment is used to alert us to the potential of falls and potential injuries. It is critical the assessment is completed upon admission, after a fall or quarterly thereafter by the Director of Resident Care or Designee. The need for that Fall Assessment may also be triggered by the Vitals Assessment. Interventions are included on the care plan.

Resident Activities:

Activities surround us 24 hours a day. The resident with Dementia can have a heightened sense of activity and every moment in his or her 24 hour day is an opportunity to contribute to his or her well-being. Every interaction they have with you or your staff, whether it is scheduled or unscheduled, is a building block creating a Neighborhood that meets all our program objectives.

Residents in our Reflections Neighborhood need an environment that provides support to be who they are, a sense of security and a feeling they are contributing or adding value on a daily basis. In planning your Neighborhood program for any given day keep in mind you are striving for outcomes that contribute to a meaningful life for your residents. Consider the following when you are selecting an event or activity:

- ☐ Does it mirror "normal" daily living as much as possible?
- ☐ Does it involve meaningful experiences?
- ☐ Does it promote social relationships?
- ☐ Is it based on familiar activities they may remember from the past?
- ☐ Is it based on individual interests?
- ☐ Does it create fun or a sense of well-being?
- ☐ Does it stimulate memory enhancement?
- ☐ Does it allow the opportunity to express thoughts and/or feelings?

Beacon Communities has identified four types of activities that should be included in your program planning.

They include:

Normalized Activity

The resident finds satisfaction through accomplishing purposeful tasks and reliving learned roles. These activities allow the resident to release excess energy, feel a sense of identify and reinforce self-esteem.

Recreational Activity

These events or activities enable the residents to have fun and fulfill the needs for emotional satisfaction and intimacy.

Memory Enhancing Activity

Through memory enhancement activities or events, residents are encouraged to remember what is important to them and assist in memory enhancement. Residents gain validation, seeing meaning in their lives and fulfill the need to leave a legacy.

Sensory Activity

Residents are allowed to appropriately express emotions and are provided a creative outlet.

Family Role in Care:

Family orientation is the family's introduction to the Reflections Neighborhood Program. Provide this information to each of your resident's families upon admission. Remember when a resident is admitted to our Reflections unit, there is usually a period of adjustment.

The Coordinator/Lead will provide a list of recommendations to the family or responsible party prior to or upon admission.

When a resident is admitted to a neighborhood, there is usually a period of adjustment. To make this time easier we suggest you pack the following items:

- Clothing that is loose, washable and easy to put on. Please label the inside of the clothing with a permanent marker.
- Shoes that slip on and are comfortable.
- Bedding and comforters that are familiar; these will help the new bed appear more inviting.
- Pictures of family or friends, perhaps in a photo album
- Items for the Memory Box
- Favorite toiletry items; no breakable bottles please

Items to Leave at Home:

- Valuables
- Money
- Over the counter medications
- Chemicals
- Easily breakable items
- Sharp items

One of the key program goals is to create a family atmosphere where the residents can engage in meaningful activities. Families are encouraged to participate in activities, dine with the resident and participate in the development of the memory boxes, life stories, activity boxes and life skill stations.

Cynthia Bagwell
Print Name of Resident/Responsible Party

C Bagwell
Signature of Resident/Responsible Party

Susan S. Bläer
Community Representative

5-17-18
Date

5-17-18
Date

BAGWELL- PENDLETON MANOR 02587

Durable Unlimited Power of Attorney

Effective Immediately

Notice to Adult Signing this Document: This is an important document. Before signing this document, you should know these important facts. By signing this document, you are not giving up any powers or rights to control your finances and property yourself. In addition to your own powers and rights, you are giving another person, your attorney-in-fact, broad powers to handle your finances and property, which may include powers to encumber, sell or otherwise dispose of any real or personal property without advance notice to you or approval by you. THE POWERS GRANTED UNDER THIS DOCUMENT ARE EFFECTIVE IMMEDIATELY AND WILL REMAIN IN EFFECT IF YOU BECOME DISABLED OR INCAPACITATED. This document does not authorize anyone to make medical or other health care decisions for you. If you own complex or special assets such as a business, or if there is anything about this form that you do not understand, you should ask a lawyer to explain this form to you before you sign it. If you wish to change your durable unlimited power of attorney, you must complete a new document and revoke this one. You have the right to revoke the designation of the attorney-in-fact and the right to revoke this entire document at any time and in any manner. You may revoke this document at any time by destroying it, by directing another person to destroy it in your presence or by signing a written and dated statement expressing your intent to revoke this document. If you revoke this document, you should notify your attorney-in-fact and any other person to whom you have given a copy of the form. You also should notify all parties having custody of your assets. These parties have no responsibility to you unless you actually notify them of the revocation. If your attorney-in-fact is your spouse and your marriage is annulled, or you are divorced after signing this document, this document may become invalid. Since some third parties or some transactions may not permit use of this document, it is advisable to check in advance, if possible, for any special requirements that may be imposed. You should sign this form only if the attorney-in-fact you name is reliable, trustworthy and competent to manage your affairs. Generally, you may designate any competent adult as the attorney-in-fact under this document.

I, Aileen Bagwell, of [REDACTED],
City of Greenville, State of SC, as Principal,
do appoint Cindy Bagwell, of [REDACTED],
City of Greenville, State of SC 29606, as my
attorney-in-fact to act in my name, place and stead in any way which I myself could do, if I were personally present,
with respect to all the following matters to the extent that I am permitted by law to act through an agent:

I grant my attorney-in-fact the maximum power under law to perform any act on my behalf that I could do personally, including but not limited to, all acts relating to any and all of my financial transactions and/or business affairs including all banking and financial institution transactions, all real estate or personal property transactions, all insurance or annuity transactions, all claims and litigation, and any and all business transactions.

This power of attorney shall become effective immediately and shall remain in full effect upon my disability or incapacitation. This power of attorney grants no power or authority regarding healthcare decisions to my designated attorney-in-fact.

If the attorney-in-fact named above is unable or unwilling to serve, then I appoint

Mike Bagwell, [REDACTED],
City of Greenville S.C., State of SC, to be my
successor attorney-in-fact for all purposes hereunder.

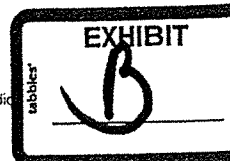
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ALFP126 Durable Unlimited POA-Imm

NOTED IN GREENVILLE COUNTY, SC A. H. J. HARRIS

BAGWELL- PENDLETON MANOR 02566



My attorney-in-fact is granted full and unlimited power to act on my behalf in the same manner as if I were personally present. My attorney-in-fact accepts this appointment and agrees to act in my best interest as he or she considers advisable. To induce any third party to rely upon this power of attorney, I agree that any third party receiving a signed copy or facsimile of this power of attorney may rely upon such copy, and that revocation or termination of this power of attorney shall be ineffective as to such third party until actual notice or knowledge of such revocation or termination shall have been received by such third party. I, for myself and for my heirs, executors, legal representatives and assigns, agree to indemnify and hold harmless any such third party from any and all claims that may arise against such third party by reason of such third party having relied on the provisions of this power of attorney. This power of attorney may be revoked by me at any time and is automatically revoked upon my death. My attorney-in-fact shall not be compensated for his or her services nor shall my attorney-in-fact be liable to me, my estate, heirs, successors, or assigns for acting or refraining from acting under this document, except for willful misconduct or gross negligence. Revocation of this document is not effective unless a third party has actual knowledge of such revocation.

I intend for my attorney-in-fact under this Power of Attorney to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (aka HIPAA), 42 USC 1320d and 45 CFR 160-164.

Signature and Declaration of Principal

I, Aileen Bagwell, the principal, sign my name to this power of attorney this 18 day of June 2018 and, being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my power of attorney and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in the power of attorney and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence, and that I have read and understand the contents of the notice at the beginning of this document.

Aileen Bagwell
Signature of Principal
Aileen Bagwell
Witness Attestation

I, Armon T. Langley, the first witness, and I, WILLIAM G. PRINCE, the second witness, sign my name to the foregoing power of attorney being first duly sworn and do declare to the undersigned authority that the principal signs and executes this instrument as his/her power of attorney and that he/she signs it willingly, or willingly directs another to sign for him/her, and that I, in the presence and hearing of the principal, sign this power of attorney as witness to the principal's signing and that to the best of my knowledge the principal is eighteen years of age or older, of sound mind and under no constraint or undue influence.

Armon T. Langley
Signature of First Witness

William G. Prince
Signature of Second Witness

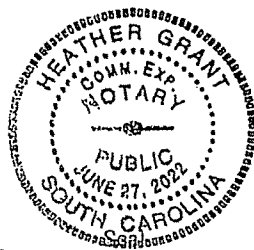
BAGWELL- PENDLETON MANOR 02567

Notary Acknowledgment

State of South Carolina County of Anderson
 Subscribed, sworn to and acknowledged before me by Cuteen Bagwell, the Principal,
 and subscribed and sworn to before me by Cindy Bagwell, witness, this 15th
 day of June 2014.

Heather Grant
 Notary Signature

Notary Public,

In and for the County of AndersonState of South CarolinaMy commission expires: June 27, 2022

Acknowledgment and Acceptance of Appointment as Attorney-in-Fact

I, Cindy Bagwell have read the attached power of attorney and am the person identified as the attorney-in-fact for the principal. I hereby acknowledge that I accept my appointment as Attorney-in-Fact and that when I act as agent I shall exercise the powers for the benefit of the principal; I shall keep the assets of the principal separate from my assets; I shall exercise reasonable caution and prudence; and I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

Cindy Bagwell June 15, 2014
 Signature of Attorney-in-Fact Date

Acknowledgment and Acceptance of Appointment as Successor Attorney-in-Fact

I, m. 3 have read the attached power of attorney and am the person identified as the successor attorney-in-fact for the principal. I hereby acknowledge that I accept my appointment as Successor Attorney-in-Fact and that, in the absence of a specific provision to the contrary in the power of attorney, when I act as agent I shall exercise the powers for the benefit of the principal; I shall keep the assets of the principal separate from my assets; I shall exercise reasonable caution and prudence; and I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

m. 3 6-15-14
 Signature of Successor Attorney-in-Fact Date

Health Care Power of Attorney

Appointment of Health Care Agent and Proxy

Notice to Adult Signing this Document: This is an important legal document. Before executing this document, you should know these facts:

This document gives the person you designate (the attorney-in-fact) the power to make MOST health care decisions for you if you lose the capacity to make informed health care decisions for yourself. This power is effective only when your attending physician determines that you have lost the capacity to make informed health care decisions for yourself and, notwithstanding this document, as long as you have the capacity to make informed health care decisions for yourself, you retain the right to make all medical and other health care decisions for yourself.

You may include specific limitations in this document on the authority of the attorney-in-fact to make health care decisions for you. Subject to any specific limitations you include in this document, if your attending physician determines that you have lost the capacity to make an informed decision on a health care matter, the attorney-in-fact GENERALLY will be authorized by this document to make health care decisions for you to the same extent as you could make those decisions yourself, if you had the capacity to do so.

The authority of the attorney-in-fact to make health care decisions for you GENERALLY will include the authority to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition.

Additionally, when exercising authority to make health care decisions for you, the attorney-in-fact will have to act consistently with your desires or, if your desires are unknown, to act in your best interest. You may express your desires to the attorney-in-fact by including them in this document or by making them known to the attorney-in-fact in another manner.

When acting pursuant to this document, the attorney-in-fact GENERALLY will have the same rights that you have to receive information about proposed health care, to review health care records, and to consent to the disclosure of health care records. You can limit that right in this document if you so choose.

GENERALLY, you may designate any competent adult as the attorney-in-fact under this document. You have the right to revoke the designation of the attorney-in-fact and the right to revoke this entire document at any time and in any manner. Any such revocation generally will be effective when you express your intention to make the revocation. However, if you made your attending physician aware of this document, any such revocation will be effective only when you communicate it to your attending physician, or when a witness to the revocation or other health care personnel to whom the revocation is communicated by such a witness communicate it to your attending physician. If you execute this document and create a valid Health Care Power of Attorney with it, it will revoke any prior, valid power of attorney for health care that you created, unless you indicate otherwise in this document. This document is not valid as a Health Care Power of Attorney unless it is acknowledged before a notary public or is signed by at least two adult witnesses who are present when you sign or acknowledge your signature. No person who is related to you by blood, marriage, or adoption may be a witness. The attorney-in-fact, your attending physician, and the administrator of any nursing home in which you are receiving care also are ineligible to be witnesses. If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

I, Aileen Bagwell residing at [REDACTED],
City of Greenville, State of S.C., appoint the
following person as my attorney-in-fact for health care decisions, my health care agent, and confer upon this person
my health care proxy. This person shall hereafter be referred to as my "health care representative":

ALFP126 Health Care POA Pg.1

ALFP126 Health Care POA Pg.1 ELECTRONICALLY FILED - 2021 Apr 06 2:48 PM - COMMON PLEAS - GREENVILLE - CASE#2020CP2304832



BAGWELL- PENDELETON MANOR 02562

Cindy Baggett, residing at _____

City of Greenville, State of SC 29608

I grant my health care representative the maximum power under law to perform any acts on my behalf regarding health care matters that I could do personally under the laws of the State of SC, including specifically the power to make any health decisions on my behalf, upon the terms and conditions set forth below. My health care representative accepts this appointment and agrees to act in my best interest as he or she considers advisable. This health care power of attorney and appointment of health care agent and proxy may be revoked by me at any time and is automatically revoked on my death. However, this power of attorney shall not be affected by my present or future disability or incapacity.

This health care power of attorney and appointment of health care agent and proxy has the following terms and conditions:

1. If I have signed a Living Will or Directive to Physicians, and it is still in effect, I direct that my health care representative abide by the directions that I have set out in that document.
2. If at any time I should have an incurable injury, disease, or illness which has been certified as a terminal condition by my attending physician and one additional physician, both of whom have personally examined me, and such physicians have determined that there can be no recovery from such condition and my death is imminent, and where the application of life prolonging procedures would serve only to artificially prolong the dying process, then:
I direct my health care representative to assure that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, the administration of nutrition and/or hydration, or the performance of any medical procedure deemed necessary to provide me with comfort, care, or to alleviate pain.
3. If at any time I should have been diagnosed as being in a persistent vegetative state which has been certified as incurable by my attending physician and one additional physician, both of whom have personally examined me, and such physicians have determined that there can be no recovery from such condition, and where the application of life prolonging procedures would serve only to artificially prolong the dying process, then:
I direct that my health care representative assure that such procedures be withheld or withdrawn, and that I be permitted to die naturally with only the administration of medication, the administration of nutrition and/or hydration, or the performance of any medical procedure deemed necessary to provide me with comfort, care, or to alleviate pain.

**THE FOLLOWING INSTRUCTIONS (IN BOLDFACE TYPE)
ONLY APPLY IF I HAVE SIGNED MY NAME IN THIS SPACE:**

However, if at any time I should have been diagnosed as being in a persistent vegetative state which has been certified as incurable by my attending physician and one additional physician, both of whom have personally examined me, and such physicians have determined that there can be no recovery from such condition, I also direct that my health care representative have sole authority to order the withholding of any aid, including the administration of nutrition, hydration, and any other medical procedure deemed necessary to provide me with comfort, care, or to alleviate pain.

4. If I am able to communicate in any manner, including even blinking my eyes, I direct that my health care representative try and discuss with me the specifics of any proposed health care decision.

5. If I have any further terms or conditions, I state them here:

I have discussed my health care wishes with the person whom I have herein appointed as my health care representative. I am fully satisfied that the person who I have herein appointed as my health care representative will know my wishes with respect to my health care and I have full faith and confidence in their good judgement.

I further direct that my health care representative shall have full authority to do the following, should I lack the capacity to make such a decision myself, provided however, that this listing shall in no way limit the full authority that I give my health care representative to make health care decisions on my behalf:

- a. to give informed consent to any health care procedure;
- b. to sign any documents necessary to carry out or withhold any health care procedures on my behalf, including any waivers or releases of liabilities required by any health care provider;
- c. to give or withhold consent for any health care or treatment;
- d. to revoke or change any consent previously given or implied by law for any health care treatment;
- e. to arrange for or authorize my placement or removal from any health care facility or institution;
- f. to require that any procedures be discontinued, including the withholding of any medical treatment and/or aid, including the administration of nutrition, hydration, and any other medical procedure deemed necessary to provide me with comfort, care, or to alleviate pain, subject to the conditions earlier provided in this document.
- g. to authorize the administration of pain-relieving drugs, even if they may shorten my life.

I desire that my wishes with respect to all health care matters be carried out through the authority that I have herein provided to my health care representative, despite any contrary wishes, beliefs, or opinions of any members of my family, relatives, or friends.

I have read the Notice that precedes this document. I understand the full importance of this appointment, and I am emotionally and mentally competent to make this appointment of health care representative.

I intend for my attorney-in-fact under this Power of Attorney to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (aka HIPAA), 42 USC 1320d and 45 CFR 160-164.

I have read the Notice that precedes this document. I understand the full importance of this appointment. I am over 19 years of age and I am emotionally and mentally competent to make this appointment of health care representative.

Date January 16th 2024

[Signature]
Signature of person granting health care power of attorney and appointing health care representative

Witness Attestation

I, Amanda Langley, the first witness, and I, Whitley L. Stokes, the second witness, sign my name to the foregoing power of attorney being first duly sworn and do declare to the undersigned authority that the principal signs and executes this instrument as his/her power of attorney and that he/she signs it willingly, or willingly directs another to sign for him/her, and that I, in the presence and hearing of the principal, sign this power of attorney as witness to the principal's signing, and that to the best of my knowledge the principal is nineteen years of age or older, of sound mind and under no constraint or undue influence. I am not related to the principal, nor am I entitled to any portion of the principal's estate. I provide health care services to the principal and

• am not financially responsible for the principal's health care.

Ammon T. Langley
Signature of First Witness

Whitley L. Stokes
Signature of Second Witness

Address of First Witness

Address of Second Witness

Notary Acknowledgment

State of South Carolina

County of Anderson

On June 15th, 2014

Cindy Bagwell

came

before me personally and, under oath, stated that he/she is the person described in the above document and he/she

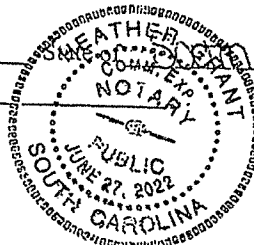
signed the above document in my presence. The witnesses Ammon T. Langley and

Whitley L. Stokes also came before me attested to the above statement and signed the document in my presence.

Heather Hunt
Notary Public Signature

Notary Public In and for the County of Anderson

My commission expires: June 27, 2022



Seal

Acceptance of Appointment as Attorney-in-Fact

I accept my appointment as Attorney-in-Fact.

Cindy Bagwell
Signature of Attorney-in-Fact

Cindy Bagwell
Printed Name of Attorney-in-Fact

California residents or persons intending that this document be valid in the State of California should use the following California Notary Acknowledgment form and the following California Witness Acknowledgments:

California Notary Acknowledgment

State of California

County of _____ } S.S.

On _____, before me, _____

(name and title of notary), personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument. I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct. WITNESS my hand and official seal.

Notary Signature

(Seal)

ELECTRONICALLY FILED - 2021 Apr 06 2:48 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2304832

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Civil Action No. 2020-CP-23-04832
	)	
Debra Lynn B Peele, as Personal	)	
Representative of the Estate of	)	
Iola Aileen Bagwell,	)	
	)	
Plaintiff,	)	Plaintiff's Memorandum in Opposition
v.	)	to Defendants' Motion to Stay and
	)	Compel Arbitration
	)	
Greenville Retirement Properties, LLC	)	
d/b/a Pendleton Manor Assisted Living,	)	
Reatha Connelly, Regency Hospice	)	
of Georgia, LLC, d/b/a Regency	)	
Southerncare,	)	
	)	
Defendants.	)	
	)	

COMES NOW Plaintiff, by and through her counsel, and files this Memorandum in Opposition to Defendants' (Greenville Retirement Properties, LLC's and Reatha Connelly) Motion to Stay and Compel Arbitration and opposes such motion based upon the following:

FACTS

On or about May 17, 2018, Aileen Bagwell entered Pendleton Manor Assisted Living (hereinafter Pendleton Manor) and thereby executed a lease agreement with several appendixes. Aileen Bagwell had a diagnosis of dementia and would not have understood the particulars of this transaction (*See Exhibit 1*). However, Cindy Bagwell, her duly appointment attorney-in-fact also signed the lease and its appendixes. (Exhibit B to Defendants' motion). One appendix was a voluntary arbitration agreement, which neither Aileen Bagwell nor Cindy Bagwell were given an opportunity to read. (Exhibit A).

The arbitration agreement states that it is not a condition of admittance, and therefore is a voluntary pre-dispute arbitration agreement. The arbitration agreement is very specific about who and how disputes would be arbitrated:

By signing this agreement, the resident agrees with the facility that any dispute between you and us, including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) **will be resolved by binding arbitration by the National Arbitration Forum**, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction.

(Appendix to Exhibit A of Defendant's motion). However, the National Arbitration Forum (hereinafter "NAF") ceased performing pre-dispute "consumer cases" and is unavailable to conduct or administer the arbitration in this case. (See Exhibit 2).

On October 20, 2020, Plaintiff filed a Summons and Complaint alleging negligence and gross negligence from fractures of unknown origins that caused significant pain and suffering, and which ultimately led to Aileen Bagwell dying from a morphine overdose administered by these Defendants and their agents. Plaintiff served discovery, which these Defendants ignored for 5 months. When Plaintiff filed its motion to compel, these Defendants filed this motion to stay and to compel arbitration.

LAW

A. Arbitration is a Matter of Contract.

"The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise." *Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App. 2002) citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law. *See e.g., Munoz v. Green*

Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). “The parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate.” *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) citing *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993).

In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). “Although South Carolina Courts are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.” *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). “Our courts’ statements that the law “favors” arbitration were never intended to elevate a contractual right of arbitration above the procedural rules of the court or other contractual provisions.” *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 856 S.E.2d 150, 152 (2021), *reh’g denied* (Apr. 20, 2021). Finally, if there is a genuine issue of fact, the Federal Arbitration Act (FAA) directs the court to hold a trial to determine whether an arbitration agreement exists. 9 U.S.C. § 4.

B. The Designation of the NAF as the Arbitral Forum is Integral to the Arbitration Agreement and the Unavailability of the NAF Mandates that Defendants’ Motion to Compel Arbitration must be denied.

It is not disputed that NAF is unavailable to conduct the arbitration of claims in this case. (Exhibits 2, 3, and 4). In this case, NAF is designated as the specific arbitral forum, and the language makes clear this designation was integral to the agreement to arbitrate. Likewise, the South Carolina Supreme Court in *Grant v. Magnolia Manor-Greenwood, Inc.* held that because the arbitration agreement’s designation of a specific arbitral forum to administer the arbitration proceedings was an integral part of the agreement, *Grant*, 383 S.C. at 131, 678 S.E.2d at 439,

Grant is controlling precedent in this case, and accordingly, Defendants' motion to compel arbitration must be denied.

In *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 382–83, 759 S.E.2d 727, 733 (2014), the South Carolina Supreme Court has reaffirmed the holding in *Grant* and provided additional guidance which reinforces its application to the current case. In *Dean*, the Supreme Court stated as follows:

Thus, in examining similar clauses, a majority of jurisdictions distinguish agreements requiring a proceeding “administered by” the named forum from those requiring a proceeding conducted “in accordance with” the named forum's rules. In the case of proceedings “administered by” a named forum, most courts view the forum selected as an integral term of the agreement because it is an express statement of the parties' intent to arbitrate exclusively before that forum; therefore, if the forum is unavailable, a material term of the agreement has failed, rendering the entire arbitration agreement invalid.

Id. at 382–83, 759 S.E.2d at 733 citing *Grant*, 383 S.C. at 131–32, 678 S.E.2d at 439; (other citations omitted). In this case, the arbitration agreement clearly and unambiguously provides that the claims “will be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect.” This language demonstrates that having the NAF resolve claims was a material term and integral to the agreement. (See also Exhibits 3 and 4). The unavailability of NAF to resolve these disputes renders the agreement unenforceable.

C. Aileen Bagwell was not Competent to Agree to Arbitration and Her Attorney in Fact did not have the Authority to Enter into a Voluntary Pre-Dispute Arbitration Agreement.

At the time of admission, Defendants found Aileen Bagwell to have dementia and to have been “confused.” Although she was oriented to person and place, she was not oriented to time and situation. However, these Defendants want this court to ignore these facts and to enforce the arbitration agreement signed by Aileen Bagwell. This would be clear error, and if there is a

question of fact as to Aileen Bagwell's competency to sign away her right to a trial by jury, this court must order a jury trial on this question of fact.

Moreover, by the terms of the arbitration agreement, it is voluntary. Agreeing to arbitrate Aileen Bagwell's disputes was not required to become a resident of Pendleton Manor. "Our courts have looked to contract law when reviewing actions to set aside or interpret a power of attorney." *Arredondo v. SNH SE Ashley River Tenant, LLC*, 856 S.E.2d 550, 553 (S.C. 2021) quoting *Stott v. White Oak Manor, Inc.*, 426 S.C. 568, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). In *Arredondo v. SNH SE Ashley River Tenant, LLC*, our Supreme Court held that two powers of attorney that provided an attorney-in-fact the authority "to pursue legal action" and "to execute all instruments concerning all types of property, including choses in action" did not provide the attorney-in-fact authority to execute a voluntary pre-dispute arbitration agreement.¹

As it relates to the authority to "pursue legal action" the Court adopted the reasoning of *Kindred Nursing Centers Ltd. Partnership v. Wellner*, 533 S.W.3d 189 (Ky. 2017). Our Supreme Court noted as follows:

The Court recognized "the power to institute or defend suits concerning [Wellner's] property rights would necessarily encompass the power to make litigation-related decisions within the context of a suit so instituted, *including the decision to submit the pending dispute to mediation or arbitration.*" Yet, the Court held the provision did not grant the agent authority to execute a pre-dispute arbitration agreement: "the act of executing a pre-dispute arbitration agreement upon admission to a nursing home ha[s] nothing at all to do with ... institut[ing] legal proceedings."

Arredondo at 559 (internal citations omitted). The Supreme Court held that despite a broad grant of power, including the power to pursue legal action, the attorney-in-fact did not have the authority to execute a voluntary pre-dispute arbitration agreement." *Id.*

¹ The Supreme Court rejected the argument that power of attorney's title had any bearing on the authority expressly granted by the language of the power of attorney. *Arredondo*. at 556.

CONCLUSION

The arbitration agreement in this case appoints NAF to be the arbitral forum, and the unavailability of NAF to resolve this dispute renders the agreement unenforceable. Moreover, Aileen Bagwell did not have the mental capacity to enter into such an agreement, and her attorney-in-fact did not possess the authority to enter into a voluntary pre-dispute arbitration agreement. For these reasons, this Court must deny Defendant's motion to compel arbitration.

Respectfully submitted,

LAW OFFICE OF W. ANDREW ARNOLD, PC

s/ W. Andrew Arnold

W. Andrew Arnold

SC Bar No. 65311

307 Pettigru Street

Greenville, SC 29601

864.242.4800 864.551.4499 fax

aarnold@aallawfirm.com

ATTORNEY FOR PLAINTIFF

May 13, 2021

Patient Information Report

Patient: BAGWELL, AILEEN C Insured ID: 9EG8DD2FX22 Primary Payor: PALMETTO HOSPICE
 MR No: RGV00030878702
 Legacy MR No:

ICD-10 Diagnoses/Procedures

Order	Code	Description	Onset / Exac.	O/E Date	Type	Related to Terminal Prognosis
6	F03.90	UNSPECIFIED DEMENTIA WITHOUT BEHAVIORAL DISTURBANCE	E	05/17/2018	D	Y
7	Z96.642	PRESENCE OF LEFT ARTIFICIAL HIP JOINT	E	05/17/2018	D	Y
8	Z91.81	HISTORY OF FALLING	E	05/17/2018	D	Y
9	R13.12	DYSPHAGIA, OROPHARYNGEAL PHASE	E	05/17/2018	D	Y

Allergies

Description

NKA

Date Entered

5/17/2018 10:22:25 PM

* denotes Non-Visit QI Reporting Collection

Code **F03.90** is the diagnosis code used for Unspecified **Dementia** without Behavioral Disturbance. is a mental disorder in which a person loses the ability to think, remember, learn, make decisions, and solve problems.

Client Coordination Note Report

02/25/2020 12:53:59 PM

Client:	BAGWELL, AILEEN C	Insured ID:	9EG8DD2FX22	Primary Payor:	PALMETTO HOSPICE
MR No:	RGV00030878702				
Legacy MR No:					
DOB					
Primary Physician		Phone		Fax	
DOLAN, LUKE A.		(864)232-4457		(864)232-9054	
Note Date	Note Type	Entered By	Note Status		
10/30/2018	NARRATIVE	PRISCILLA KIRBY, REGISTERED NURSE	Active		
	Last Update	Last Updated By			

Note

83 YO W F IN ALF. DX HYPER HEART WITH KIDNEY DISEASE DEMENTIA DEPRESSION INCONTINENCE O2 DEPENDENT CHF HYPOXIC S O2. DEPENDENT FOR 5/6 ADLS. FEEDS SELF 50-75% 2-3 SMALL MEALS A DAY PLUS SNACKS. WEIGHT DOWN FROM 105# TO 99. LOSS OF 6 LBS. MUAC REMAINS 21 CM. PT SLEEPS APPROXIMATELY 16 HOURS WITH NAPS. RECOGNIZES DTR THAT VISIT DAILY. BUT CAN NOT REMEMBER WHAT HAPPENED 5 MINUTES AGO. IS TRANSFERRED BY ONE FROM BED TO WC. PPS REMAINS 40. PT BECOMES HYPOXIC CONFUSED AND ANXIOUS WITH SUPPLEMENTAL O2 AT 2 L PER MIN VIA NC. PT DENIES PAIN. PT IS INCONTINENT OF BOWEL AND BLADDER REGULAR BMS WITH RX INTERVENTIONS. FAST 6E.

Client Coordination Note Report

02/25/2020 12:53:46 PM

Client:	BAGWELL, AILEEN C	Insured ID:	9EG8DD2FX22	Primary Payor:	PALMETTO HOSPICE
MR No:	RGV00030878702				
Legacy MR No:					
DOB	[REDACTED]				
Primary Physician		Phone		Fax	
DOLAN, LUKE A.		(864)232-4457		(864)232-9054	
Note Date	Note Type	Entered By	Note Status		
12/05/2018	NARRATIVE	JULIE REDMOND, SOCIAL WORKER MSW	Active		
	Last Update	Last Updated By			

Note

MSW VISITED WITH PT ON THIS DATE FOR SCHEDULED VISIT UPON ARRIVAL PT OBSERVED IN WHEELCHAIR POSITIONED FOR COMFORT DRESSED APPROPRIATELY IN FACILITY COMMONS AREA WITH FELLOW PEERS PASSIVELY PARTICIPATING IN A.M. ACTIVITY O2 CONTINUOUS NO SIGNS AND SYMPTOMS OF DISTRESS NOTED MSW APPROACHED PT GREETED WITH A HELLO PT GLANCED UP AT MSW MINIMAL RESPONSES TO VERBAL INTERACTION MSW COMPLIMENTED PT ON APPEARANCE PT RESPONDED APPROPRIATELY FLAT AFFECT WITH WORRIED FACIAL EXPRESSION MSW ATTEMPTED TO ENGAGE PT IN CONVERSATION OF INTEREST PT PRESENTED WITH SHORT ATTENTION SPAN AND FOCUS EASILY ANNOYANCE MSW OFFERED THERAPEUTIC REDIRECTIONS INEFFECTIVE MSW COLLABORATED CARE WITH ASSIGNED STAFF REPORTS PT CONTINUES TO REQUIRE DAILY WEEKLY ADL CARE ASSISTANCE DENIES PAIN OR DISCOMFORT PRESENTS SEVERLY CONFUSED AXOX1 SELF HAS GENERAL WEAKNESS IN EXTREMITIES APPETITE AND SLEEP FAIR WITH FLUCTUATIONS DUE TO DISEASE PROGRESSION PT EXHIBITS SLEEP PATTERN DISTURBANCES RESTLESSNESS AT NIGHT DIFFICULTIES STAYING ASLEEP ATTEMPTS TO REMOVE SELF FROM BED AT NIGHT CURRENT BEHAVIORAL DISTURBANCES DELUSIONAL THOUGHT PATTERNS VISUAL HALLUCINATIONS CONVERSATIONS WITH DECEASED SPOUSE ADL CARE RESISTANCE PERIODS OF COMBATIVENESS IN THE A.M. SOCIALLY INAPPROPRIATE BEHAVIORS DISRUPTIVE SOUNDS REPEATITIVE VERBALIZATIONS YELLS OUT "HELP ME HELP ME" WILL REMOVE CLOTHING IN A.M. AND O2 TUBING SIT ON COUCH IN ROOM NOT EASILY ALTERED DURING ONSETS TRIGGERS DX. OF MAJOR DEPRESSIVE DISORDER DEMENTIA WITHOUT BEHAVIORAL DISTURBANCES FAMILY INVOLVED IN PATIENT CARE DAUGHTER CINDY BAGWELL VISITS DAILY INVOLVED IN PATIENT CARE MSW ATTEMPTED TO CONTACT DAUGHTER FOR ADDITIONAL INFORMATION MESSAGE LEFT NO FURTHER ISSUES NOTED WILL PROCEED WITH POC

ADMISSION FACE SHEET

Pendleton Manor Assisted Living ☐ Memory Care ☒		Room #: 302	Reservation Date: 5-17-18	Move-In Date: 5-17-18
Resident Name: Aileen Bagwell			Marital Status: Single Married <u>Widow</u> Divorced (circle one)	
AGE: 82	DOB: [REDACTED]	SEX: Female ☒ Male ☐	Religion:	
Physician:		Address:		Phone #: Fax#:
ADMITTING DIAGNOSIS				
Primary		General		General
(L) hip fx-surg repair		Hypothyroid		
Dementia w/ Behaviors		CAD		
HTN, CKD, CHF		Depression		
ALLERGIC:				
CONTACTS				
Responsible Party (POA)	Relationship	Address	(H) #	Cell #
Cindy Bagwell	daughter	Greenville SC 29	(W) #	423-136
Next of Kin	Relationship	Address	(H) #	Cell #
Debbie Peele	daughter		(W) #	616-084
Next of Kin	Relationship	Address	(H) #	Cell #
			(W) #	
INSURANCE INFORMATION				
Social Security #	[REDACTED]	Medicare #		
Long Term Ins. #	[REDACTED]	Secondary Ins. #		
Company Name:		Company Name:		
VA Benefits	Yes ☐ No ☒	Private Pay	Yes ☒ No ☐	
GENERAL INFORMATION				
Education: 1 2 3 4 5 6 7 8 9 10 11 12 (circle one)			College: 1 2 3 4 5 6 (circle one)	
Preference		Address		Phone #
Hospital Preference:		St. Frances		
Ambulance Preference:		Ang		
Nursing Home Preference:				
Funeral Preference:				
LEGAL INFORMATION				
DNR: ☐ Yes ☐ No	Living Will: ☒ Yes ☐ No	Medical POA: ☒ Yes ☐ No		
Donor: ☐ Yes ☐ No	Durable POA: ☐ Yes ☐ No	Legal Guardian: ☐ Yes ☐ No		

ELECTRONICALLY FILED - 2021 May 13 2:25 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2304832

BAGWELL- PENDLETON MANOR 00001

Mental Status:	Alert/Oriented	Confused	Mood Swings
Emotional Status:	Stable/Cooperative	Combative	Depression
	Paranoia	Phobias	Anxiety

Please explain any limitations or prescribed services:

Is this individual:

Self-medicating: (Able to understand medication schedule, take correct medications at the proper time, report any perceived side effects and maintain medications in a proper locked area.)

Needing supervision: ☒ (Needing reminders to take medications at prescribed times, assistance opening containers or packages or replacing lids, assistance in obtaining medications from pharmacy and returning medications to proper locked area.)

Please explain limitations: Staff to admin all meds, crushed in apple sauce

Medications and instruction (Please attach an itemized list of both prescribed and over-the counter medications.) Include name, reason for medication.

List any known drug allergies: NKA

Diet Instructions

Diet Requirements: Regular No added salt No conc. Sweets

Mechanical Soft Pureed Chopped Meats

List any known food allergies: None

Individual Characteristics (check the appropriate box):

Yes ☒ No ☐ This individual exercises good judgment in decision-making on personal matters.
If no, please explain: Dementia

Yes ☒ No ☐ The behavior of this individual may pose a danger to self or others that is not controllable by medication. (Medication may be used to help ease agitation, etc., but may not be used for restraining the resident.)

Yes ☒ No ☐ This individual requires continuous daily attention of a Nurse
If yes needs explanation:

☒ Yes ☐ No This individual needs assistance from staff during the night.
If supervision needed, please explain:

Appropriateness (check the appropriate box):

☒ Yes ☐ No Based on the type of care the staff of a Assisted Living (CRCF) may legally provide, the individual's needs can be met in a CRCF for adults that is not a medical facility.

Other Pertinent Information (Please include any other information which may be helpful):

PHYSICIAN (Typed or Printed) <u>Glenn Brothers</u>			MEDICAL LICENSE NUMBER	
ADDRESS			D.E.A. NUMBER	
CITY	STATE	ZIP CODE	PHONE	
PHYSICIAN'S SIGNATURE <u>[Signature]</u>			DATE <u>6/17/18</u>	

Form # RC 04

BAGWELL- PENDLETON MANOR 00008

Mental Emotional Limitations (check all that apply):

Mental Status: ☐ Alert/Oriented ☐ Forgetful ☒ Confused ☐ Memory Lapses

Emotional Status: ☐ Stable/Cooperative ☐ Combative ☐ Mood Swings ☐ Depression

☐ Paranoia ☐ Phobias ☐ Anxiety

Please explain any limitations or prescribed services:

Is this individual:

Self-medicating: ☐ (Able to understand medication schedule, take correct medications at the proper time, report any perceived side effects and maintain medications in a proper locked area.)

Needing supervision: ☒ (Needing reminders to take medications at prescribed times, assistance opening containers or packages or replacing lids, assistance in obtaining medications from pharmacy and returning medications to proper locked area.)

Please explain limitations:

Medications and instruction (Please attach an itemized list of both prescribed and over-the counter medications.)

Include name, reason for medication.

List any known drug allergies:

Diet Instructions

Diet Requirements ☒ Regular ☐ No added salt ☐ No conc. Sweets

☐ Mechanical Soft ☐ Pureed

List any known food allergies:

Individual Characteristics (check the appropriate box):

Yes ☐ No ☒ This individual exercises good judgment in decision-making on personal matters.

If no, please explain: Does not

Yes ☐ No ☒ The behavior of this individual may pose a danger to self or others that is not controllable by medication. (Medication may be used to help ease agitation, etc., but may not be used for restraining the resident.)

Yes ☐ No ☒ This individual requires continuous daily attention of a Nurse

If yes needs explanation:

Yes ☒ No ☐ This individual needs assistance from staff during the night.

If supervision needed, please explain: Safety

Appropriateness (check the appropriate box):

Yes ☒ No ☐ Based on the type of care the staff of a Assisted Living (CRCF) may legally provide, the individual's needs can be met in a CRCF for adults that is not a medical facility.

Other Pertinent Information (Please include any other information which may be helpful):

1. Any condition or habits which would adversely affect the well-being of others in the facility? Yes ☐ No ☒ If yes please explain.

2. Does this person have the physical ability to engage in light, specially designed low-level, geriatric exercise? Yes ☒ No ☐

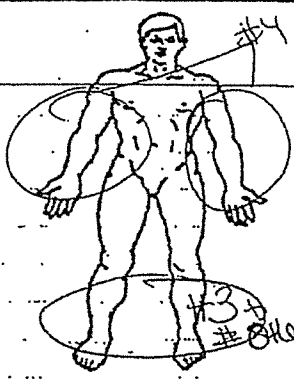
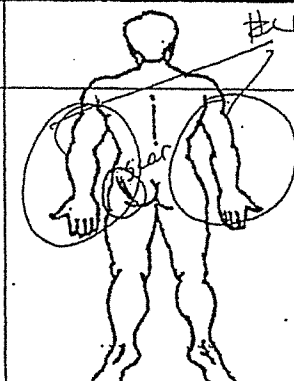
3. Is this person ambulatory; able to enter and exit the facility unassisted? Yes ☒ No ☐

PHYSICIAN (Typed or Printed)	MEDICAL LICENSE NUMBER
Wheeler	
ADDRESS	DEA NUMBER
850 S. Pleasantburg On St. 1A	525440778
CITY	PHONE
Greenville	8642324457
PHYSICIAN'S SIGNATURE	DATE
	5/19

Form # RC 04

BAGWELL- PENDLETON MANOR 00010

**Resident Move -In/ Return
Body Assessment & Admission Note**

Resident: <u>Gillean Bagwell</u>		Date: <u>5-17-18</u>	Time: <u>am</u> <u>pm</u>
Room: <u>302</u>	New Move-in: Yes <u>No</u>	Return from hospital: Yes <u>No</u> <u>✓</u>	
Vitals: T/ <u>98</u> P/ <u>74</u> R/ <u>18</u> BP/ <u>133/80</u> <u>92/60/21</u>		Weight: <u>105</u>	Last BM: <u>5/17/18</u>
Body Condition			
Resident Condition: (circle ones that applies)	<u>Alert</u> <u>Oriented</u>	<u>Ambulatory</u> <u>Non-Ambulatory</u>	Verbal of Needs
Skin Condition: (circle ones that applies)	<u>Normal</u> <u>Dry</u> <u>Moist</u> <u>Oily</u> <u>Scaly</u> <u>Clean</u>		
Walking Device Used: (circle ones that applies)	<u>Wheel chair</u> <u>Walker</u> <u>Cane</u> <u>Prosthesis</u>		
Appearance: (circle ones that applies)	<u>Good</u> <u>Fair</u> <u>Poor</u> <u>Continent Bladder</u> <u>Continent Bowel</u>		
Body Assessment			
	<u>Indicate on Diagram</u> 1. Cuts _____ 2. Abrasion _____ 3. Burn _____ 4. Bruise <u>old to @ groin & L</u> 5. Skin Tear _____ 6. Pain _____ 7. Edema swelling <u>@ LF +3</u> 8. Pressure area _____ - Other specify) <u>purple discoloration</u>		
Admission Note:			
<u>Pts arrived via wk van from rehab BLP @ hip for surgical repair. Scar healing well. PPHA, lungs clear, O2 @ 2L via nc. Breath sounds @ x4 quadrants old bruise to @ LF + legs purple in color skin to toes, +3 edema noted, skin to upper body warm & dry, feet & legs cool. APOA2, in w/c all good here + admitted to hospice today upon arrival to community.</u>			
Staff Signature: <u>[Signature]</u>		Title: <u>LPN</u>	

BAGWELL- PENDLETON MANOR 00011

ELECTRONICALLY FILED - 2021 May 13 2:25 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2304832



PENDLETON MANOR

ASSISTED LIVING AND MEMORY CARE

Lease Agreement



PENDLETON MANOR ASSISTED LIVING AND MEMORY CARE
414 Summit Drive
Greenville, South Carolina 29609



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PENDLETON MANOR

ASSISTED LIVING LEASE AGREEMENT

THIS ASSISTED LIVING LEASE AGREEMENT (the "Lease Agreement") entered into this 17 Day of May, 2018 by and between Pendleton Manor (the "Operator"), and Aileen Bagwell (the "Resident") and Cynthia Bagwell (responsible party).

Resident desires to reside in apartment number 405 (the "Apartment") at Pendleton Manor 414 Summit Drive Greenville SC, 29615 (the Community"), and have the right, in common with others, to use the common areas of the Community and to the services as described in the attached Service Addendum.

FOR CONSIDERATION RECEIVED, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **TERM:** The term of this Lease Agreement is one (1) month (the Initial Term), unless earlier terminated as provided herein, and commencing 5-16-2018 (original date of occupancy) as the Date of Occupancy".
2. **NON-REFUNDABLE INITIAL SERVICE FEE:** A Non-Refundable Initial Service Fee of 1000.00 is required with the acceptance of this lease.
- **BASIC SERVICES FEE:** Resident agrees to pay to the Operator, a Basic Services Fee during the term of this Lease Agreement, which is currently the sum of \$3800.00/month of the Basic Services Fee will entitle the Resident to the use of the Apartment during the term of this Lease Agreement and the services and accommodations described in the Service Addendum. The Basic Services Fee will remain in effect during the absence of a Resident from the Community due to hospitalization or other reason in order to hold the Apartment for the Resident. The Operator may increase the Basic Services Fee once each calendar year pursuant to Paragraph 6, below. All other services not included on the Service Addendum ("Ancillary Services") shall be charged separately in accordance with the fee schedule published and made available to Resident by the Operator, which shall be subject to change with a prior notice. Examples of Ancillary Services include, but are not limited to, services such as beauty and barber, unscheduled transportation, apartment upgrades, guest meals, and special activities away from the Community. Additionally, furniture is available if the Resident does not provide his/her own. There will be a nominal charge to the Resident for the furniture. The Resident may furnish his/her own room. The Operator reserves the right of final approval with regards to health, safety, and appearance decisions. Furniture provided by the Resident shall be the responsibility of the Resident to maintain and insure. At a minimum, the Resident Room shall have a single bed with moisture-proof mattress and linens including sheets, blankets, bedspread, pillow and pillowcases; a closet or wardrobe and bedside table; and a comfortable chair.

3. **PAYMENT OF FEES:** The Resident agrees to pay all prorated charges from the initial Date of Occupancy, along with the first full month's Basic Services Fee on or before the date of move-in. Thereafter, the monthly Basic Services Fee shall be payable in advance on the first (1st) day of each month for the balance of the Term of this Lease Agreement. The Basic Services Fee shall be payable at the business office located at the Community. A late fee of five percent (5%) per month of any unpaid amount shall immediately and automatically be due if not paid prior to the tenth (10th) day of the month, unless otherwise approved in advance and in writing by the Operator.
4. **MONTH-TO-MONTH:** At the end of the Initial Term, this Lease Agreement shall continue on a month-to-month basis, unless either party notifies the other of termination, pursuant to Sections 8 or 9 hereof.
5. **BASIC SERVICE FEE ADJUSTMENT:** The Operator shall have the right to adjust the amount of the Basic Services Fee once during each calendar year, on the anniversary date of this Lease Agreement. A written notice of the adjusted Basic Services Fee shall be sent to Resident no less than thirty (30) days prior to the effective date of any increase.
6. **RESIDENTS LIABILITY:** Resident is financially responsible for all damages to the Apartment, which, in the Operator's opinion, exceeds normal usage. The Operator shall provide Resident with an itemized accounting of any damages assessed, and Resident must pay the Operator for damages within (10) ten days of an invoice. Resident may keep a pet at the Residence pursuant to the Pet Addendum.
7. **TERMINATION BY OPERATOR AND OTHER REMEDIES:** If Resident (i) becomes physically or mentally ill so as to jeopardize his/her safety or to jeopardize the health, comfort, or peace of other residents or employees; (ii) no longer meets any applicable governmental regulations concerning admission; (iii) does not comply with any one or more of the policies, procedures, or house rules of the Community as outlined in the Resident Handbook and the Admission and Discharge Criteria; (iv) refuses to pay any of the Community's charges; or (v) breaches this Lease Agreement, the Operator shall have the right to terminate this Lease Agreement upon fourteen (14) days written notice, not to exceed thirty (30) days.
 - a. The right to terminate this Lease Agreement is not the only right of the Operator upon occurrence of any of the above events, and the Operator retains all other rights and remedies provided for under this Lease Agreement or by law. In the event of Resident's breach of this Lease Agreement, Resident shall be responsible for the Operator's costs and expenses in connection with such breach, including without limitation, reasonable attorney's fees and court costs incurred by the Operator.
 - b. In the event of the death of the Resident or a medical emergency, as determined by the Operator, this Lease Agreement will terminate upon the occurrence of both the receipt by the Operator of notice of Resident's death or medical emergency as applicable and the removal of the Resident's belongings from the Apartment.
 - c. The Operator may immediately transfer or discharge Resident from the Community for health or safety reasons or in the event of an emergency, as determined in the sole discretion of the Operator and in accordance with State regulations. Such transfer or discharge will not be considered a breach, termination, or notice of

termination of this Lease Agreement. The Operator shall discuss the reason for such discharge or transfer with the Resident and/or the personal representative.

- d. If at any time the Operator determines that Resident's mental or physical condition requires or is likely to require another party to assist Resident in making decisions and in handling Resident's personal affairs (including those relating to Resident's occupancy of the Apartment), the Operator may require Resident to provide to the Operator, as a condition of Resident's continued occupancy of the Apartment, an agreement in form and substance, and from a party satisfactory to the Operator, to provide such assistance to Resident.

8. **TERMINATION BY RESIDENT AND REFUND POLICY:** Resident may terminate this Lease Agreement without cause prior to its expiration date by giving written notice to the Operator or its agent. The Operator requires a 14 day notice. Resident must pay to the Operator all fees due to the Termination Date. Termination Date is the date that Resident and all Resident's personal belongings have been removed from the Community. If the Termination Date falls on other than the last day of any month, the charges due for such last month shall be prorated from the first day of such month to the Termination Date. Any refund due Resident will be paid within thirty (30) days after the Termination Date.

9. **USE OF PREMISES:** The Apartment shall be used and occupied as a personal residence and for no other purpose.

10. **SERVICES AND AMENTIES / POLICIES AND PROCEDURES:**

- a. Refer to the Resident Handbook for a summary of services and amenities, and policies and procedures of the Community. The Resident Handbook and Policies and Procedures are made a part of this Lease Agreement, and Resident shall comply with all such policies and procedures as the same may be amended from time to time by the Operator in its sole discretion.
- b. This Lease Agreement includes the Resident Care Plan. A Functional Assessment of Resident's Activities of Daily Living (ADL's), completed at the time of admission, will specifically outline the assistance to be provided to Resident. Resident shall be re-assessed after thirty (30) days and thereafter on a quarterly basis or at any acute change of condition, or as needed to determine the need for changes in the level of assistance needed. At any time a change is observed a new Resident Care Plan will be initiated and will replace the previous Resident Care Plan.

11. **MEDICAL RELEASE OF INFORMATION:** The Resident authorizes providers of medical, nursing and pharmacy services to release information to the Operator as needed.

12. **AUTHORIZATION TO RELEASE INFORMATION:** Resident hereby authorizes and consents to the release of any and all admissions records and medical documents currently on file with the Community. The Operator is hereby authorized and directed to release the information and health records concerning Resident to other medical and health care facilities, insurance companies, federal, state and local agencies and regulatory bodies to the extent necessary to obtain payments and otherwise comply with applicable laws and regulations.

13. **INSURANCE: LIABILITY AND RELEASE:** It shall be Resident's obligation to insure any personal property which may be contained in the Apartment or in storage within the Community, and it shall also be Resident's obligation to insure any personal vehicle belonging to Resident which is parked on the Community's premises.

Resident agrees that the Operator will not be liable to Resident for any personal injury or property damage (including without limitation, damage to or loss or theft of, automobiles or personal property of Resident) suffered by Resident or Resident's agents, guests, or invitees, unless the injury or damage is caused by the gross negligence of the Operator or its employees or agents. Resident hereby releases the Operator from any liability for personal injury or property damage suffered by Resident or Resident's agents, guests or invitees, unless caused by the gross negligence of the Operator or its employees or agents. The Operator shall not be liable to Resident as a result of the criminal acts of any other party.

Notwithstanding anything contained in this Lease Agreement to the contrary, no personal liability shall accrue against the owner of the Community, management company, or any agent, subsidiary, or affiliate of the owner or management company or any individual, officer, director, member, partner, or fiduciary of the owner or management company, or any heirs, personal representative, successor or assign of the foregoing, or shall their respective personally owned property be realized against for the satisfaction of any claims. It being expressly understood and agreed that Resident shall look solely to the Operator's interest in the Community for the satisfaction of any and all claims arising out of or relating to this Lease Agreement or Resident's use and occupation of the Community.

Because of the delay and expense of the court systems, the Operator and Resident agree to use confidential binding arbitration, instead of going to court, for any controversy or claims that arise between the Resident and the Operator, or owner, or the management company, and/or their related companies. This includes any claims concerning this Lease Agreement, resident rights, resident care, resident services and policies and procedures. Before arbitration, Resident agrees first to present any claims in writing and in full detail to the Operator and next, to cooperate with any internal review process by the management company. Such review shall be conducted and completed within ten (10) days of Resident's notice to the Operator. In any arbitration, the then-prevailing rules of the American Arbitration Association shall apply.

14. **MAINTENANCE AND REPAIRS:** The Resident shall, during the term of this Lease Agreement and at Resident's sole expense, keep the interior of the Apartment in as good order and repair as it was at the date of commencement of this Lease Agreement, and further agrees that upon vacating the Apartment, Resident shall remove any and all rubbish and other refuse from the Apartment.
15. **ASSIGNMENT:** Resident shall not assign, mortgage, pledge or encumber this Lease Agreement of the Apartment in whole or in part, nor sublease nor otherwise transfer any interest in the Apartment or any part thereof, without prior written consent of the Operator.
16. **COVENANTS OF RESIDENTS:** Resident covenants that he/she is of good moral character. Resident further agrees that he/she will notify the Operator in the event of any change in his/her financial status, which would affect his/her ability to meet ordinary and

customary living expenses. Furthermore, Resident will notify the Operator of any changes in his/her health status, which affect his/her ability to live at the Community in compliance with the policies outlined in this lease agreement.

17. **COVENANTS OF RESIDENCE:** The Operator covenants that there are no restrictions as to race, creed, national origin, color, or religion.

18. **ACCESS TO APARTMENT:** The Operator and its agents may enter the Apartment to carry out the Operator's obligations under this Lease Agreement, to respond to any emergency situation or other indication that Resident may require assistance. The Operator agrees to make its presence known (except in emergencies) when entering the Apartment and will schedule the entry in advance whenever possible. For Resident's safety in cases of emergency, Resident will not use any private locks or locking devices on the door to the Apartment other than those provided with the Apartment.

19. **TERMINOLOGY AND SECTION HEADINGS:** All personal pronouns in this Lease Agreement, whether used in a masculine, feminine or neutral gender, shall include all other genders, the singular shall include the plural and the plural shall include the singular. Titles of Sections in this Lease Agreement are for convenience only and neither limits nor amplifies the provisions of the Lease Agreement.

20. **SUBORDINATION:** This Lease Agreement and Resident's rights under this Lease Agreement are subject and subordinate to the rights of any holder of the obligations secured by any mortgage, deed of trust or other encumbrance, together with any renewals, extensions, modifications, consolidations and replacements of them, that now or at any subsequent time may affect the Community or the Operator's or the owner's interest therein. This provision shall be self-operative and no further instrument of subordination will be required in order to effectuate it. If the holder succeeds to the interest of the owner of the Community, the holder in its discretion may 1) require Resident to attorn to the holder so that this Lease Agreement remains in full force and effect between Resident and such holder upon the terms and conditions stated herein, or 2) terminate this Lease Agreement. This Lease Agreement and Resident's interest in the Apartment are subject and subordinate to the owner's lease of the Community to the Operator.

21. **AMENDMENT:** This Lease Agreement constitutes the complete and entire agreement with respect to the subject matter addressed herein and shall not be modified or amended except by written agreement, signed by the parties hereto. The Operator will be neither liable for, nor bound by, any statements made by any person representing or purporting to represent the Operator unless such statements are described in this Lease Agreement.

22. No provisions of this Lease Agreement shall supercede Federal, State or local laws.

IN WITNESS THEREOF, the parties have executed this Lease Agreement as indicated below.
By signing below Resident acknowledges receipt of the Resident Handbook.

ELECTRONICALLY FILED - 2021 APR 06 2:48 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2304832
ELECTRONICALLY FILED - 2021 MAY 13 2:23 PM - GREENVILLE - COMMON PLEAS - CASE#2020CP2304832

5250 NONAPOROTETONETDNDNBAW - 5250

By: Susan S. Blae'z

Executive Director

5-17-18

Date

Aiken Bagwell
Cynthia Bagwell (ROA)

Resident

5-17-18

Date

Responsible party acknowledges that he/she has read and understands the foregoing Lease Agreement and agrees to perform Resident's obligations under the Lease Agreement.

Cynthia Bagwell 5-17-18

Name of Responsible Party

Date

FEE SCHEDULE FOR 2018

Fee for Room and Care Services For Assisted Living Memory Care	Private room - \$3700
	Private room - \$3800
Shared Space	Shared suite - \$ 3200
One Time Non-refundable Community Fee	\$1000
Incontinence Products	Ordered if requested and invoiced to family
Guest Meals	Guest Meals are \$5 per person. Please try to give our kitchen a 4-hour notice if the resident will be having guests for any meal.
Transportation	The facility will assist with the coordination of local (Greenville) medical appointments as needed.

Miscellaneous Items:

Room Furnishings	provided by resident or family
Supplies	per invoice billed by store or vendor
Dietary Supplies	per invoice billed by store or vendor
Medications	Ordered by community from Contract Pharmacy
Safety Equipment	per invoice billed by store or vendor
Personal Care Products	provided by family
Linens, Towels, or Bedding	provided by family
Beauty Shop	per invoice billed by store or vendor

Cynthia Bagwell
 Printed Name of Resident or Responsible Party

5-17-18
 Date

Cynthia Bagwell
 Signature of Resident or Responsible Party

Susanne S. Blane
 Executive Director Signature

APPENDIX

Arbitration Agreement

Arbitration is a cost effective and time saving method of resolving disputes without involving the courts. In arbitration proceedings, the disputes are heard and decided by a private individual called an arbitrator. Neither the Community nor the Resident is waiving their right to sue or obtain statutory and/or contractual remedies by agreeing to arbitrate disputes within the scope of this Arbitration Agreement. However, the dispute will not be heard or decided by a judge or jury, as both the Community and the Resident desire and expressly agree that any dispute between them be resolved outside of the court system.

By signing this agreement, the resident agrees with the facility that any dispute between you and us, including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made (including, to the full extent permitted by applicable law, third parties who are not signatories to this Agreement) will be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. Any award of the arbitrator(s) may be entered as a judgment in any court having jurisdiction. In the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion will not be effective and the remainder of the agreement will remain effective. Information may be obtained and claims may be filed at any office of the National Arbitration Forum, at www.arbitration-forum.com, or at P.O. Box 50191, Minneapolis, MN 55405. This agreement will be governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.

This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the facility including any spouse or heirs of the resident.

This provision for arbitration may be revoked by written notice delivered to the facility within 14 days of signature.

The resident understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the facility and its employees and agents, cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

The resident also understands that nothing in this agreement prevents him/her from contacting regulatory or administrative agencies in relation to services provided by the facility, and that, once admitted, the resident cannot be discharged for refusing this agreement.

Aileen Bagwell 5-17-18 Cynthia Bagwell 5-17-18

Signature of Resident (Date) Signature of Resident's Legal Representative (Date)

Susan S. Blauer 5-17-18

Signature of Community Representative (Date)

BAGWELL- PENDLETON MANOR 02578

APPENDIX - A

RESPONSIBLE PARTY AGREEMENT

Aileen Bagwell (the "Resident"), Cynthia Bagwell (the "Responsible Party"), and Pendleton Manor.

WHEREAS, the Resident desires to live in the apartment referenced in Pendleton Manor Lease Agreement to which this Agreement is attached: and

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

WHEREAS, the Responsible Party has agreed to provide such assistance and to pay such obligations if and as necessary.

In consideration of the foregoing, the receipt and sufficiency of all of which is hereby acknowledged, the parties agree as follows:

1. In the event that the conditions of the Resident makes such assistance necessary or advisable, the Responsible Party, upon the request of Pendleton Manor, will:
 - a. Participate as needed with Pendleton Manor staff in evaluating the Resident's needs and in planning and implementing an appropriate plan for the Resident's care;
 - b. Assist the Resident as necessary to maintain the Resident's welfare and to fulfill the Resident's obligations under the Lease Agreement;
 - c. Assist the Resident in transferring to a hospital, nursing home or other medical residence in the event that the Resident's needs can no longer be met by Pendleton Manor.
 - d. Assist in removing the Resident's personal property from the Apartment when the Resident leaves the Residence;
 - e. Make necessary arrangements or assist the legally responsible person in making necessary arrangements for funeral services and burial in the event of death.
2. In the event that the Resident fails to pay any amount or amounts due to Pendleton Manor under the Lease Agreement, the Responsible Party hereby agrees to pay Pendleton Manor all amounts due from the Resident under the Lease Agreement as it may be amended from time to time, including any amounts resulting from increases in fees or charges authorized by the Lease Agreement or attachments. The Responsible Party agrees to pay Pendleton Manor within thirty (30) days of receiving each notice from Pendleton Manor of non-payment by the Resident. Responsible Party agrees that recourse may be had against Responsible Party hereunder without recourse first having been had against Resident or the assets of Resident.
3. The Responsible Party acknowledges that he/she has reviewed a copy of the Lease Agreement, and has had an opportunity to ask any questions the Responsible Party may have.

IN WITNESS WHEREOF, the undersigned have duly executed this Agreement, or have caused this Agreement to be duly executed on their behalf, as of the day and year first above written.

RESIDENT		RESPONSIBLE PARTY	
<u>A. Baywell</u>	<u>5-17-18</u>	<u>Cynthia Baywell</u>	
Signature	Date	Signature	
<u>Anleen Baywell</u>	<u>5-17-18</u>	<u>Cynthia Baywell</u>	
Printed Name	Date	Printed Name	
<u>Sharon S. Baywell</u>	<u>5-17-18</u>		
Executive Director	Date		

APPENDIX - B

PET AGREEMENT

1. Resident accepts full responsibility for the bird, dog or cat (hereby referred to as "pet") and its actions. All liabilities of the pet are the sole responsibility of the Resident and not Pendleton Manor.
2. The pet must be on a leash or in a cage at all times when entering or leaving the Residence. Pets are not allowed in the common areas of the facility with exception of pets that provide assistance to the Resident, such as a seeing-eye dog.
3. Weight of pets is limited to twenty (20) pounds and under, unless the pet provides assistance to the Resident, such as a seeing-eye dog.
4. All pets must be spayed/neutered; cats de-clawed and be indoor cats only. No exceptions. Cat litter must be disposed of properly and not dumped into toilets.
5. A non-refundable \$500.00 pet fee for each pet shall be paid prior to move-in and held to cover the cost of any necessary repairs due to damage caused by the pet.
6. When taking pets outside, the designated outer perimeter (away from the building) must be used. All droppings must be cleaned up and disposed of in appropriate trash receptacles. Care must be taken not to kill grass or plantings in landscaped areas.
7. This Addendum is applicable solely to the pet, which is in possession at the time the signing of the Lease Agreement.
8. For the safety of the Resident, staff and pet, the pet shall be on a leash with the owner present or, in a crate during the times a Pendleton Manor staff member is performing a service in the Residents apartment (i.e., housekeeping, maintenance, etc). The housekeeping staff has the right to enter the apartment to clean any unsanitary conditions resulting from the pet which is not handled by the resident.
9. All pets must have, and maintain, a current health certificate, a copy of which must be provided to the Residence.
10. Pendleton Manor reserves the right to request that the Resident or Responsible Party make other housing arrangements for an existing pet, if it is deemed by the Executive Director that the Resident cannot adequately care for the pet, or if having a pet poses a risk to the Resident or to other residents of Pendleton Manor, or a nuisance to others.
11. Ongoing discretion will be exercised by the Executive Director with regard to residents and staff, noise, cleanliness and procedures in caring for the pet.
12. Pendleton Manor has the right to remove the pet at Residents/Responsible Party's expense if the Resident/Responsible Party refuses to do so.
13. Pet Fee in the amount \$ 0 received on —.

Resident/Responsible Party Signature: C. Bagwell
Printed Name: Cynthia Bagwell No Pets
Date: 5-17-18

APPENDIX – C

ALZHEIMER'S DISCLOSURE STATEMENT

Mission

It is the mission of the Pendleton Manor Reflections Program is to provide a safe, secure, familiar and consistent environment that allows residents to move about freely in the community. A structured but flexible lifestyle will be provided for all residents by developing an individual plan of care, including activities suitable for each resident's needs. Each resident's care plan will stress maintaining the resident's present abilities and promote the highest possible level of physical and mental functioning possible.

We believe in maintaining each resident's dignity through the design of our physical environment. The community design allows ample space for physical exercise, ample space for planned and spontaneous social activities. Assistance with activities of daily living is provided by trained caregivers. Medication management for each resident is provided by Trained Medication Technicians. We also provide each resident with proper nutritious meals.

Disclosure Statement

Process and Criteria for Admission, Transfer or Discharge:

1. Prior to admission, residents must have a physician's report of examination (physician's history and physical) completed within 30 days prior to admission to the community. The physical examination may reflect that the resident has a diagnosis of probable Alzheimer's Disease or other dementias, a description of any behavioral, personality and physical symptoms, and treatment plan and has symptoms which demonstrate a need for placement in the secured community. Other related dementias may include, but not limited to, Lewy body Disease, Vascular Dementia, Parkinson's Disease, etc. Physical examinations will be completed at least annually.
2. The Executive Director or Director of Resident Care shall specify the appropriateness of the individual's placement by completing an assessment prior to admission. This assessment helps to determine the care needs of the residents and services to be provided. The facility bases admission decisions on the facility's ability to meet the individual's needs, state licensure limitations on the facility's level of care, and the availability of licensed nursing staff to provide care. Any resident needing hospitalization, nursing home care, has a contagious disease or requires continuous medical or nursing supervision will not be admitted.
3. The assessment includes but is not limited to a social history; family supports; level of activities of daily living, physical functioning; cognitive level; behavioral impairment; and nutritional status, including weight and nutritional requirements. This assessment will help to determine significant behavioral manifestations of dementia or cognitive impairment observed by the family member or health care professional e.g., significant confusion and disorientation, pacing and wandering (especially at night), attempts to elope or has eloped, social isolation, agitation, aggression, inappropriate social or sexual behavior, eating/feeding difficulties and communications disabilities. Residents that are admitted have been screened, assessed and approved by a physician to determine appropriateness. Residents' service and care needs will be identified by completing this functional assessment. Services will be provided 24-hours a day and will be provided by a trained

Medication Technicians and trained caregivers. These services include activities of daily living, basic first aid and medication administration.

4. If non-continuous (intermittent) skilled services are needed, these services will be provided by Home Health or Hospice.
5. If a resident is exhibiting uncontrolled behaviors and current interventions can not manage the behaviors, the resident may be immediately transferred for treatment in an acute hospital or other behavioral setting. The family must be involved in this process.
6. If the level of care exceeds the facility license or if a resident has become injurious to self or others and treatment in an acute hospital or other setting does not improve the resident's condition, discharge may be necessary. If the resident's financial status changes and they are no longer able to pay, the community will work with the family to find payment (and give notice). Families are informed and involved regarding decisions related to discharge. When a change of condition is identified, communication begins with the family immediately. Any new assessments are shared with POA/the family.
7. The family member/ responsible party/Power of Attorney (POA) seeking admission of a resident into the facility shall be provided with a copy of this disclosure statement and a copy of the admission agreement.
8. This secured unit may also provide services to and care for residents without a dementia diagnosis, but desires to live in the unit. The resident would waive his or her right to live in a less restrictive environment.

Care Planning Process:

1. Residents are assessed with 72 hours of admission, 30-days after admission, quarterly and upon change of condition.
2. The Individualized Care Plan (ICP) is developed by the administrator (or designee) and Resident/POA within seven days of admission, quarterly and upon change of condition.
3. The ICP will address: The needs of the resident, including the activities of daily living for which the resident requires assistance, what assistance, how much, who will provide the assistance, how often, and when. It will address transportation arrangements for visits to physicians or other health providers, advanced care directives/healthcare power-of-attorney, recreational and social activities which are suitable, desirable for the resident and the resident's dietary needs.
4. The ICP will indicate objective measurable goals, interventions, the responsible person in the facility to help meet the needs of the resident and the expected achievement dates.
5. The facility will maintain a copy of the written plan of care for the Resident which has been developed by the community.

Staffing Patterns:

1. The number and qualifications of staff members will be determined by the number and condition of the residents, including those with Alzheimer's disease and/or related dementia in an Alzheimer's special care unit or program.
2. The minimum number of staff members that will be one staff member for each eight residents on duty during all periods of peak hours. During nighttime (non-peak) hours, there shall be at least one staff member on duty for each 30 residents.

3. Since there will be residents whose cognitive/physical impairments prevent them from safely evacuating the facility independently, a staff member shall be awake and dressed during nighttime hours.

Staff Training:

Prior to resident contact and at least annually, staff will be in-serviced on the following.

- Basic first-aid to include emergency procedures as well as procedures to manage/care for minor accidents or injuries;
- Procedures for checking and recording vital signs (for designated staff members);
- Management/care of persons with contagious and/or communicable disease, such as hepatitis, tuberculosis, HIV infection;
- Medication management including storage, administration, receiving orders, securing medications, interactions, and adverse reactions;
- Care of persons specific to the physical/mental condition being cared for in the facility, e.g., Alzheimer's Disease and/or related dementia, cognitive disability, etc., to include communication techniques (cueing and mirroring), understanding and coping with behaviors, safety, activities, etc. Ten (10) hours of this specialized Alzheimer's/dementia care training will be conducted within the first 30 days of hire into the memory care unit and again annually.
- Use of restraints in accordance with the provisions of Section 905. This facility does not use restraints or side rails.
- OSHA standards regarding blood-borne pathogens;
- Cardiopulmonary resuscitation for designated staff members/volunteers to insure that there is a certified staff member/volunteer present whenever residents are in the facility;
- Confidentiality of resident information and records and the protecting of resident rights (review of Bill of Rights for Long-Term Care Facilities (Resident's Bill of Rights), etc.);
- Fire response training within 24 hours of their first day on the job in the facility;
- Emergency procedures/disaster preparedness within 24 hours of their first day on the job in the facility.

Physical Environment and Safety Management:

The Neighborhood environments you create play a key role in making Reflections an acceptable alternative for families in giving residents feelings of validation and security. The four factors in creating the best environments are Customized Wellness, Safety Management, Alarm Systems and Risk Management Tools.

Customized Wellness:

Our customized wellness for our Reflections residents includes the Mini Mental or Reflections Profile Assessment. This is designed for the Coordinator/Lead to document abilities with activities of daily living, cognitive abilities and behaviors exhibited. This provides for individualized and meaningful assistance in maintaining resident independence and/or compensation for losses. This does not replace the current Vitals assessments.

Safety Management:

Our safety program is designed to provide a secure environment for our residents. It includes alarm system response and operation and risk management assessment tools.

Alarm Systems:

All Reflections Neighborhoods are equipped with an alarm system to assist in assuring the security of our Neighborhoods. All Neighborhoods have exterior door alarms to alert staff that residents may be attempting to leave the secured area. This allows staff members to intercede as necessary. All courtyards and patios are enclosed and secured as well.

Risk Management Tools:

There are two documentation tools that will be used to proactively consider the potential for a negative outcome to develop and to allow an intervention plan to be initiated. These include Elopement Assessment and Fall Risk Assessment.

1. Elopement Assessment

Residents often have a desire to leave the secured area of the community which puts them at serious risk or harm. The Elopement Assessment Tool provides the means of identifying those residents who are more likely to attempt elopement. The assessment is completed for residents that are exit seeking and are triggered by the Care Vitals Assessment. It may be completed by the Director of Resident Care or designee upon admission and quarterly thereafter. Written interventions are reviewed and approved by the Director of Resident Care and the responsible party and are included on the care plan.

2. Falls Assessment

The resident with Dementia is at an increased risk to fall. The increased risk is due to decreased activity, decreased safety awareness and physical problems. The Fall Assessment is used to alert us to the potential of falls and potential injuries. It is critical the assessment is completed upon admission, after a fall or quarterly thereafter by the Director of Resident Care or Designee. The need for that Fall Assessment may also be triggered by the Vitals Assessment. Interventions are included on the care plan.

Resident Activities:

Activities surround us 24 hours a day. The resident with Dementia can have a heightened sense of activity and every moment in his or her 24 hour day is an opportunity to contribute to his or her well-being. Every interaction they have with you or your staff, whether it is scheduled or unscheduled, is a building block creating a Neighborhood that meets all our program objectives.

Residents in our Reflections Neighborhood need an environment that provides support to be who they are, a sense of security and a feeling they are contributing or adding value on a daily basis. In planning your Neighborhood program for any given day keep in mind you are striving for outcomes that contribute to a meaningful life for your residents. Consider the following when you are selecting an event or activity:

- ☐ Does it mirror "normal" daily living as much as possible?
- ☐ Does it involve meaningful experiences?
- ☐ Does it promote social relationships?
- ☐ Is it based on familiar activities they may remember from the past?
- ☐ Is it based on individual interests?
- ☐ Does it create fun or a sense of well-being?
- ☐ Does it stimulate memory enhancement?
- ☐ Does it allow the opportunity to express thoughts and/or feelings?

Beacon Communities has identified four types of activities that should be included in your program planning.

They include:

Normalized Activity

The resident finds satisfaction through accomplishing purposeful tasks and reliving learned roles. These activities allow the resident to release excess energy, feel a sense of identity and reinforce self-esteem.

Recreational Activity

These events or activities enable the residents to have fun and fulfill the needs for emotional satisfaction and intimacy.

Memory Enhancing Activity

Through memory enhancement activities or events, residents are encouraged to remember what is important to them and assist in memory enhancement. Residents gain validation, seeing meaning in their lives and fulfill the need to leave a legacy.

Sensory Activity

Residents are allowed to appropriately express emotions and are provided a creative outlet.

Family Role in Care:

Family orientation is the family's introduction to the Reflections Neighborhood Program. Provide this information to each of your resident's families upon admission. Remember when a resident is admitted to our Reflections unit, there is usually a period of adjustment.

The Coordinator/Lead will provide a list of recommendations to the family or responsible party prior to or upon admission.

When a resident is admitted to a neighborhood, there is usually a period of adjustment. To make this time easier we suggest you pack the following items:

- Clothing that is loose, washable and easy to put on. Please label the inside of the clothing with a permanent marker.
- Shoes that slip on and are comfortable.
- Bedding and comforters that are familiar; these will help the new bed appear more inviting.
- Pictures of family or friends, perhaps in a photo album
- Items for the Memory Box
- Favorite toiletry items; no breakable bottles please

Items to Leave at Home:

- Valuables
- Money
- Over the counter medications
- Chemicals
- Easily breakable items
- Sharp items

One of the key program goals is to create a family atmosphere where the residents can engage in meaningful activities. Families are encouraged to participate in activities, dine with the resident and participate in the development of the memory boxes, life stories, activity boxes and life skill stations.

Cynthia Bagwell
Print Name of Resident/Responsible Party

C Bagwell
Signature of Resident/Responsible Party

Susan S. Blair
Community Representative

5-17-18
Date

5-17-18
Date

BAGWELL- PENDLETON MANOR 02587

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Case Type: Other Civil
(Consumer Protection)

State of Minnesota by its Attorney General,
Lori Swanson,

Court File No. 27-CV-09-18550
Judge John L. Holahan

Plaintiff,

vs.

CONSENT JUDGMENT

National Arbitration Forum, Inc.,
National Arbitration Forum, LLC, and
Dispute Management Services, LLC, d/b/a
Forthright,

Defendants.

WHEREAS, Plaintiff State of Minnesota, by and through its Attorney General, Lori Swanson ("State"), filed a Complaint in this matter on July 14, 2009 ("Complaint") against National Arbitration Forum, Inc., National Arbitration Forum, LLC, and Dispute Management Services, LLC, d/b/a Forthright (hereinafter, collectively, the "NAF Entities") (the State, and the NAF entities are hereinafter collectively referred to as the "Parties");

WHEREAS, this Consent Judgment shall not be construed as an admission of wrongdoing or liability by the NAF Entities;

NOW, THEREFORE, in the interest of resolving this action, the State and the NAF Entities hereby stipulate and consent to entry of this Consent Judgment, as set forth below:

1. The purpose of this Consent Judgment is to require the complete divestiture by the NAF Entities of any business related to the arbitration of consumer disputes.

2. The term "Consumer Arbitration" means any arbitration involving a dispute between a business entity and a private individual which relates to goods, services, or property of any kind allegedly provided by any business entity to the individual, or payment for such goods, services, or property. The term includes any claim by a third party debt buyer against a private individual. It does not include, however, the arbitration of internet domain name disputes on behalf of the Internet Corporation for Assigned Names and Numbers (ICANN), the processing of personal injury protection (PIP) disputes, the processing of shipping or storage disputes under 49 CFR § 375.211, or arbitrations where a NAF Entity is appointed and supervised by a government entity.

3. On or after July 24, 2009, no NAF Entity shall:

- a. Accept any fee for processing any new Consumer Arbitration.
- b. Administer or process any new Consumer Arbitration.
- c. In any manner participate in any new Consumer Arbitration.
- d. Attempt to influence the outcome of any arbitration proceeding currently pending before it.

4. The NAF Entities shall not engage in any deceptive practices, or make any false or misleading statements, in violation of Minn. Stat. §§ 325F.69, subd. 1; 325D.44, subd. 1; and 325F.67.

5. The NAF Entities shall pay investigative costs to the State of Minnesota within ten days of the date this Consent Judgment is signed. Notwithstanding this payment, the NAF Entities shall also pay the State of Minnesota an amount equal to any amount paid to the City of San Francisco over the next six months, in excess of the City's actual investigative expenses and attorneys' fees.

6. The Parties have read this Consent Judgment and voluntarily agree to its entry.

7. In consideration of the stipulated relief, the sufficiency of which is acknowledged, the Office of the Attorney General, by execution of this Consent Judgment, hereby fully and completely releases the NAF Entities, including all of their past and present agents, employees, officers, directors, subsidiaries, shareholders, and affiliates, of any and all claims of the Attorney General connected with or arising out of the allegations in the State's Complaint in the above-captioned action, up to and including the date of this Consent Judgment.

8. Promptly after receiving notice that the Court executes this Consent Judgment, the State shall voluntarily dismiss the above-captioned action pursuant to Minnesota Rule of Civil Procedure 41.01(a).

9. The Parties shall cooperate to implement and facilitate this Consent Judgment, including the exchange of information reasonably necessary for that purpose or to confirm the NAF Entities' compliance with this Consent Judgment.

10. Any failure by any Party to this Consent Judgment to insist on performance by any other Party of any provision of this Consent Judgment shall not be deemed a waiver of any of the provisions included herein.

11. The Parties agree to bear their own costs and fees in this matter.

12. Each Party participated in the drafting of this Consent Judgment, and each agrees that the Consent Judgment's terms may not be construed against or in favor of any Party by virtue of draftsmanship. Each signatory further agrees they have authority to enter into this Consent Judgment.

13. This Consent Judgment, including any issues relating to interpretation or enforcement, shall be governed by the laws of Minnesota. The Court shall retain jurisdiction over this matter to enforce the terms of this Consent Judgment.

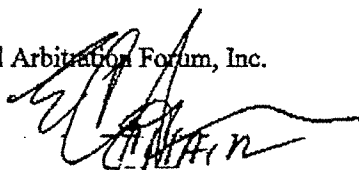
Dated:

7/17/09

National Arbitration Forum, Inc.

By:

Its



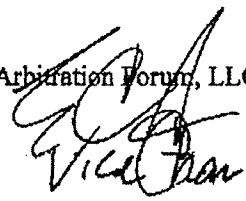
Dated:

7/17/09

National Arbitration Forum, LLC

By:

Its



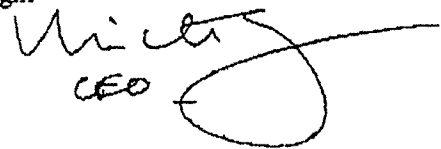
Dated:

7/17/09

Dispute Management Services, LLC, d/b/a
Forthright

By:

Its



Dated:

7/17/09

LORI SWANSON
ATTORNEY GENERAL
STATE OF MINNESOTA


Lori Swanson

IT IS SO ORDERED.

Dated:

BY THE COURT:

John L. Holahan
Hennepin County District Court Judge

LET JUDGMENT BE ENTERED ACCORDINGLY.



OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

July 19, 2009

President
American Arbitration Association
Corporate Headquarters
1633 Broadway
10th Floor
New York, New York 10019

Dear President:

This office recently concluded a year long investigation of National Arbitration Forum ("NAF"). The investigation concluded with an agreement by NAF that it would no longer arbitrate consumer debt disputes. I enclose a copy of the Consent Order and the amendatory letter. While the lawsuit focused on conflict of interest issues, our investigators and attorneys also interviewed over one hundred consumers who complained about the arbitration process. Based on our investigation, it is my conclusion that pre-dispute mandatory arbitration provisions are fundamentally unfair to the consumer. This is particularly the case with credit card contracts and other consumer contracts—such as cell phone, utility, loan, and hospital agreements—where the mandatory arbitration provisions are hidden in the fine print. Our findings include the following:

First, pre-dispute mandatory arbitration agreements are nearly always the product of unequal bargaining power between the consumer and the business. In almost every interview we found that the consumer was not aware of the arbitration provision. In many cases the consumer never saw the provision, because it was simply mailed with a monthly statement. The consumer is given virtually no opportunity to reject the provision. Yet, through these provisions, the consumer gives up their important right to have his or her day in court.

Second, because the consumer is unaware of the mandatory arbitration provision, in many cases the consumer ignored the notice of arbitration served on them. Since they did not know that they agreed to arbitration, and were unfamiliar with the arbitration process, they didn't believe they were obligated to respond to an arbitration notice from an office in Minnesota. It is part of our democracy that we have a right to redress in a court of law, and that includes the notion that the court should be easily accessible to the consumer. Through pre-dispute mandatory arbitration clauses, consumers forfeit this important right without even knowing it.

Third, it is apparent, based on many interviews with consumers, arbitrators and employees of NAF, that arbitrators have a powerful incentive to favor the dominant party in an arbitration; namely, the corporation. Indeed, there is a term commonly used in the arbitration industry called "repeat player bias," describing a phenomena describing where an arbitrator is more likely to favor the party that is likely to send future cases. This bias does not exist in a court, where the judge is not reliant on a dominant player for his or her future income. In the case of NAF, arbitrators and employees claimed that arbitrators who issued an award against the corporation, or who failed to award attorney's fees against the consumer, were simply "deselected" and not appointed to future proceedings.

Fourth, consumers are not aware they can submit exhibits, and many are not aware that there will only be a "document hearing" with no opportunity to be heard. For instance, victims of identity theft were not told to submit a copy of a police report, even though arbitrators were advised that, absent such documentation, the claim of identity theft should be ignored.

Fifth, the arbitration process is fundamentally unfair for holding corporations responsible for any wrongdoing. In some cases, consumers forfeited important rights in the fine print of contracts they had never seen. Consumers who we interviewed in the NAF investigation were told that, when they initiated a claim against the corporation, the claim could be delayed for up to one year before there was any review of the matter.

There are many other defects in the process. The fundamental problem with consumer arbitrations under "fine print" contracts is that the arbitration company draws its income from the dominant participant—namely the credit card company, telecommunications company, the hospital, etc.—and personnel have a financial incentive to make sure that the corporation is pleased with the outcome. Otherwise, the corporation will undoubtedly look to other arbitration administrators. As noted above, this "repeat player" bias does not occur in court, since judges rely on taxpayers—not litigants—for their income.

In short, for the above reasons and many others, I ask that your organization take the initiative to announce that it will not accept the arbitration of credit card and other consumer debt claims based on pre-dispute mandatory arbitration clauses. Because the AAA and NAF are the largest arbitration companies, I believe such a proclamation by AAA would be a powerful signal to Congress that reform is desperately needed in this area.

Sincerely,



LORI SWANSON
Attorney General

Enclosure

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) Case Number: 2009-CP-23-6381
2009 JUL 13 P 3:22
Florence L. Briody, Personal Representative)
of the Estate of Harriett Lucy Hartsgrove,)
Plaintiff,)
vs.)
THI of South Carolina at Magnolia Place)
at Greenville, LLC, THI of South Carolina,)
LLC, THI of Baltimore, Inc., Fundamental)
Long Term Care Holdings, LLC,)
Fundamental Administrative Services, LLC)
and Fundamental Clinical Consulting, LLC)
Defendants.)

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JUL 13 2009
ORDER

This matter comes before the Court on Defendant THI of South Carolina at Magnolia Place at Greenville, LLC's Motion to Stay and to Compel Arbitration as follows:

I. FINDINGS OF FACT

1. Harriett Hartsgrove was 92 years old when she became a resident of Magnolia Place of Greenville in June 15, 2005. Ms. Hartsgrove executed a durable power of attorney on June 10, 2005.

2. On June 15, 2005, Ms. Hartsgrove's daughter, Florence L. Briody, executed all of the admissions documents on behalf of her mother, including an "Admission Contract" which contained an arbitration provision to be "administered by the National Health Lawyers Association (the 'NHLA')." The NHLA is now the American Health Lawyers Association or AHLA. Also on June 15, 2005, Mrs. Briody also executed a separate Arbitration Agreement in which the parties agreed to arbitrate "as provided by the National Arbitration Forum Code of Procedure."

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3. Ms. Hartsgrove was injured in September 10, 2007 while in the custody and care of Defendant. Ms. Hartsgrove was hospitalized on September 15, 2007 as a result of this injury. Plaintiff alleges negligence related to the cause and treatment of this injury, which is the basis of the claims asserted in this action.

4. In 2004, the AHLA ceased administering pre-injury arbitration agreements.¹ At the time Mrs. Briody executed the Arbitration Agreement in June 2005, AHLA's rules of arbitration provided:

The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 *only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service* at the time the parties make a request for a list of arbitrators. For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

5. Under the AHLA Rules, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. Standing alone, the parties' waiver of this set of rights in the Admissions Contract's arbitration provisions and the AHLA rules appear to reflect their specific intent to arbitrate *exclusively* before that body. The AHLA has its own fee schedule that applies to all aspects of the arbitration. The AHLA appears to be an integral part of the agreement to arbitration.

6. However, at the same time as Mrs. Briody executed the Admissions Contract,

¹ Defendant contends that a later amendment to the AHLA rule permits arbitration under a pre-injury arbitration agreement if a judge orders the AHLA to administer the arbitration agreement. This rule was not in place at the time the parties executed the agreement. Second, the AHLA is not a party to this action and it is difficult to understand how the court issue an order directed at AHLA. Third, because Defendant contends that in fact the National Arbitration Forum's rule govern the arbitration, it is difficult to reconcile this contention with the application of the AHLA's subsequent amendment.

Mrs. Briody signed a separate Arbitration Agreement requiring “arbitration as provided by the National Arbitration Forum Code of Procedure” (“NAF Code”). The NAF has its own fee schedule that applies to all aspects of the arbitration. It also has rules on communications, service, counting of days, publication and form of the award, release of documents and administration. These terms are different than in the AHLA rules.

7. Importantly, as it relates to administration, the 2005 NAF Code provides:

“This Code shall be deemed incorporated by reference in every Arbitration Agreement, which refers to the National Arbitration Forum, the International Arbitration Forum, the Arbitration Forum, arbitration-forum.com or this Code of Procedure, unless the Parties agree otherwise. **This Code shall be administered only by the National Arbitration Forum.**”

(Emphasis added). Standing alone, the parties' agreeing to arbitrate as provided by the NAF Code of Procedure would appear to reflect their specific intent to arbitrate *exclusively* before that body. Based upon these rules which by its terms are incorporated by reference into the Arbitration Agreement, the NAF appears to be an integral part of the agreement.

8. Mrs. Briody was not given a copy of either the AHLA rules nor the NAF Code or Procedure at the time she executed either agreement.

9. On July 17, 2009, the NAF entered into a Consent Judgment with the State of Minnesota, following a yearlong investigation by the Minnesota Attorney General's office. The terms of the Consent Judgment clearly and unequivocally state that the National Arbitration Forum is to stop “any business related to the arbitration of consumer disputes.”

10. This divestiture applies to all “Consumer Arbitration,” which includes “any arbitration involving the dispute between a business entity and a private individual which relates to goods, *services*, or property of any kind *allegedly provided by any business entity to the*

individual, or payment for such goods, services, or property.² Paragraph 3 of the Consent Judgment states:

On or after July 24, 2009 no NAF Entity shall:

- a. Accept any fee for processing any new Consumer Arbitration.
- b. Administer or process any new Consumer Arbitration.
- c. In any manner participate in any new Consumer Arbitration.
- d. Attempt to influence the outcome of any arbitration proceeding currently pending before it.³

11. The parties mediated this case pursuant to S.C. Code §15-79-125 on April 22, 2009. Defendant did not move to compel arbitration nor demand arbitration before this mediation.

12. After filing the Notice of Intent but prior to filing litigation, counsel for Defendant, Mac White, represented to Plaintiff's counsel, W. Andrew Arnold, that there was an arbitration agreement between the parties.⁴

13. Plaintiff's counsel asked for a copy of the arbitration agreement between the parties, and Defendant's counsel provided him with a copy of an arbitration agreement, which stated that arbitration should be provided by the National Arbitration Forum Code of Procedure.

² Id. ¶ 2. The language of the Consent Judgment clearly indicates that this divesture applies to claims arising in ALL states, not just potential claims in the State of Minnesota.

³ Id. ¶ 3. Defendant does not dispute that this language encompasses actions involving allegations of negligent care at a nursing home in South Carolina.

⁴ The findings of fact contained in paragraphs 13 through 30 are based upon the record of filings and the facts contained in uncontradicted Affidavit of Counsel filed on behalf of Plaintiff. Defendant's counsel did not file an opposing affidavit nor present any testimony contradicting the facts set out in the Affidavit of Counsel.

Mr. White represented to Mr. Arnold that this agreement was *the* arbitration agreement between the parties.⁵

14. Plaintiff filed the Summons and Complaint in July 2009. It was served on Defendant in August 2009. Defendant did not move to compel arbitration nor did Defendant raise arbitration as a defense before serving an Answer in September 2009.⁶

15. Defendant served an Amended Answer in October 2009, which also failed to raise arbitration as a defense.

16. Plaintiff served discovery on Defendant in October 2009. Defendant asked for an extension and then served non-responses in December 2009, contending that they were not in possession of any documents responsive to such requests, which would have included arbitration agreements. (See Plaintiff's Motion to Compel.)

17. In December 2009, Plaintiff moved to compel discovery and moved to amend its complaint. Defendant opposed both motions. At no such time during these proceedings did Defendant raise either arbitration agreement as a defense to Plaintiff's claims or Plaintiff's motions. Plaintiff's motion to amend was granted and the court held that the amendments as it relates to THI of South Carolina at Magnolia Place at Greenville, LLC related back to August 2009.

18. In January 2010, Plaintiff had served subpoenas on several of Defendant's employees. In January 2010, Defendant made a motion to quash these subpoenas. At no time during these proceedings did Defendant raise either arbitration agreement as a defense.

⁵ This was shortly after the decision of *Grant v. Magnolia Manor of Greenwood*, 383 S.C. 125, 678 S.E.2d 435 (2009) had been decided which invalidated an agreement by the Supreme Court of South Carolina. This was also before the Minnesota consent order prohibiting the National Arbitration Forum (NAF) from administering arbitration in cases like the present case.

⁶ Plaintiff misidentified Defendant as "Magnolia Place of Greenville, Inc. d/b/a as Magnolia Place of Greenville."

19. In January 2010, Plaintiff filed and served its Amended Complaint. Plaintiff reserved discovery on Defendant in February 2010.

20. In February 2010, Defendant filed an Answer and for the first time, Defendant included a defense based upon the arbitration agreement. However, Defendant did not move to compel arbitration at that time.

21. Later in February 2010, Defendant served "responses" to Plaintiff's Interrogatories and Requests to for Production. In these responses, Defendant did not answer any interrogatories nor produce any documents, but instead objected to all discovery requests because of the existence of "an enforceable Arbitration Agreement." However, Defendant did not file a motion to compel arbitration at that time.

22. After receiving the discovery responses, Plaintiff's counsel alerted Defendant's counsel to the existence of the Minnesota consent order prohibiting NAF from administering arbitration in the present case. Defendant's counsel asked that Plaintiff's provide a copy of the consent order and indicated (perhaps implicitly) that he was unfamiliar with this consent order.

23. Plaintiff moved to compel responses to her Interrogatories and Requests to Produce. A hearing was scheduled for May 24, 2010.

24. As required by the standing court order, the parties mediated a second time on May 13, 2010.

25. On May 14, 2010 (ten days before the scheduled hearing on Plaintiff's motion to compel discovery), Defendant filed a motion to compel arbitration and requested that it be scheduled for May 24, 2010.

26. The delay in seeking to arbitrate this matter has resulted in Plaintiff's counsel spending 50 to 75 hours in attorney time, which would have been rendered unnecessary by a timely motion to compel arbitration.

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27. The delay in seeking to compel arbitration of this matter has also resulted in the incurring of unnecessary expenses, including mediation expenses and other court costs.

28. Moreover, Defendant's Senior Counsel, Eva Gonzalez, represented to Plaintiff's counsel that liability insurance is provided under a rapidly eroding insurance policy and that attorney fees and other expenses reduce the amount of insurance available to cover a judgment. (Defendant has refused to provide a copy of this insurance policy to Plaintiff.)

29. In addition, there is a factual dispute as to whether the medical director was advised of Harriett's Hartsgrove injury. There may be claims against the medical director, but because of the delay, discovery may be delayed until after the statute of limitations expires, which may be in September 2010.⁷

30. Defendant's 17 month delay in seeking to arbitrate this matter and filing a motion to compel arbitration since the filing of the Notice of Intent and the almost 10 month delay since the filing of this action has resulted in prejudice to Plaintiff. Accordingly, Defendant has waived its right to enforce arbitration in this case.

II. CONCLUSIONS OF LAW

A. Standard of Review

When ruling on a motion to compel arbitration, the court uses a standard analogous to the summary judgment standard. *See e.g., Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir.1980). "Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." *Id.* "Although we [South Carolina Courts] are constrained to resolve all

⁷ This court does not intend to make a finding on the statute of limitations since there may be arguments regarding tolling, equitable and otherwise. This court merely takes note that the Ms. Hartsgrove's injuries occurred in September 2007 and generally, a three year statute of limitations applies to claims for negligence.

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doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis.” *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007).

Section 2 of the FAA states that:

A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC § 2 (emphasis added). “[T]he court should apply ‘ordinary state-law principles that govern the formation of contracts.’” *Towles v. United Healthcare Corp.* 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App. 1999) (citing *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995))). “Arbitration is a matter of contract and controlled by contract law.” *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citing 5 Am. Jur. 2d *Arbitration and Award* § 11 (1962)). This court has applied South Carolina contract law to the facts in the record of this case.

B. The South Carolina Supreme Court’s Holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009) Mandates Denial of Defendant’s Motion to Compel Arbitration.

Defendant seeks to enforce two separate arbitration agreements, each of which reference different arbitration forums administered in accordance with different rules for arbitration, different methods of selecting arbitrators from lists of panels maintained by two different arbitration services. Despite these facts, Defendant argues that the parties designated the AHLA as “their chosen forum.” Although this Court finds this argument to be without merit because of the existence of two different agreements to arbitrate with conflicting sets of procedures,

(discussed below in Part C), the South Carolina Supreme Court holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009) warrants denial of Defendants motion to compel arbitration even if the AHLA was the chosen forum of the parties. The Supreme Court in *Grant* held that because the selection of AHLA as an arbitration forum was an “integral” part of that arbitration agreement and because AHLA was no longer available to arbitrate the dispute, the arbitration agreement was unenforceable. *Id.* at 132. Because the same arbitration agreement is at issue in this case, this Court concludes that the decision in *Grant* is controlling and that a denial of Defendant’s motion for arbitration to be administered by the AHLA.

Defendant seeks to re-litigate the issue decided in *Grant*, despite the fact that the law, the arbitration agreement, and the arbitration rules are the same as in *Grant*. Defendant argues that the Supreme Court overlooked a fact in the record of *Grant*, which Defendant explains in footnote 3 of its memorandum in support of its motion to compel arbitration:

decision was predicted on the erroneous presumption that the AHLA had amended its rules in 2004 to provide that in health care liability cases, ‘the AHLA would only arbitrate claims pursuant to arbitration agreements entered into after the alleged injury occurred.’ In fact, under its amended rules, the AHLA continues to arbitrate health care liability claims pursuant to pre-injury arbitration agreements *when ordered by a court to do so*.

Accordingly, Defendant indicates that “*Grant* is inapposite because the AHLA is available to administer the parties arbitration.” In support of this position, Defendant cites a copy of AHLA Rules that were amended in 2006 in support of this contention and seeks to have this court *order AHLA to administer an arbitration between the parties.*⁸

⁸ Even if this court were to ignore all the other infirmities with Defendant’s argument, the rule that Defendant’s purport to rely upon makes clear that it only applies if “a judge orders that the service administer an arbitration....” This court does not believe that it can order the AHLA to do anything unless it is a party to this action. *See e.g., Green Tree Servicing, LLC v. Adams*, 375 S.C. 583, 654 S.E.2d 100 (S.C. App. 2007). The court may not act against a party without personal jurisdiction. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Moreover, a court should not render a judgment affecting the rights of a party without proper notice. *Ex*

First, the amended rule relied upon by Defendant was not in effect when the parties to the current dispute executed the Admissions Contract in 2005, and thus, at that time AHLA the provision relied upon by Defendant was not in existence at that time. At that time, the AHLA's rules of arbitration provided:

The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 *only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service* at the time the parties make a request for a list of arbitrators. For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

See Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 994 So.2d 159 (Miss. 2008).⁹ This court believes that the scope of claims governed by the AHLA rules at the time of entering into the contract reflects the agreement of the parties.¹⁰

The Defendant cites *Adler v. Dell, Inc.* No. 08-CV-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009) as authority supporting its position. First, *Adler* conducted the same analysis as our Supreme Court *Grant* and reached a different conclusion. This court is not at liberty to adopt the *Adler* approach instead of *Grant*, which represents binding precedent. Nonetheless, the arbitration agreement in *Adler* stated that the "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect..."

Parte South Carolina Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002). Thus, the AHLA remains unavailable whether it applies the 2005 AHLA rule that existed at the time the parties executed the agreement or the 2006 rules that were amended after the parties had entered into an agreement.

⁹ The Court relies on this *Magnolia HealthCare* case since a copy of the 2005 rules were not available to Plaintiff. Presumably, Defendant would have a copy of these rules dating back to 2005, and it has not contested this court taking judicial notice of the AHLA rules as found by the Mississippi Supreme Court.

¹⁰ This conclusion relates to the "meeting of the minds" requirement discussed further in Part C of this opinion.

Id. at *1 (capital letters in original and bold emphasis added). Thus, for various reasons, this court does not find *Adler* persuasive.

Second, even if the 2006 AHILA amendments can be said to expand the scope of the arbitration rules, these rules pre-date the decision in *Grant* by three years and were the rules upon which the Supreme Court relied in reaching his holding in *Grant*. This court is simply not persuaded that the Supreme Court reached a erroneous decision in *Grant* because it failed to take note of a central fact. Even so, there are compelling reasons for this court to reach the same conclusion as *Grant* that AHILA is no longer “unavailable.”

First, the 2006 AHILA rules urged by Defendant make clear that the AHILA will only arbitrate a dispute (such as exist in this case) if it is ordered to do so by a court of law. This is because the AHILA will not honor a pre-injury arbitration agreement, and thus, the AHILA requires the court to make a new post-injury agreement for the parties. According to the AHILA,

If a judge gives a written order that the AHILA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHILA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter.

<http://www.healthlawyers.org/Resources/ADR/Pages/RulesAmendment.aspx>¹¹ Considering the AHILA rules that existed at the times the parties contracted in 2005, such an order would indeed create a new agreement between the parties. The Court is “without authority to alter a contract by construction or to make new contracts for the parties.” *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm’n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445 (1984)). This court is not willing

¹¹ This statement comes from the AHILA website cited by Defendant. Plaintiff provided the court with a copy of this website, without objection, during the hearing.

to make a new post-injury agreement by way of an order of this court to remedy a situation the parties did not undertake voluntarily to remedy themselves.¹² See *Grant*, 678 S.E.2d at 437 (“The parties did not modify the admission contract to reflect the AHLA policy change.”)

In addition, Defendant also seeks enforcement of a second arbitration agreement, which requires “arbitration as provided for by the *National Arbitration Forum Code of Procedure*.”¹³ Putting aside at the moment the contradictory AHLA arbitration agreement, the NAF agreement considered independently suffers from the same deformity as the arbitration agreement that contains the AHLA provision. The NAF is prohibited by court order from participating “any business related to the arbitration of consumer disputes” or “in any manner participat[ing] in any new Consumer Arbitration.”¹⁴ However, an arbitration conducted “as provided by the [NAF] Code of Procedure” must comply with Rule 1 of the NAF Code which states that “[t]his Code shall be administered only by the National Arbitration Forum.” (emphasis added).

Considering the NAF Agreement on its own terms, this court finds that the NAF is an “integral part” of the second arbitration agreement. See e.g. *Carideo v. Dell, Inc.*, 2009 WL 3485933 (W.D. Wash.) (holding NAF was integral to an agreement to arbitrate and expressly rejected approach of *Adler*); *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 918 N.E.2d 598 (Ill.App. 5 Dist. 2009) (holding NAF as forum was integral to the agreement.) In *Carr*, the Court quoted and cited *Grant* when it said: “[T]he designation of a [specific arbitral] forum such as the [NAF] ‘has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of

¹² It is difficult to understand how Defendant gets the benefit of a 2006 amendment when Defendant advocates an construction that reconciles the two arbitration agreements by suggesting that the intent was for the AHLA to conduct the arbitration in accordance with the NAF Code of Procedure. Despite this argument, Defendant repeatedly makes reference to the AHLA rules, which if the NAF Code governs are moot.

¹³ Plaintiff has attached a copy of the rules in existence at the time the parties signed the arbitration agreements.

¹⁴ See Consent Judgment, ¶ 1.

12


the arbitral award, and the cost of the arbitration.” *Id.* at 1087 (citation omitted). The adoption of a set of rules that by its own terms requires administration by a particular forum makes that forum “integral.”

And, since the NAF is unavailable, the ruling in *Grant* is controlling as to the arbitration agreement in the Arbitration Agreement as well. Accordingly, this court denies Defendant’s motion to stay this matter and compel arbitration.

C. **There was no “Meeting of the Minds” on the Material Terms of an Enforceable Agreement to Arbitrate.**

Assuming *arguendo*, that *Grant* is inapposite, Defendant’s motion encounters perhaps an even greater obstacle in that it seeks at once to enforce two separate and contradictory sets of arbitration procedures both of which are to be administered by separate and distinct forums. “The Federal Arbitration Act recognizes that arbitration is strictly a matter of contract and that the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate.” *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993) (citing *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1255, 103 L.Ed.2d 488, 500 (1989)). The contradictory nature of the two agreements makes it impossible to enforce fully enforce both without taking out the court’s blue pencil, rewriting each set rules to reconcile the differences and to make guess as to the secret intentions of the parties.

General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 539, 542 S.E.2d 360, 364 (2001). The choice of the arbitral forum is one of the most important and material terms in an agreement to arbitrate. South Carolina common law requires that “[i]n order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with

regard to all essential and material terms of the agreement. *Grant* at 130 citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891(1989). This court finds that that the contradictory rules and the provisions of such rules that mandate administration by separate arbitral forums indicates clearly that the parties did not have a meeting of the minds in regards tot he material terms of an enforceable arbitration agreement.

First, the Supreme Court in *Grant* found that “[w]here designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution,” the designation of a forum such as AHLA is “an integral part of the agreement.” *Id.* at 131. This provisions cannot be reconciled with the separate agreement to arbitrate “as provided by the National Arbitration Forum Code of Procedure,” which according to Rule 1, “**shall be administered only by the National Arbitration Forum.**” See e.g., *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002)(use of words such as “shall” or “must” indicates a mandatory requirement). This court concludes that an agreement that requires that AHLA administer an arbitration under Rules that mandate that the NAF administer the arbitration cannot be reconciled.

Moreover, there are procedures that the AHLA considers non-negotiable if it is to administer an arbitration. “Under the AHLA policy, **the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service.**” *Grant* at 131-32 (emphasis added). However, the NAF Code has different requirements regarding communications, service, counting days, publication and form of the award, release of documents and administration. Under the NAF, it provides its own panel of arbitrators. Applying the NAF Code would “vary” these non-negotiable and mandatory rules, on which AHLA participation is conditioned. Again, these provisions cannot be reconciled and this

court cannot rewrite a set of rules in an attempt to make one agreement from two sets of contradictory rules.

It is nonsensical that the parties could have had a meeting of the minds to use two separate procedures, to be administered by separate forums, each of which is "integral" to arbitration process provided by the respective e rules, and each containing mandatory but contradictory procedures, not the least of which is separate and distinct methods of selecting arbitrators. Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract."¹⁵ *Reed v. Boykin*, 282 S.C. 614, 320 S.E.2d 68 (S.C.App.,1984) *quoting* 1 CORBIN ON CONTRACTS, § 95 (1963). The existence of two contradictory arbitration provisions creates an indefinite and uncertain set of circumstances that is impossible for the parties and courts to decipher with any degree of confidence, especially five years after the fact.

In *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 847 A.2d 621, 624 (N.J. 2004), the New Jersey Superior Court confronted a sufficient similar set of facts, which involved two distinct and different arbitration agreements. The New Jersey Superior Court held that "the arbitration agreement is highly ambiguous because the parties executed two documents which contain separate and somewhat disparate arbitration clauses. This ambiguity, we conclude, is fatal to the compelling of the arbitration of plaintiffs' CFA claims."

There was no meeting of the minds in regards to which forum would administer the arbitration, which rules would apply nor the scope of the claims subject to arbitration. There are

¹⁵ Plaintiff omitted a phrase inserted into the quoted material "[such as consideration, as we have in the instant case]" to avoid confusion.

no facts in the record which provide any clue to the manner in which both parties reconciled these contradictions in their minds, assuming such would have been possible since Plaintiff was never given a copy of either set of rules at the time of signing. *See Hooters of America, Inc. v. Phillips*, 39 F.Supp.2d 582 (D.S.C.1998) *affirmed and remanded*, 173 F.3d 933 (4th Cir. 1999)(meeting of the minds includes a meeting of the minds on the rules governing arbitration.) The Court is “not at liberty to consider the undisclosed or secret intentions of the parties but must be governed by their outward expressions.” *Kable v. Simmons*, 217 S.C.161, 60 S.E.2d 79, 81 (1950). Accordingly, Defendant’s motion must be denied because there was no meeting of the minds.

D. The Defendant Waived Its Right to Enforce the Arbitration Agreement.

Finally, even if this court was to determine that an enforceable arbitration obligation exists, then it is clear to this Court that Defendant has waived its right to enforce the arbitration agreements. Served with the Notice of Intent in December 2008, Defendant failed to assert the arbitration agreement or request arbitration for over 17 months. Having waiting 17 months after it was first served with the Notice of Intent and almost 10 months since being served with the Summons and Complaint, Defendant has deliberately delayed seeking to compel arbitration to delay the action.¹⁶ Defendant filed an Answer September 2009 and then an Amended Answer in October 2009, but in neither was arbitration asserted as a defense. Defendant served discovery in November 2009, filed a motion to quash in January 2010, sought a protective order in January 2010, participated in pre-suit mediation (April 2009) and then a year later, participated in court mandated mediation (May 2010). After objecting to discovery in March 2010, it held its motion to compel arbitration until the last possible day before it could use arbitration to further delay discovery. Defendant has certainly been unjustifiably slow in demanding arbitration.

¹⁶ Defendant has not proffered any reason to justify its 17 month delay in seeking to compel arbitration.

It is undisputed that "the right to enforce an arbitration clause may be waived." *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 525 (S.C. Ct. App. 2004); *General Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct.App.2001); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992); 6 C.J.S. Arbitration § 37 (1975). **"A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration."** *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76- 77 (S.C. Ct. App. 2003)(emphasis added). The "party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* (citing *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985)).

In this case, Plaintiff has litigated for 17 months, and Plaintiff's counsel has wasted at least 50 hours of valuable time, including the attendance of two fruitless mediations, neither of which would have not been necessary if Defendant had timely sought to compel arbitration. In addition, Plaintiff's has been required to amend pleadings and move to compel discovery, which required an expenditure of attorney time, which all would have been rendered unnecessary by a timely motion to arbitrate. Moreover, these activities resulted in unnecessary expenses, including motion fees, service fees, and mediation expenses. *See Evans v. Accent Manufactured Homes, Inc.* 352 S.C. 544, 575 S.E.2d 74 (S.C. App. 2003)(holding incurring costs that would not have been incurred had party moved for arbitration constituted prejudice).

Moreover, under the NAF Code of Procedure, Plaintiff can be held liable for "all expenses and costs, including attorney fees..." for commencing litigation. Defendant's litigation and costs are much more significant after 17 months than such would have been if Defendant would have sought to arbitrate at the outset of the action. This exposure to thousands of extra

dollars in sanctions for filing an action is not only unconscionable but a clear example of prejudice.

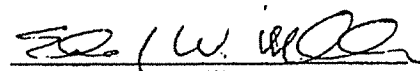
In addition, according to the uncontradicted facts contained in the Affidavit of Counsel, Defendant's Senior Counsel, Eva Gonzalez, has represented to Plaintiff's counsel that liability coverage was provided under a rapidly eroding insurance policy and that attorney fees and other expenses reduce the amount of insurance available to cover a judgment. Because the entity that manages the facility d/b/a Magnolia Place of Greenville has little or no assets, this potentially could completely eliminate a remedy for Plaintiff's harm. In addition, after 17 months, Defendants have successfully frustrated discovery, and now the statute of limitations may expire in September 2010. Potential claims against others will be place in jeopardy if a stay is granted and the parties are required to select an arbitrator prior to being able to commence discovery.

"There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id*; see *Unisys*, 358 S.E. at 184, 594 S.E.2d at 525. The determination of whether one's actions constitute waiver is a question of fact. *Laser Supply and Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 676 S.E.2d 139 (Ct.App.2009). Based upon the facts before this court, this Court concludes that Defendant has waived its right to enforce any agreement to arbitrate that may exist between the parties.

IV. CONCLUSION

For all the reasons stated above, this Court denies Defendant's motion to compel arbitration and to stay the proceedings.

IT IS SO ORDERED.


Judge Edward Miller
Thirteenth Circuit Court Judge

Dated: 7/13/10

STATE OF SOUTH CAROLINA COUNTY OF OCONEE Robert C. Bowser, as Personal Representative of the Estate of Robert F. Bowser, Plaintiff(s), vs. Assisted Living Concepts, Inc., and ALC TISSC, LLC, Defendant(s).	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 2011-CP-37-742 <u>ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE STAY LITIGATION AND COMPEL ARBITRATION</u>
--	--

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUN 28 PM 2 35

In this wrongful death and survival action arising out of the death of Robert Bowser while a resident at the Defendants' community residential care facility known as the Inn at Seneca, this matter comes before the Court on Defendants' Motion to Dismiss or in the Alternative, Stay Litigation Pending Arbitration.

A hearing on Defendants' Motion was held on March 5, 2012. The Plaintiff was represented by Mark D. Chappell and the Defendants were represented by Todd W. Smyth. Both parties submitted detailed memorandums of law arguing their positions. Having reviewed the parties' briefs, heard arguments from counsel, reviewed the relevant case law, and after due deliberation, the Defendants' motion is DENIED.

Arbitration forum selection clauses can have far reaching and vast implications:

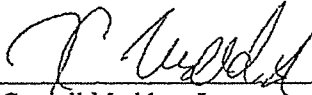
To determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the "essence" of the arbitration agreement. Warren, 718 So.2d at 49 (citing Zechman, 742 F.Supp. at 1364). Under the AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of

arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate exclusively before that body. Furthermore, the designation of a forum such as the AHLA "has wide-ranging substantive implications that may affect, inter alia, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." Singleton v. Grade A Market, Inc., 607 F.Supp.2d 333, 339 (D.Conn. 2009). Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither "logistical" nor "ancillary." See Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc., 212 F.3d 858, 862 (4th Cir.2000) ("It is far better to interpret the agreement based on what is specified, rather than attempt to incorporate other remote rules by reference."); Wall Street Associates v. Becker Paribas, Inc., 818 F.Supp. 679 (S.D.N.Y. 1993), affd. 27 F.3d 845 (2d Cir.1994) ("[A]n agreement to arbitrate before a particular forum is as integral a term of a contract as any other, which courts must enforce.").

Grant v. Magnolia Maynor-Greenwood, Inc., 383 S.C. 125, ___, 678 S.E.2d 435, 439 (2009).

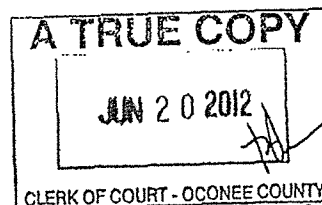
The forum selection clause fails because the National Arbitration Forum can no longer arbitrate consumer disputes such as the disputes in this case. The forum selection in this case is more than a logistical concern, and affects the substantive rights of the parties. Therefore, the Arbitration Agreement is unenforceable and Defendants' motion is DENIED.

AND IT IS SO ORDERED.


J. Cordell Maddox, Jr.
Circuit Court Judge

Dated: June 13, 2012
, South Carolina

FILED OCOONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JUN 20 PM 2 35



Maddox, J. Cordell Secretary (Cynthia Hicks)

From: Maddox, J. Cordell Law Clerk (Jessica H. Lerer)
Sent: Wednesday, June 13, 2012 12:33 PM
To: Maddox, J. Cordell Secretary (Cynthia Hicks)
Subject: FW: Bowsver v. Assisted Living
Attachments: Order Denying Def's MTD 6-12-12 (ALC Operating, LLC).docx; Order Denying Def's MTD 6-12-12.docx

Jessica H. Lerer
Law Clerk to The Honorable J. Cordell Maddox, Jr.
Tenth Judicial Circuit Court
P.O. Box 8002
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864-260-4636
cmaddoxlc@sccourts.org

From: Hugh McAngus [<mailto:Hugh@csa-law.com>]
Sent: Wednesday, June 13, 2012 10:46 AM
To: Maddox, J. Cordell Law Clerk (Jessica H. Lerer); Maddox, J. Cordell; 'tsmyth@smythwhitley.com'
Cc: Mark Chappell; Bonnie Sluce
Subject: Bowsver v. Assisted Living

Jessica:

In response to your request for a proposed order denying the Defendants' Motion to Dismiss, I have attached two orders. If you will recall, there are two civil actions arising out of the same set of facts, and the Defendants filed identical motions in both cases. Please let me know if Judge Maddox would prefer that I mail hard copies, which I would be happy to do.

W. Hugh McAngus, Jr.
CHAPPELL SMITH & ARDEN, P.A.
1510 Calhoun St.
PO Box 12330
Columbia, SC 29211
(803) 929-3600 (p)
(803) 929-3604 (f)
(803)-509-5828 (Direct)

Also licensed in North Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2020-CP-23-04832
	)	
Debra Lynn B. Peele as Personal	)	
Representative of the Estate of Iola	)	
Aileen Bagwell,	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF MOTION
	)	OF DEFENDANTS GREENVILLE
Greenville Retirement Properties, LLC	)	RETIREMENT PROPERTIES, LLC D/B/A
d/b/a Pendleton Manor Assisted Living,	)	PENDLETON MANOR ASSISTED LIVING
Reatha Connelly and Regency Hospice	)	AND REATHA CONNELLY TO STAY AND
of Georgia, LLC d/b/a Regency	)	TO COMPEL ARBITRATION
Southernicare,	)	
	)	
Defendants.	)	
	)	

Defendants Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living ("Pendleton Manor") and Reatha Connelly ("Connelly") (collectively "Defendants") submit the following memorandum in support of their Motion to Stay and Compel Arbitration.

FACTS

Plaintiff's claims against Defendants stem from the care and services rendered to Bagwell while she was a resident at Pendleton Manor, an assisted living facility in Greenville, South Carolina. Bagwell was admitted to Pendleton Manor on May 17, 2018, at which time she and Cynthia Bagwell, who held valid financial and health care power of attorneys that allowed her to act on Bagwell's behalf, executed an arbitration agreement. (Compl., ¶ 11; Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.; Power of Attorneys, Exs. B and C to Mot. to Stay and Compel Arb.) This Arbitration Agreement was an appendix to a contemporaneously executed lease agreement that set forth the terms of Bagwell's admission to facility. (Lease Agreement, Ex. A. to Mot. to Stay and Compel Arb.) At the same time, Cynthia Bagwell also signed an agreement

acknowledging that, pursuant to a contract between the pharmacy and the facility, all of Bagwell's medications must be purchased from Sr. Care Pharmacy in Charlotte, North Carolina. (Medication Agreement, attached hereto as Ex. A)

During Bagwell's ensuing residency at Pendleton Manor, she sustained a fracture in the neck of the left humerus that Plaintiff believes occurred in the course of care provided by Defendants pursuant to the Lease Agreement. (Compl., ¶¶ 21-22) Later during her stay, Bagwell developed another fracture that Plaintiff believes was the result of a fall or drop, also occurring in the course of Bagwell's stay at Pendleton Manor. (Compl., ¶¶ 25-26) Following the second fracture, a physician prescribed morphine to treat Bagwell's pain. (Compl., ¶ 28) About a week later, Bagwell died, and the coroner attributed her death to morphine intoxication. (Compl., ¶¶ 31-33)

Plaintiff asserts negligence, gross negligence, wrongful death, and breach of contract claims against Defendants as a result of the care and treatment Bagwell received at Pendleton Manor. The crux of each claim rests on actions Plaintiff claims were taken or should have been taken in the course of services provided pursuant to the Lease Agreement. The plain language of the Arbitration Agreement executed by Bagwell and her legal representative mandates that all claims arising out of or relating to the treatment or services provided by Pendleton Manor must be resolved by arbitration and that the Federal Arbitration Act governs. (Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.) As such, Defendants move for an order staying the present action and ordering the parties to arbitration instead.

LEGAL STANDARD

Absent agreement by the parties to the contrary, the question of arbitrability of a claim is an issue for the court. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118

(2001). Defendants' motion to compel arbitration relies on the application of the Federal Arbitration Act ("FAA"). The FAA provides as follows:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C.A. § 2. Generally, a party seeking to compel arbitration under the FAA must establish the following four elements:

(1) the existence of a dispute between the parties; (2) a written agreement that includes an arbitration provision which purports to cover the dispute; (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce; and (4) the failure of, neglect or refusal of the [other party] to arbitrate the dispute.

Whiteside v. Teltech Corp., 940 F.2d 99, 102 (4th Cir. 1991); *McCutcheon v. THI*, 2011 U.S. Dist. Lexis 144288 (D.S.C. 2011). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 23-24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

LAW AND ARGUMENT

This Court should stay the present litigation and compel Plaintiff to submit her claims to arbitration because the Arbitration Agreement is valid, enforceable under the FAA, and encompasses all of Plaintiff's claims. The agreement signed by Plaintiff applies to "[a]ny dispute arising out of the diagnosis, treatment, or care of the resident[.]" (Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.) In accordance with the terms of the Lease Agreement, including the attached Arbitration Agreement, due to the nexus of the underlying activities to interstate commerce, and in recognition that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," Plaintiff's claims belong in an arbitration forum.

A. THE LEASE AGREEMENT EVIDENCES A TRANSACTION INVOLVING INTERSTATE COMMERCE.

Consistent with the FAA and the trend towards more liberal enforcement of arbitration agreements, South Carolina courts have consistently enforced arbitration agreements pursuant to the FAA, even where those agreements did not conform to the rigid requirements of the SCUAA. *See, e.g., Episcopal Housing Corp. v. Federal Ins. Co.*, 269 S.C. 631, 239 S.E.2d 647 (1977); *Soil Remediation Co. v. Nu-Way Envtl. Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996); *Munoz v. Greentree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

Since the Supreme Court of the United States announced the expansive interpretation of the scope and reach of the FAA in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the South Carolina Supreme Court has recognized that

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

Zabinski, 346 S.C. at 591-92, 553 S.E.2d at 115.

Following these principles, an arbitration provision is valid and enforceable under the FAA if the provision is contained in "a contract evidencing a transaction involving commerce," and Plaintiff cannot legitimately contend otherwise. 9 U.S.C.A. § 2; *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273 (1995). In *Dobson*, the Court clarified the correct interpretation of the phrase "evidencing a transaction" and specifically rejected any argument that the phrase requires a contract to evidence "on its face" a transaction involving interstate commerce. Thus, the *Dobson* court determined that the question is not whether the contract itself evidences a transaction involving interstate commerce but whether the transaction underlying the contract

does. 513 U.S. at 273. *See also Cape Romain Contrs., Inc. v. Wando E., LLC*, 405 S.C. 115, 123, 747 S.E.2d 461, 465 n.5 (2013) (overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) “to the extent it determined the FAA did not apply because the contract on its face failed to demonstrate that the parties contemplated an interstate transaction”).

The *Dobson* Court also defined the appropriate scope of the FAA by broadly interpreting the phrase “involving commerce” as the equivalent of “affecting commerce,” thereby reaching the fullest contours of Congress’ Commerce Clause powers. *Dobson*, 513 U.S. at 277. The South Carolina Supreme Court has cited *Dobson* for this very proposition and elaborated as follows: “Under the reach of the Commerce Clause, ‘Congress has authority to regulate (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce . . . and (3) those activities having a substantial relation to interstate commerce.’” *Cape Romain Contrs., Inc.*, 405 S.C. at 125, 747 S.E.2d at 464 (quoting *United States v. Gould*, 568 F.3d 459, 470 (4th Cir. 2009)). Furthermore, “Congress’[s] Commerce Clause power ‘may be exercised in individual cases without showing any effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal control.’” *Citizens Bank v. Alababco, Inc.*, 539 U.S. 52, 56-57 (2003) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)).

The South Carolina Supreme Court has held that nursing home residence contracts implicate interstate commerce and the FAA. *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727, 732 (2014) (explicitly overruling *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) in its entirety). Citing to other federal and state court decisions reaching the same conclusion, the Court stated, “Generally, these holdings center on a common theme:

nursing home residency contracts usually entail providing residents with meals and medical supplies that are inevitably shipped across state lines from out-of-state vendors.” *Id.* at 381, 759 S.E.2d at 732. The services need not be in direct dispute for the relationship to evidence a transaction involving interstate commerce. *Id.* at 381-82, 759 S.E.2d at 732-33. Rather, reviewing courts must ““focus upon what the terms of the contract specifically require for performance in determining whether interstate commerce was involved.”” *Id.* (quoting *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)).

In the present matter, the Lease Agreement and services associated with that agreement evidence a transaction involving interstate commerce. Pendleton Manor is an assisted living facility located in Greenville, South Carolina. (Lease Agreement, p. 3, Ex. A. to Mot. to Stay and Compel Arb.) As part of the residential care rendered pursuant to the Lease Agreement, Bagwell received three meals per day. (Lease Agreement, Ex. A. to Mot. to Stay and Compel Arb.; Resident Handbook, p. 11, attached hereto as Ex. B) Moreover, medical supplies were available, and if utilized, were billed to Bagwell separately. (Lease Agreement, p. 9, Ex. A. to Mot. to Stay and Compel Arb.) These are the precise services recognized by *Dean* as involving interstate commerce. *Dean*, 408 S.C. at 381-82, 759 S.E.2d at 732-33.

As further evidence of Pendleton Manor’s impact on interstate commerce, the Medication Agreement signed by Bagwell’s representative required all medications to be purchased from an out-of-state pharmacy located in Charlotte, North Carolina. (Medication Agreement, attached hereto as Ex. A) These medications were then given to Bagwell in the course of the federally regulated medical and residential care provided by Pendleton Manor pursuant to the Lease Agreement. *See Dean*, 401 S.C. at 381 n.7, 759 S.E.2d at 732 n.7 (citing *Miller v. Cotter*, 448 Mass. 671, 863 N.E.2d 537, 544 (Mass. 2007) (holding health care in general is an activity subject

to federal control under the Commerce Clause and thus involves interstate commerce). There can be no doubt the residential care Bagwell received as a result of the Lease Agreement implicated interstate commerce, and Plaintiff cannot make a valid argument otherwise.

In light of the foregoing, the Arbitration Agreement executed in conjunction with the Lease Agreement is valid, irrevocable, and enforceable pursuant to the FAA because the transaction underlying the Lease Agreement is one that inherently involves interstate commerce.

B. THE PURPORTED DESIGNATION OF THE NATIONAL ARBITRATION FORUM AS THE ARBITRAL FORUM IS NOT A MATERIAL TERM OF THE ARBITRATION AGREEMENT.

Plaintiff erroneously contends arbitration before the National Arbitration Forum (“NAF”), a forum in which consumer disputes can no longer be heard, is a material term of the Arbitration Agreement, and without it, the contract cannot be enforced. *See Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550, 2009 Minn. Dist. LEXIS 340, (Minn. County Ct. July 17, 2009) (consent judgment stating NAF agrees to no longer arbitrate consumer disputes). Arbitration agreements, like all other contracts, are subject to the general rules of contract interpretation. *Dean*, 401 S.C. at 382, 759 S.E.2d at 733. Therefore, when an arbitration clause identifies a forum for arbitration in which disputes arising under the contract cannot be resolved, courts must determine whether the forum selected is an integral part of the agreement or a mere ancillary matter such that the intent of the parties can be carried out in its absence. *Id.* at 384, 759 S.E.2d at 734.

In *Dean*, the South Carolina Supreme Court adopted an “in accordance with” and “administered by” method for determining whether the parties intended for their designation of a specific forum to be a material term of their agreement to arbitrate. *Id.* Absent evidence to the contrary, when an arbitration provision specifies the arbitration is to be conducted “in accordance with” the procedural rules of a designated forum, the term is not material because any forum could

presumably utilize those procedures. *Id.* at 382-84, 759 S.E.2d at 733-34. Typically, though, when a provision mandates the arbitration be “administered by” a specific forum, the term is material to the agreement because, absent other evidence to the contrary, the parties agreed the dispute would be resolved only in that forum, and their contractual intent cannot be carried out if that forum is unavailable. *Id.*

The arbitration agreement at issue in *Dean* was a separate agreement signed by the plaintiff on behalf of her mother when entering into a nursing home residency agreement. *Id.* at 376, 759 S.E.2d at 730. The plaintiff voluntarily entered into the agreement, as signing it was not a condition of the patient’s admission. *Id.* at 376-77, 759 S.E.2d at 730. When deciding whether the arbitration agreement’s forum selection clause required the arbitration to be “administered by” the forum, thus integral to the contractual intent of the parties, versus “in accordance with” the forum’s procedures, thus not an integral part of the agreement, the Supreme Court considered more than the limited language used to identify the arbitral forum. *Id.* at 383-87, 756 S.E.2d at 733-35. It considered the absence of evidence that the forum itself was of particular importance to the parties and the vital role the inclusion of a severance clause played when ascertaining and carrying out the intent of the parties. *Id.* at 387, 759 S.E.2d at 735. *Id.* The *Dean* Court ultimately held the forum designated in the agreement was not a material term due, in part, to the significance of the severance clause permitting the removal of any portion of the agreement found to be unenforceable, stating, “The severance provision indicates that the intention was not to make the AAA integral, but rather only to have a dispute resolution process through arbitration.” *Id.* (internal quotation and citations omitted).

Like the plaintiff in *Dean*, Cynthia Bagwell signed a separate arbitration agreement at the time of Bagwell’s admission to Pendleton Manor. This Arbitration Agreement was not a condition

of admission and directly above the signature lines notified Bagwell and her legal representative that “the resident cannot be discharged for refusing this agreement.” (Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.) As further evidence of the voluntariness with which the parties entered into the Arbitration Agreement, the contract allows for termination “by written notice delivered to the facility within 14 days of signature.” *Id.* Neither Bagwell nor her legal representative attempted to terminate the agreement.

This voluntary agreement plainly expresses the contractual intent of the parties to resolve any disputes arising as a result of Bagwell’s admission to Pendleton Manor via arbitration and not the court system. The Arbitration Agreement includes a general overview of the arbitration process and explains that “[a]rbitration is a cost effective and time saving method of resolving disputes without involving the courts.” (Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.) The Arbitration Agreement goes on to clearly state,

In arbitration proceedings, the disputes are heard and decided by a private individual called an arbitrator. Nether [Pendleton Manor] nor [Bagwell] is waiving their right to sue or obtain statutory and/or contractual remedies by agreement to arbitrate disputes within the scope of this Arbitration Agreement. However, the dispute will not be heard or decided by a judge or jury, as both [Pendleton Manor] and [Bagwell] desire and expressly agree that any dispute between them be resolved outside of the court system.

Id. (emphasis added)

Per the agreement, all disputes are to “be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect.” (Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.) Importantly, the agreement contains a severance clause shortly thereafter explaining that “[i]n the event a court having jurisdiction finds any portion of this agreement unenforceable, that portion will not be effective and the remainder of the agreement

will remain effective.” *Id.* The parties agreed the agreement is “governed by and interpreted under the Federal Arbitration Act, 9 U.S.C. Sections 1-16.” *Id.*

The plain language of the Arbitration Agreement indicates Defendants and Bagwell, through her legal representative, entered into the contract with the express intent that “any dispute between them be resolved outside of the court system” through arbitration governed by the Federal Arbitration Act. This is evidenced by the great lengths taken to explain the purpose of arbitration and ensure voluntary entrance into the agreement. Moreover, the Arbitration Agreement includes a severance clause, which the South Carolina Supreme Court has found to be “other evidence” that the designation of an arbitral forum was not an integral term of an agreement to arbitrate. *See Dean*, 401 S.C. at 387, 759 S.E.2d at 735. When considering the “be resolved by” language of the clause purporting to designate the NAF as the arbitrable forum in the context of the Arbitration Agreement as a whole, this designation is ancillary to the plain intent of the parties and instead attempts to provide a mechanism through which their manifest desire to engage in arbitration can be accomplished. The agreement does not include, nor does any exist, evidence that the parties included the NAF and its Code of Procedure due to a special connection between that forum and disputes arising at of the diagnosis, treatment, or care of Bagwell under the Lease Agreement. The designation simply was not an essential and material term of the Arbitration Agreement.

Per the consent order entered July 17, 2009, the NAF no longer arbitrates consumer claims. However, the unavailability of the NAF to arbitrate this dispute does not invalidate the agreement because the severance clause permits the court to strike this designation and interpret the agreement in its absence. The intent of the parties – to resolve any disputes arising under the Lease Agreement through arbitration government by the FAA – can be carried out in the absence of the NAF

designation. Accordingly, Defendant asks this Court to sever the purported forum selection provision and enforce the remaining terms mandating arbitration under the FAA.

In light of the foregoing, the Arbitration Agreement is valid and should be enforced by this Court. Once this Court upholds the validity of the Arbitration Agreement, the parties and court will determine the forum for arbitration and designate an arbitrator in accordance with the gap filler provisions of the FAA. *See* 9 U.S.C.A. § 5 (if an arbitration agreement does not designate a method of naming or appointing an arbitrator, then “the court shall designate and appoint an arbitrator . . . who shall act under said agreement with the same force or effect as if he . . . had been specifically named therein”).

C. CYNTHIA BAGWELL HAD LEGAL AUTHORITY TO EXECUTE THE ARBITRATION AGREEMENT ON THE PATIENT’S BEHALF.

Plaintiff cannot legitimately dispute that Cynthia Bagwell executed the Lease Agreement pursuant to a valid health care power of attorney authorizing her to admit the patient to any health care facility deemed appropriate and executed the Arbitration Agreement pursuant to a valid durable power of attorney authorizing her to enter into all legal, financial, and business transactions the patient would have had the ability to enter into herself had she been competent. Accordingly, Cynthia Bagwell had legal ability to bind Bagwell to arbitration per the terms of the Arbitration Agreement.

Courts apply general contract law when interpreting the validity and scope of a power of attorney. *Stott v. White Oak Manor, Inc.*, 426 S.C. 586, 577, 828 S.E.2d 82, 87 (Ct. App. 2019). “When the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect.” *Id.* (quoting *Watson v. Underwood*, 407 S.C. 443, 455, 756 S.E. 2d 155, 161 (Ct. App. 2014)). Therefore, when determining whether a power of attorney gives the attorney-in-fact authority to enter into a pre-dispute arbitration agreement on the

principal's behalf, courts look to the specific language of the appointment. *Arrendondo v. SNH SE Ashley River Tenant, LLC*, 856 S.E.2d 550, 2021 S.C. LEXIS 21, at * 14 (2021). A power of attorney giving the attorney-in-fact the ability “to transact, handle, and dispose of all matters” affecting the principal and “generally to do and perform . . . all that [the principal] might do if present,” is sufficiently broad to authorize the execution of a pre-dispute arbitration agreement. *Id.* (quoting *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S.Ct. 1421, 1429 (2017)).

The plain language of the broad durable power of attorney freely given to Cynthia Bagwell by the patient broadly delegates the following authority,

I, Aileen Bagwell, . . . do appoint Cindy Bagwell . . . as my attorney-in-fact the maximum power under law to perform any act on my behalf that I could do personally, including but not limited to, all acts relating to any and all of my financial transactions and/or business affairs including all banking and financial institution transactions, all real estate or personal property transactions, all insurance or annuit transactions, all claims and litigation, and any and all business transactions.

(Durable Unlimited Power of Attorney, Ex. B to Mot. to Stay and Compel Arb.) The health care power of attorney executed by Bagwell contained similarly broad language that authorized Cynthia Bagwell to admit her to any health care facility or institution. (Health Care Power of Attorney, Ex. C to Mot. to Stay and Compel Arb.)

Relying on *Arrendondo*, Plaintiff theorizes the broad language authorizing Cynthia Bagwell to assert claims and institute litigation on her behalf did not include the ability to execute a pre-dispute arbitration agreement. Plaintiff's argument is wholly without merit. While the South Carolina Supreme Court found the power of attorney at issue in *Arrendondo* was not sufficiently broad to delegate the authority to enter into a pre-dispute arbitration agreement on behalf of the principal, the Supreme Court noted the outcome would have been different had the agreement given the attorney-in-fact the broad power to enter into all agreements or other transactions that

the principal could have entered had he been competent. *Arrendondo*, 2021 S.C. LEXIS 21, at *14. The durable power of attorney executed by Bagwell does just that; it broadly authorizes Cynthia Bagwell, as Bagwell's attorney-in-fact, to enter into any transaction Bagwell could have entered into had she been competent. As such, the unlimited durable power of attorney executed by Bagwell authorized Cynthia Bagwell to enter into the Arbitration Agreement, and Plaintiff is now bound by the terms of that valid and legally authorized contract.

D. THE LEASE AGREEMENT'S ARBITRATION PROVISION ENCOMPASSES THE CLAIMS ASSERTED BY PLAINTIFF.

The policy of the United States and of South Carolina is to favor arbitration of disputes. *Zabinski*, 346 S.C. at 596, 553 S.E.2d at 118. "[U]nless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Id.*, at 597, 553 S.E.2d at 119 (citing *S.C. Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 564, 437 S.E.2d 22, 25 (1993)).

Moreover, "[a] clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly." *Landers v. FDIC*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013). As explained by the South Carolina Supreme Court in *Landers*,

Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does not limit arbitration to the literal interpretation or performance of the contract, **but embraces every dispute between the parties having a significant relationship to the contract.**

402 S.C. at 109-10, 739 S.E.2d at 214 (internal citations omitted) (emphasis added). Stated differently, an agreement to arbitrate will be enforced unless a party, in signing the agreement to arbitrate, could not possibly have been agreeing to arbitrate claims arising from wholly unexpected tortious conduct. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007). Any

doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 110; *see also Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (“The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.”) (internal citations omitted).

The Arbitration Agreement at issue covers all of the claims asserted in Plaintiff’s Complaint. The parties to the Lease Agreement understood and agreed,

[A]ny dispute between [Bagwell] and [Pendleton Manor], including any services rendered prior to the date this agreement was signed and any dispute arising out of the diagnosis, treatment, or care of the resident, including the scope of this arbitration clause and the arbitrability of any claim or dispute, against whomever made . . . will be resolved by binding arbitration by the National Arbitration Forum, under the Code of Procedure then in effect. . . .

This agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the facility including any spouse or heirs of the resident. . . .

The resident understands that the result of this arbitration agreement is that claims, including malpractice claims he/she may have against the facility and its employees and agents, cannot be brought as a lawsuit in court before a judge or jury, and agrees that all such claims will be resolved as described in this section.

(Lease Agreement, p. 10, Ex. A. to Mot. to Stay and Compel Arb.) (emphasis in the original)

Plaintiff’s Complaint alleges Defendants were negligent and grossly negligent when providing care to Bagwell during her stay at Pendleton Manor, resulting in two fractures, the administration of morphine for pain, and death as a result of morphine intoxication. (Compl., ¶¶ 11- 42; 52-57)

Plaintiff further alleges Pendleton Manor breached its contract with Bagwell by failing to provide a safe environment, trained caregivers to assist with activities of daily living, trained medication technicians to manage medicine, sufficient staff to care for the resident mix, twenty-four-hour services by trained medical technicians and caregivers, and appropriate measures to prevent falls.

(Compl., ¶¶ 58-65) The broad language of the Arbitration Agreement plainly encompasses all Plaintiff's claims against these Defendants, as they all relate to the treatment and services Bagwell received while a resident at Pendleton Manor.

Lest any doubt as to the enforceability of the agreement to arbitrate remain, the Supreme Court of the United States has made it clear that "[a] rule selectively finding arbitration contracts invalid because improperly formed fares no better under the [Federal Arbitration] Act than a rule selectively refusing to enforce those agreements once properly made." *Kindred Nursing Centers Limited Partnership v. Clark*, 137 S. Ct. 1421, 1428 (2017) (invalidating Kentucky rule barring one granted a general power of attorney from entering into an agreement to arbitrate on behalf of the grantor). When there is any dispute as to the enforceability of an arbitration clause, courts are to err on the side of enforcement. Here, Cindy Bagwell had authority and voluntarily agreed, on behalf of Bagwell and her heirs, including Plaintiff, to binding arbitration of *any* dispute arising out of Bagwell's stay at Pendleton Manor. The broad agreement to arbitrate covers all Plaintiff's claims against these Defendants. Accordingly, this Court must stay the current proceedings and enforce the terms of the Arbitration Agreement instead.

CONCLUSION

Plaintiff's claims are subject to the valid arbitration agreement executed by both Bagwell and Cynthia Bagwell, as Bagwell's legal representative, and are governed by the FAA. As a result, the Court should stay the present matter and compel Plaintiff to arbitrate her claims in accordance with the agreement, not through this litigation.

TURNER PADGET GRAHAM & LANEY P.A.

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**ATTORNEY FOR DEFENDANTS
GREENVILLE RETIREMENT PROPERTIES,
LLC D/B/A PENDLETON MANOR ASSISTED
LIVING, REATHA CONNELLY**

Resident Handbook

Pendleton Manor

WELCOME !

Welcome to a wonderful new beginning!

We consider retirement years a new and rewarding chapter of your life. That is why we developed a unique community that supports this vital and exciting independent lifestyle. You will find our staff to be genuinely interested in you and will be responsive to your needs and concerns. As a result, we hope you will enjoy a rich, full life, and a stimulating new lifestyle.

Please take a few minutes to familiarize yourself with your resident handbook. The handbook is designed to explain what you can expect from us and to provide answers to commonly asked questions. If you have additional questions or concerns, please feel free to speak with us.

We look forward to your stay with us.


Executive Director

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PENDLETON MANOR Resident Information

ABSENCES

Our residents are free to come and go as they please.

Please sign in and out at the front entrance. However, when you plan to be absent overnight or for a longer period or not planning to come to the dining room for a meal, please call the office to inform us how you might be reached and your expected date and time of return. This will help us to better respond in cases of emergency. Your cooperation with this request is greatly appreciated. Office telephone number is 271-7562.

ACTIVITIES

We have an Activities Director located in the building that plans, coordinates and implements our resident activities program. Suggestions for additional activities and programs are always welcome, and residents are encouraged to participate in activity programs of interest.

An Activities Calendar is published on a monthly basis. If you have any announcements, which you would like to see included in the calendar, please see the Activities Director.

Daily activities schedule and information will be posted on the bulletin board in the main hall outside activity room.

A resident would need their own funds for admission to certain events, any items they wish to purchase on shopping trips and meal charges for eating out, if desired. Arrangements can be made at the Business Office for the safekeeping of personal monies for the residents until the there is a need for it.

ADMISSION CRITERIA

Appropriateness of an individual for admission is determined by the Executive Director, based on the Health Assessment for Assisted Living Resident form and the following criteria.

The resident applicant:

- Does not require more than personal supervision or assistance with grooming, bathing, eating, and dressing;

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- Is able to participate in social and leisure activities;
- Has not been adjudicated incompetent, or if so, has a legal guardian who is able to make decisions on his/her behalf;
- Is non-violent, as determined by a physician;
- Is free from apparent signs and symptoms of communicable diseases;
- Is in sufficient health so as not to require licensed professional care on a 24-hour basis;
- May have special dietary needs as long as they can be met by the facility;

AUTOMOBILES - PARKING

The parking spaces at the front entrance have been reserved for Residents, their families and other guests of the community.

BEFORE MOVING IN

- Arrange with AT&T to have your phone service provided. The phone number for AT&T is 1-866-620-6000.
- Do not forget to give the post office a change of address card.
- Prior to your move-in date, a residency agreement signing date will be set. The Executive Director will review this agreement with you and go over all the details plus answer any questions you may have pertaining to the agreement or the move-in process. If two individuals are to occupy the apartment, both should be present to sign the residency agreement.
- Your rent and Initial Service Fee (and pet deposit if applicable) will be paid at this time as well as the issuance of the keys to your apartment. As stated in the application for residency, no keys can be issued unless the management office has received your completed application.
- We realize how hectic move-in day can be, so in an effort to alleviate any additional stress on move-in day, we prefer to handle all the paper work pertaining to this event before hand.

CABLE TELEVISION

Basic cable television service is included in your rent. You must contact the local cable company if you want additional cable services, which will be at your expense billed directly by the cable provider. Our local cable company is Charter Communications and the phone number is 1-800-955-7766

CHURCH SERVICE

Non Denomination Church Service is in activity room on Sundays
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DRESS CODE

Appropriate dress is required when outside your apartment. No housecoats, gowns, pajamas or slippers are allowed.

INSURANCE

We are adequately protected with liability and disaster insurance. This insurance program does not provide insurance coverage for your personal property. Please contact your insurance agent regarding your insurance needs, especially to secure renter's insurance.

LOST AND FOUND

The Director of Resident Care will collect lost and found items. Check with her if you find something or lose an item. Lost and found items not claimed after 45 days will be donated to charity.

MONTHLY SERVICE CHARGES/BILLING PROCEDURE

Your monthly statement will be forwarded to you, or your designated payee, by the 25th of each month. The billing period runs from the 1st of the month through the end of the month. The statement will include your monthly rental fee, the second occupant fee (if any) for the following month and any ancillary charges from the prior month, such as beauty shop, supply charges, guest meals etc.

Payments must be made by check or money order, no cash will be accepted. Payments should be made payable to Pendleton Manor. Please include resident's name. You may make payments at the Business Office during regular business hours or you may mail your payment to:

Pendleton Manor
414 Summit Drive
Greenville, SC 29609

As specified in your Agreement for Residency, a late charge of 5% of the unpaid balance will be charged for payments received after the 10th day of the month. In addition, a \$30.00 charge is assessed for returned checks.

Any questions regarding your monthly statement can be discussed with the Executive Director.

PARTIAL MONTH

Payments will be made on move-in date only for the remaining portion of the month. Thereafter, the full monthly payment will be due and payable on the first of each month.

REFUNDS

A refund of unused charges paid in advance will be made within thirty (30) days after Pendleton Manor

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termination to you or your designated payee.

MOVES WITHIN THE COMMUNITY

Occasionally residents may want to move from their existing apartment to another apartment within the community. Moves within the community are allowed under the following conditions:

1. Resident must submit a request to the Executive Director indicating their desire to move within the community. The request should specify apartment size and location.
2. Resident will be responsible for the cost of the move and for moving their belongings.
3. Resident will be responsible for contacting utility companies to discontinue services on their previous apartment and schedule services on their new apartment.
4. The Initial Service Fee is transferable to the new apartment.
5. Resident will pay the current market rent for the new apartment. An addendum to the Residency Agreement will be executed reflecting the new rent and the new apartment number.
6. The resident/responsible party will be assessed any and all costs associated with preparing the old room for re-leasing including carpet cleaning and up to repainting the room.

NEWSPAPER

The local newspaper can be delivered to your residence daily. Please call to arrange for delivery

PETS

Small pets are allowed. A non-refundable deposit of \$500.00 will be required. The resident must be able to care for the pet. All shots must be current and given to the community.

PHOTOCOPY SERVICE

Residents desiring photocopying service for documents and other materials may arrange for this service by contacting the Business Office between the hours of 9:00 a.m. to 4:30 p.m. Monday through Friday.

ROOM SERVICE

Room Service will be provided *only on a temporary basis* to those residents who are unable to come to the dining room because of temporary illness or circumstances.

RETENTION OF RESIDENTS

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BINDER000045

If, at any time after admission, a resident appears to need care beyond which the facility is licensed to provide, the Executive Director shall require the resident to be physically examined by a licensed physician. Examination shall be paid for by the resident with personal funds.

If examination results conclude that the resident's needs exceed the level of care, which Pendleton Manor is licensed to provide, a thirty (30) day notice to relocate will be given. Facility personnel will be available to assist the resident/responsible party in the relocation.

We regret losing a member of our community under these circumstances. However, it is our policy to always assist residents in obtaining the proper level of care for their needs.

ASSISTED LIVING SUITES

Your apartment is your home and we encourage you to decorate it to your taste and preference. Please feel free to hang pictures and have plants.

A few suggestions when decorating:

- Do not use stick up mirrors or picture hangers. Nails work better and do not damage the wall.
- Do not use contact paper in your cabinets or drawers. It will damage the finish.
- Feel free to purchase your own window decorations. Pendleton Manor provides mini-blinds for all apartments.

TELEPHONE SERVICE

AT&T provides telephone service to residents of our community. They will assist you in transferring existing service or establishing your new service and assigning you a telephone number. Contact them directly by telephoning: 1-866-620-6000. Please inform the Business Office of your telephone number as soon as it is available. If you do not wish your telephone number listed, please inform the receptionist.

TIPPING

The community has adopted a "no tipping" policy. To offer tips could be construed as favoritism and would be detrimental to the morale of the staff. Please be aware that employees could be discharged for accepting tips of any kind. This includes any monies, clothing, furniture or objects of value. Kind words, however, are always appreciated.

VALUABLES

Management cannot be responsible for the loss or theft of valuables. We recommend the use of a safe deposit box at a local bank.

VISITORS

Pendleton Manor
pg. 8

BINDER000046

We encourage guests to visit family and friends. We do ask that all guests abide by the facility house rules during their visits. Cooperation with this policy will ensure that residents and guests have an enjoyable stay.

If you and your guest plan to leave the community, please inform us by signing the in/out book located in the foyer by the front office. This is to inform us of your location in the event of an emergency.

VOLUNTEER PROGRAM

Resident volunteers play a vital role within the community. Though it is hoped that a volunteer project will appeal to your talents, there is no requirement for you to participate. Volunteers from family members, civic organizations or from your church are also welcomed. The volunteer program is coordinated by the Activity Director.

BUILDING SERVICES

HALLWAYS AND CORRIDORS

The hallways and corridors must remain clear of all items and articles for safety and fire prevention reasons. Please refrain from placing personal items, such as doormats, boots, umbrellas, etc. in the hallways. Such items should be kept within your residence.

HEATING/AIR CONDITIONING

Every residence has a heating/air conditioning unit. The level of heating or cooling in your residence may be adjusted to your own preference. Operating procedures will be explained to you by the staff at the time you move in. Please do not operate your heating/air conditioning unit with your windows open.

Energy Saving Tips

- Do not turn your air conditioning off during the day while you are away. It takes more energy to cool a very hot unit. Instead, leave your thermostat set at 70 –75 degrees during the day. Heating is just the opposite. Turn it down during the day.
- Report any dripping faucets or running commodes so we can repair them immediately.

LIGHT BULBS

We will supply all light bulbs for residency fixtures. When a bulb burns out, please notify the Staff. We do not provide light bulbs for personal fixtures or lamps.

MAIL DELIVERY

Assisted Living

Mail will be delivered to the resident's apartment on a daily basis in assisted living. Please bring out going mail to the front desk where the outgoing mail slot is.

COMMUNITY SERVICES

BEAUTY/BARBER SHOP

One of the many amenities of our community is a beauty/barber shop. The beauty/barber shop is managed by a licensed cosmetologist.

The cosmetologist is not an employee of the community. Therefore, the no tipping policy does not apply.

The hours of operation and charges are established by the beauticians, although we will ensure that rates are competitive. A schedule of service charges and hours of operation is Wednesdays and Thursdays only and are subject to change from week to week. Residents will be notified in advance. You may schedule appointments with the beautician directly. The facility will bill the resident for services provided by the beauty/barber shop on a monthly basis.

BUSINESS OFFICE

Daily business hours are 10:00 a.m. to 4:00 p.m. Monday – Friday.

DINING SERVICES

Your cook has a new dining experience awaiting you daily. Tablecloth dining and tastefully presented meals will surely compliment the beautiful decor to enhance your dining pleasure. The breakfast menu will include a choice of continental or full breakfast; lunch menus will include a full meal with one main entrées and vegetables and supper menus will include a light menu.

Each resident is entitled to three meals per day.

DINING ROOM HOURS

Full Breakfast.....8:00a.m. to 9:00 a.m.

Dinner.....12:00 noon to 1:00 p.m.

Supper 5:00 p.m. to 6:00 p.m.

GUESTS

You are encouraged to invite guests to visit at any time. All guests are welcome to utilize the dining room. It is requested that 24 hours' notice be given as a courtesy to our dining room staff. Guest

meal charges can be paid at the Business Office or billed on your monthly statement. See the ancillary fee schedule for meal charge amounts.

EMERGENCY RESPONSE SYSTEM

Your residence is furnished with an emergency alert system with two locations; one in the bedroom and the other in the bathroom. This alert system is monitored 24 hours daily. Appropriate personnel will respond to your signal for assistance and will enter your residence to assist you. Please use the system to call our staff should you need assistance.

HOUSEKEEPING SERVICES

Basic housekeeping services include the following services provided once a week in assisted living.

- Disinfectant cleaning of the bathroom lavatory, toilet, and shower.
- Damp mopping of bathroom floors.
- Vacuuming of carpeted floors.
- Dusting of tabletops.

Heavy cleaning on every residence is done as needed. At this time, outside windows and heavy cleaning will be done. The Housekeeper will contact residents for arrangements in advance and review the program at that time.

MAINTENANCE SERVICES

If you require maintenance services, please contact the front office so that your requests will receive prompt attention and be resolved correctly.

Normal maintenance, repairs and service will be handled by appointment from 9:00 a.m. to 4:00 p.m. You must either authorize management to enter your residence if you are not home or be home during normal repair hours.

Emergencies are handled 24 hours a day. Contact a staff member on duty. Emergencies are defined as follows:

- No heat, air conditioning or electricity
- Broken window
- Non-functioning toilet

PEST CONTROL

With concern for the welfare and comfort of all residents, we maintain a quarterly pest control program for each apartment. If our quarterly control program does not appear to be adequately controlling pests in your apartment, please contact the office. You can assist us in this effort by maintaining a sanitary environment.

PERSONAL CARE

Enhancement of residents' independence and self-esteem is our primary goal. We therefore, encourage rehabilitative and self-care efforts as much as possible. However, when assistance with daily living is needed, Resident Care Assistants will be available 24 hours a day, 7 days per week to supervise and or assist with:

- Dressing (partial)
- Bathing (extremities)
- Grooming
- Medication Management
- Walking (limited assistance)

The amount of assistance is based on the results of our functional assessment and an agreed upon plan of care.

TRANSPORTATION

Scheduled trips within 10 miles of the community are included in your Rental Fee. Transportation is provided to medical appointments, and to other scheduled activities.

Local medical transportation reservations are made through the Activities Director. Although every effort will be made to accommodate your needs, we cannot guarantee we will always be able to provide transportation at the time you desire. Please consult the Director of Resident Care for details or contact the front office for further information regarding transportation services. Non-emergency unscheduled trips will be subject to additional charges.

SCHEDULING FOR MEDICAL APPOINTMENTS

- Residents should inform the Director of Resident Care at least 48 hours prior to any appointment to be assured transportation will be available.
- Residents should be at the pickup point at least fifteen (15) minutes before the scheduled appointment time or when the transporter assigns a pickup time.
- Family members or responsible parties are required to accompany the Resident to all medical appointments. Furthermore, family members or responsible parties may take Residents to

medical appointments outside of the appointed transportation days. If this is done, please see the Director of Resident Care or a caregiver for the appropriate paperwork that must accompany the Resident to the appointment.

EXHIBIT B

Pharmacy Agreement

MEDICATION AGREEMENT

Pendleton manor requires all medication to be purchased from our contract pharmacy, Sr. Care Pharmacy, Charlotte, NC.

By using contract pharmacy family members are no longer required to refill, deliver to Pendleton Manor, or in any way manage the medication process. When new residents move in, medication brought from home in bottle form will be used to completion as long as the medications match the current physician admission paperwork.

Pendleton Manor does NOT manage any billing for the pharmacy; a direct bill will be sent to the designated family member or financially responsible party. Pendleton Manor is responsible for providing the pharmacy with any and all insurance options for medication. If there is a billing question, contact the pharmacy directly at 704-545-8641.

To follow all DHEC State Regulations, ALL medications, including over the counter drugs, must have a Physician's Order. If there are medications you are unsure of we are happy to get in touch with the physician and make the necessary arrangements for these orders. All medication orders must be obtained BEFORE move-in in order to be distributed to the resident.

Any new orders obtained from a resident's physician should be given to the nurse or med tech and they will have that medication delivered from Sr. Care Pharmacy to Pendleton Manor. Please DO NOT purchase medications from other pharmacy's and bring to Pendleton Manor. They will not be accepted! Our pharmacy provides 24-hour service 7 days a week.

Absolutely NO medication or treatment supplies or items can be kept in a resident room at any time. Pendleton Manor does not allow residents to self-administer medications of any kind at any time. This is a safety precaution for every resident.

C. Bagwood
Resident or Responsible Party

5-17-18
Date

Susan S. Paer
Executive Director

5/17/18
Date

1 THE COURT: Call the next one.

2 CLERK OF COURT: Case 2020-CP-23-04832. Debra Lynn
3 Peele, Personal Representative et al, versus Greenville
4 Retirement Property, LLC, et al.

5 THE COURT: This is listed as a motion to compel.

6 MR. ARNOLD: May it please the Court, Your Honor.

7 THE COURT: Yes, sir.

8 MR. ARNOLD: May I take my mask off?

9 THE COURT: Yes, sir.

10 MR. ARNOLD: I am Andy Arnold representing the
11 Plaintiff in this action. Our motion is a motion to
12 compel. This is a case of negligence, gross negligence,
13 wrongful death against an assisted living facility and a
14 hospice. And Ms. Peele is Personal Representative for the
15 Estate of her late mother. And we filed the action in
16 November, 2020 or thereabouts and with the summons and
17 complaint served discovery, request for production and
18 interrogatories. Those have yet to be answered. We filed
19 our motion to compel. Within three hours of filing our
20 motion to compel, five months, again, after discovery was
21 originally due; within three hours after filing our motion
22 to compel, the next motion you will hear was filed which
23 was a motion to stay. So, you know, it seems to me that
24 there was a delay until, I guess, I got the gumption to
25 make my motion to compel and then they decided they would

1 stay proceedings. So we received no objections, no
2 responses of any sort. And so I would ask this Court
3 simply to compel full and responsive answers to discovery.
4 Well, as little time as you would give them, 15 days.

5 THE COURT: What kind of -- was it interrogatories?

6 MR. ARNOLD: Interrogatories, request to produce and
7 I believe those were attachments to the motion.

8 THE COURT: Okay. You have got the attachment. All
9 right. What is -- let me, okay, you have got some
10 exhibits that I need to look at. Tell me about the motion
11 to stay. What is that about?

12 MS. BOZEMAN: Good morning or good afternoon, Your
13 Honor. May I take off my mask?

14 THE COURT: Yes, ma'am.

15 MS. BOZEMAN: My name is Virginia Bozeman and I am
16 with Turner/Padget here on behalf of Greenville Retirement
17 Properties and Reatha Connelly. We have filed a motion to
18 stay the proceedings to compel arbitration pursuant to an
19 arbitration agreement signed on the patient's behalf at
20 the time she was admitted To Pendleton Manor, the nursing
21 home where she was residing shortly before she died. And
22 it is our position, Your Honor, that, I mean clearly if
23 the motion to stay is granted then the discovery responses
24 will not be due. If our motion to stay is granted then we
25 ask for 15 days to respond is sufficient in the event that

1 the Court does not compel arbitration.

2 THE COURT: Let me ask you this. You said, is the
3 agreement attached as an exhibit to your --

4 MS. BOZEMAN: -- it is. So we have filed a memo in
5 support of our motion as well.

6 THE COURT: Okay.

7 MS. BOZEMAN: The agreement is attached, it is the
8 tenth page of the lease agreement that is attached to our
9 memo as Exhibit A. It is a separately executed agreement
10 but as you are scrolling through the exhibits, it is very
11 --

12 THE COURT: Well, let me just, let me just to save
13 time. I am going to go back and I am going to read it.
14 But tell me, who signed the agreement on her behalf?

15 MS. BOZEMAN: Yes, Your Honor. If you would like, I
16 can, would you like for me to go ahead and argue our
17 motion to stay now or just briefly address the arbitration
18 agreement?

19 THE COURT: Address the arbitration agreement. And
20 let me hear about the arbitration agreement because that
21 will be, if arbitration is appropriate and your motion is
22 granted that is going to affect the other motion. So let
23 me hear that first.

24 MS. BOZEMAN: Yes, Your Honor. At the time that Ms.
25 Bagwell was admitted to Pendleton Manor her daughter,

1 Cynthia Bagwell, held valid Health Care Power of Attorney,
2 held a valid Heath Care Power of Attorney and a General
3 Durable Power of Attorney that allowed her to sign the
4 lease agreement admitting her to the assisted living
5 facility and the arbitration agreement at the same time.
6 Your Honor, the arbitration agreement broadly allows Ms.
7 -- (inaudible), that arbitration agreement indicates that
8 it's governed by the FAA and that any disputes arising
9 between parties, relating to the care and treatment of Ms.
10 Pendleton or of Ms. Bagwell will be resolved outside of
11 the court system through arbitration instead. As
12 Plaintiff's Counsel indicated, this is a wrongful death
13 suit and the allegations in the complaint generally allege
14 that Ms. Bagwell died as a result of injuries endured
15 while being cared for at Pendleton Manor. So there is no
16 dispute that the cause of action itself falls within the
17 scope of the arbitration agreement. The Plaintiff instead
18 challenges the validity of the agreement on the grounds
19 that it identifies a forum for arbitration that no longer
20 hears consumer disputes. And that Cynthia Bagwell, who
21 did hold a General Power of Attorney, did not have the
22 authority to sign the arbitration agreement on Ms.
23 Bagwell's behalf. Now, Ms. Bagwell's signature is also on
24 this agreement. We don't contest the fact that Ms.
25 Bagwell had dementia. This agreement was executed by

1 Cynthia Bagwell as the attorney-in-fact for Ms., for
2 Aileen Bagwell, the patient. So I will briefly address, I
3 would like the opportunity to respond to Plaintiff's
4 Counsel's arguments. Pursuant to Dean versus Heritage
5 Health care, Plaintiff's Counsel has argued in response
6 that identification of the National Arbitration Forum,
7 which we don't contest no longer adheres at consumer
8 disputes, was an integral part of the agreement. And
9 because of that the Court can't strike it and interpret
10 the contract in its absence. We disagree. The contract
11 also includes a very broad severance clause. And if you
12 read through the arbitration agreement it identifies
13 arbitration as a means, as resolving the parties
14 disagreements outside of the courtroom. It plainly
15 expresses the intent of the parties entering into this
16 agreement to resolve any disputes concerning the care and
17 treatment of the residents through arbitration. And then
18 it does identify the National Arbitration Forum as the
19 forum that is to preside over the arbitration. However,
20 after that it includes a severance clause that allows any
21 clause within arbitration agreement, that is at any point
22 deemed to be unenforceable to be removed, to be severed
23 from the agreement. And in Dean versus Heritage Health
24 Care, the South Carolina Supreme Court adopted an
25 administrative, in accordance with method of interpreting

1 methods for the Court to use when deciding how to
2 interpret an arbitration agreement that has identified a
3 forum in which the dispute arising between the parties
4 cannot be resolved. And it says in the absence of other
5 evidence, if the agreement states that the arbitration is
6 to be conducted in accordance with a particular forum
7 procedures then that's not an equitable part of the
8 agreement. But in the parties intent in entering into the
9 agreement can still be carried out in the absence of that
10 forum identification. On the other hand, if the clause,
11 if the arbitration agreement instead says that the
12 arbitration is to be conducted, to be conducted by or
13 administered by a particular forum, then it is typically
14 in absence of evidence to the contrary, an integral part
15 of the agreement therefore using basic contract law, there
16 is no meeting of the minds, if you remove that clause from
17 the agreement. When the Dean Court interpreted the
18 arbitration agreement at issue in that case, it did go on
19 to consider this other evidence. It considered the
20 language of the arbitration agreement as a whole, not
21 simply the in accordance with administered by language and
22 it went ahead and considered the terms of the severance
23 clause included within that arbitration agreement. And it
24 noted when a severance clause is included within an
25 arbitration agreement that is an indication that the

1 parties intent was for their differences to be resolved
2 outside of the courtroom through mediation. And the
3 identification of any forum in addition, any forum that,
4 by the time the dispute has arisen can no longer hear the
5 matter, it is just ancillary to that agreement. And that
6 is exactly what we have here. In fact, the arbitration
7 agreement explicitly states after explaining to the
8 parties exactly what arbitration is, that by entering into
9 this agreement it is the expressed intent of the parties
10 that they resolve their differences outside of the
11 courtroom through arbitration. In addition to that, not
12 only does it include a severance clause, it then gives the
13 patient or the patient's representative in this case 14
14 days to rescind the contract and to provide written notice
15 of the fact that she wants to terminate the arbitration
16 agreement and that wasn't done. This arbitration
17 agreement is still valid even in the absence of the
18 identification of the National Arbitration Forum to serve
19 as the (inaudible). Your Honor, in the absence of that,
20 this, the FAA contemplates this situation. It
21 contemplates a situation where there is an arbitration
22 agreement that doesn't identify forum and in section five
23 of it the Court is given the ability to appoint the
24 arbitrator when the agreement itself does not do so. I
25 don't think that we are at that point today. Today the

1 Court will decide whether or not this agreement is valid.
2 But if the Court upholds the agreement and compels the
3 parties to engage in mediation then we would decide --

4 THE COURT: -- mediation or arbitration?

5 MS. BOZEMAN: Arbitration, excuse me, Your Honor. If
6 the Court compels arbitration then the forum for
7 conducting that arbitration would be the subject of a
8 later motion where, subject the parties could agree to.
9 Relying on, moving onto the Plaintiff's second objection
10 to this agreement, Plaintiff has relied on Arrendondo, the
11 most recent case addressing the inability as an
12 Attorney-in-fact to sign an arbitration agreement on
13 behalf of a principal. Your Honor, the arbitration clause
14 at issue in Arrendondo was very narrow and very
15 distinguishable. The Power of Attorney appointment in
16 Arrendondo was very narrow. It had to do with the
17 ability, as the Attorney-in-fact, to enter into various
18 property related contracts on behalf of the principal. It
19 did not include and the Arrendondo Court pointed this out,
20 it did not include general language allowing the
21 Attorney-in-fact to enter into any and all transactions
22 that the principal would be allowed to, would be able to
23 enter into if the principal were competent. And the Court
24 noted, had that language been included in the Power of
25 Attorney then the outcome would have been different. Here

1 and the General Power of Attorney is also attached as an
2 exhibit, I believe it is Exhibit B, to our motion to
3 compel arbitration. The Power of Attorney signed by
4 Cynthia Bagwell includes the dry general appointment
5 language that the South Carolina Supreme Court noted was
6 missing from the Arrendondo Power of Attorney. It
7 indicates and I will briefly read introductory clause. I
8 grant my Attorney-in-fact the maximum power under law to
9 perform any act on my behalf that I could do personally
10 including but not limited to and a long stream of
11 transactions are listed. And it includes all claims and
12 litigation. The magic language in that clause is the
13 language indicating that Cynthia Bagwell had the power to
14 perform any act that her mother could have performed had
15 she had the mental competency and so had this durable
16 Power of Attorney not put in place, to make that decision
17 on her behalf. And for that reason the Power of Attorney
18 signed by Cynthia Bagwell is distinguishable from the
19 Power of Attorney interpreted in the Arrendondo decision.
20 And this Power of Attorney included all rights, including
21 the ability to enter into an arbitration agreement
22 allowing the parties to resolve their differences outside
23 of the courtroom including any disputes arising as the
24 result of the residential care and the Health Care
25 provided it to Ms. Bagwell while she was a residence in

1 Pendleton Manor. And for those reasons we ask the Court
2 to stay the current litigation, enforce the valid
3 arbitration agreement executed by the parties and compel
4 the parties pursuant to the FAA to arbitrate this matter.

5 THE COURT: Thank you, Ms. Bozeman. Mr. Arnold, your
6 response on the Defense motion.

7 MR. ARNOLD: I do. So in order to resolve this
8 motion you need to know one statute and three cases. The
9 FAA and the Grant case which I cited in my relatively
10 short memorandum, so that may be the one you want to start
11 with, and the Grant case is cited on page three. The Dean
12 case which cited on page four and then the Arrendondo
13 case, which she just mentioned, which is cited on page
14 five. So let's start with the FAA. The FAA essentially
15 says that an arbitration agreement included in a
16 transaction that implicates interstate commerce is subject
17 to arbitration and can be compelled by the Court. What
18 section four says, however, and it says it repeatedly.
19 That a court can direct such arbitration to proceed in the
20 manner provided in the agreement. It says it again, the
21 Court shall make an order to direct the parties to proceed
22 to arbitration in accordance with the terms of the
23 agreement. And it ends with, shall make an order
24 summarily to direct the parties to proceed with
25 arbitration in accordance with the terms thereof. Okay.

1 So this idea that we just get to compel anything, the
2 Arbitration Act says what we are looking to do is to
3 compel arbitration consistent with the agreement of the
4 parties. Section five states, if the agreement, if the
5 agreement provision be made for a method of naming or
6 appointing an arbitrator such method shall be followed.
7 So that is what that says. I did say there is three
8 cases, I am going to give you one other just, there is a
9 Supreme Court case and I am just going to quote it. U.S.
10 Supreme Court case says, the FAA confers a right to compel
11 arbitration only in the manner provided for by the parties
12 in the agreement. So this is governed by the FAA. Now,
13 there are really two issues that are before the Court
14 under both Grant and Dean. So Grant and Dean govern, what
15 we call this first issue, is whether this arbitration
16 agreement is enforceable. So first of all, I have got to
17 be able to demonstrate that the Forum is unavailable,
18 okay, and I think we agree. NAF, that Forum that is
19 specified in the arbitration agreement is unavailable, the
20 National Arbitration Forum, NAF, they are owned by, they
21 have been unavailable since 2009. So somebody may want to
22 start looking at these agreements because we could have
23 saved ourselves some time and expense. So that Forum is
24 unavailable. So the next question for the Court is, is
25 NAF integral, let me say that again, integral to the

1 agreement of the parties. Okay. So that is where Grant
2 and Dean come in. Grant says there is these two, and she
3 went over fairly well but I am going to just kind of
4 repeat what the Court said. Said there is two sets of
5 language, one that says it will be administered by NAF or
6 it will be done consistent with the rules of NAF or some
7 variation of that type of language. So they look at the
8 language of whether or not NAF, we are looking at NAF for
9 the rules or for the forum itself. Okay. And the
10 language of the agreement specifically says will be
11 resolved by binding arbitrator by the National Arbitration
12 Forum, under the code of procedures, then in effect. So
13 if you look at Grant and then Dean goes and talks about
14 Grant and goes through all the cases in, and continues
15 with this dichotomy and so I think we would both agree
16 that the language of this arbitration agreement resembles
17 that of Grant, not Dean. Now, what appears in Dean that
18 wasn't an issue in Grant was this issue of severability.
19 And one of the factors the Court got to and it is actually
20 the very last one, I think it was the fifth factor they
21 get to. They say, in that case there was a severability
22 provision and that was one of the factors that tip the
23 scales in favor of compelling arbitration in Dean. I do
24 not believe the case stands for the proposition that any
25 arbitration agreement with the severability clause will

1 fall under Dean. And, again, we have outlined Dean but I
2 think you are just going to have to look at the language
3 of Dean and that section that deals with severability.
4 Our position would be, if you sever and I don't know what
5 you sever and that would be another question, do you just
6 take, you take out the provisions that has NAF. If you
7 do, that is the only provision provided in arbitration in
8 this agreement. The one at the bottom says, we are going
9 to resolve these claims that is described in this section.
10 What is described in this section. Arbitration resolved
11 by NAF. At a certain point you start getting, it gets
12 redundant. It says, to initiate a claim of arbitration
13 you send it to the NAF and they give you the address of
14 NAF. So this idea that they are ancillary to this deal.
15 Now I will admit that the language of Dean is a little
16 scary for me. I mean listen, before I read it this was a
17 slam dunk. Grant makes us a slam dunk. Dean, it is a
18 slam dunk and, you know, kimalon, (inaudible), is guarding
19 the goal. So maybe that is the analogy. But I believe
20 that what, you get a circular argument if you buy
21 Defendant's argument which is, it can't be integral if
22 there is a severability argument. But it has the language
23 that the Court says is characteristic of integral
24 agreements. So I don't think it is quite as clear, well,
25 I know it is not quite as clear as Defendant makes it out.

1 And I think the question for the Court is, does the
2 severability clause trump the otherwise fairly clear
3 language that NAF was integral to this agreement. And
4 that is the issue. That is the first issue. Okay. We
5 contend, again, that they were in fact integral and that
6 if you take them out, if you take that provision out you
7 are left with nothing. And I guess if you want to go
8 strike through certain words, I guess that -- well, I will
9 leave that to Your Honor. But it gets a little
10 complicated even after the first set of questions. The
11 second issue and this is one governed by Arrendondo and
12 that is the one we cited on page four, is whether or not
13 the, I am sorry, that is page five. Whether the POA,
14 Cynthia Bagwell, had authority to enter into a voluntary
15 pre-dispute arbitration agreement. And all of that is
16 important. So for example, if this weren't voluntary, if
17 she had signed the arbitration agreement as a requirement
18 of the lease and that her mother could not become a
19 resident of the facility unless she signed this agreement
20 then clearly, if she has got the ability to sign the
21 lease, she has got the ability to sign an arbitration
22 agreement that is required to execute the lease. In this
23 case the arbitration agreement states pretty clearly that
24 this isn't required for admission, this is voluntary. So
25 then the question is, does the POA have the ability to

1 sign an arbitration agreement that is completely
2 voluntary, that has no other purpose than -- the way,
3 right to a jury trial. And Arrendondo suggest that it
4 does not. Now, I will again concede, the language in our
5 POA is different than the language in Arrendondo. But I
6 would point the Court to in the Power of Attorney, the
7 language that she quoted earlier. I grant my
8 Attorney-in-fact the maximum power of the law to perform
9 any act on my behalf which I can do personally including
10 but not limited to all acts related to. And then she
11 mentioned that there was this long string of things that
12 the POA could do, none of which apply to signing an
13 arbitration agreement. Now, my first response was, when I
14 am doing the research and I am making the arguments is,
15 well, it says relating to all claims and litigation. And
16 that arbitration, the agreement to arbitrate the claims
17 surely is part of that grant. Well, in Arrendondo there
18 was severed language. And the Court said, we are not
19 dealing with claims or litigation. This is pre-dispute
20 arbitration agreement. There were no claims, this is not
21 in connection with claims. This is a connection with
22 signing a pre-dispute arbitration agreement that is
23 voluntary. That has no other import and is not required
24 for Ms. Bagwell's interest in this facility. And so our
25 contention, is that under these facts, in light of

1 Arrendondo, that the POA did not posses the authority to
2 enter into a voluntary pre-dispute arbitration agreement.
3 And that language is language you will find in Arrendondo.
4 And so I think it is, again, you have to look at all the
5 facts and all the particulars. So to sum it up, we don't
6 think that this Court can compel arbitration because we
7 believe NAF is, in fact, an integral part of this
8 agreement and they aren't available. And if the Court
9 disagrees with us, then the Court should consider whether
10 the POA had the authority to enter into this agreement and
11 we don't believe she did. And I will end with this which
12 is, I am not sure, that there is this two-step. I mean,
13 we have got to have an arbitrator and I suppose we can try
14 to negotiate ourselves and I have already, I would like to
15 have that conversation if you compel but somebody is going
16 to have to decide who arbitrates this. We have got to
17 decide what rules we are arbitrating. And if you are
18 going to sever the arbitration provision of the
19 arbitration agreement you have got to decide whether or
20 not you severed the entire provision which is normally my
21 understanding of severance, you take one out and you leave
22 the rest. But if you take out the provision with NAF in
23 it you are left with nothing. So I would ask the Court to
24 consider that as well.

25 THE COURT: Any response, I will give you the last

1 word.

2 MS. BOZEMAN: Thank you, Your Honor. I will be
3 brief. I have got three points to raise. As far as the
4 language at section five. Section five specifically
5 states, if an arbitration agreement does not designate a
6 method of naming or appointing an arbitrator, excuse me,
7 that is my language, then and this is the important part
8 of section five. The Court shall designate and appoint an
9 arbitrator who shall act under said agreement with the
10 same force or effect as if he had been specifically named
11 therein. And section five not only address situations
12 where the arbitration agreement does not include the name
13 of the arbitrator but it also addresses situations where
14 the appointment of the arbitrator has lapsed which is not
15 exactly what has occurred here. But if the identification
16 of the National Arbitration Forum is severed from the
17 arbitration agreement then what the parties and the Court
18 are left with is an arbitration agreement that does not
19 identify an arbitrator. And section five does apply and
20 the FAA does provide the Court the ability to instead
21 decide on the arbitrator. And as far as Dean's, the Dean
22 decision and the language relating to the severance
23 agreement, Dean interpreted the Grant decision and took it
24 a step further. The severance agreement falls into the
25 category of other evidence that the Court can consider.

1 When determining whether the identification of an
2 arbitrator is in full part of the agreement or not. The
3 Court can look at this administered by, versus accordance
4 with language. But the Court can also consider additional
5 evidence. I submit, Your Honor, that regardless of
6 whether the identification of the arbitrator follows,
7 administered by the language versus in accordance with
8 language, the significance of the severance agreement
9 remains the same. And in the arbitration agreement, too
10 many agreements and clauses, but in the arbitration
11 agreement, when you have a chance to read it, the
12 agreement, word by word, it is clear that the parties are
13 agreeing to arbitrate their disputes outside of the
14 courtroom through arbitration even in the absence of
15 identification of the National Arbitration Forum. In
16 fact, even if for some reason, the severance clause would
17 apply, will be resolved by binding arbitration and again
18 with, by the National Arbitration Forum. For sentences,
19 before that, the term, arbitration, is explained. The
20 intent, the agreement even says that the parties expressly
21 agree to resolve their differences outside of the
22 courtroom and this follows a sentence explaining that that
23 is the purpose of arbitration, that the parties aren't
24 agreeing to give up their ability to sue or to later
25 challenge any, to later bring any cause of action arising

1 as a result of the lease agreement. Instead they are
2 agreeing that they will resolve this outside of the
3 courtroom through arbitration. Your Honor, that is the
4 integral part of the arbitration agreement under Grant.
5 And for that reason the Defendants are asking this Court
6 to compel arbitration. And quickly, Arrendondo decision,
7 simply that is not applied to the Power of Attorney that
8 Cynthia Bagwell signed, is that. Ms. Bagwell signed
9 appointing Cynthia Bagwell as her Attorney-in-fact. When
10 Your Honor reviews that opinion it sites to a Supreme
11 Court decision indicating that there is no requirement
12 that the Durable Power of Attorney include the ability to
13 sign an arbitration agreement. The FAA does not require
14 that and in the Arrendondo decision even points out that
15 there, a Durable Power of Attorney does not have to
16 specify arbitration by name in order for an attorney in
17 fact to sign, to validly sign an arbitration agreement
18 under the authority given to him or her by the Durable
19 Power of Attorney. Instead it points to the language in
20 the Power of Attorney being considered by the Arrendondo
21 Court. In that appointment the Attorney-in-fact was given
22 the authority to enter into various property transactions
23 and contracts as on the principal's behalf. The parties
24 argued that those property interests included the property
25 interest associated with lawsuits including future

1 litigation that was unknown at that certain time. And the
2 Court said this clause is too narrow. While arbitration
3 does not have to be included within the string of powers,
4 the principal is giving his or her Attorney-in-fact the
5 ability to conduct on his behalf. It does have to be
6 broader than just the general property transaction
7 language included in that specific Durable Power of
8 Attorney. It then pointed out that in the Kindred
9 decision, which is United States Supreme Court decision,
10 that the Arrendondo Court relied heavily on, the outcome
11 was different. And there the outcome was different
12 because the Durable Power of Attorney included that all
13 encompassing language giving the Attorney-in-fact the
14 ability to enter into any agreement that the principal
15 would have been able to enter into. And that is what we
16 have here, Your Honor. We do have all claims in
17 litigation included within the string of powers and that
18 language, Your Honor, was not an issue in Arrendondo. But
19 in addition to that, we have got this all encompassing,
20 you can do anything that I can do language. And that is
21 the language that the Arrendondo Court indicated would
22 have made a difference. And it did actually make a
23 difference in the Kindred decision. And for those
24 reasons, Your Honor, I submit the arbitration agreement is
25 valid and enforceable. And for that reason we ask that

1 the Court stay the present litigation and compel the
2 parties, arbitration is done.

3 THE COURT: Counsel, I am going to ask both of you
4 this question. And, Ms. Bozeman, you made a point earlier
5 about the Court having the authority to appoint an
6 arbitrator. Now, what I am hearing from you, Mr. Arnold,
7 is you believe, again, I am going to have to read
8 everything and make a decision on this. But in the event
9 that the motion were granted are you arguing that the
10 Court appoint that arbitrator?

11 MR. ARNOLD: I think that is what has to be done.
12 Now if the Court wants to give the parties a chance to
13 agree amongst themselves, I am certainly appreciative of
14 that. But I do think the Court would have to --

15 THE COURT: Again, I am going to take this under
16 advisement. I want to read what you submitted. I want to
17 go through this case law very carefully. But in the
18 meantime the two of you talk and see if you can agree on
19 an arbitrator and if you can't then, again, depending on
20 what I decide, that can be included in it.

21 MR. ARNOLD: Okay.

22 MS. BOZEMAN: Thank you, your Honor.

23 THE COURT: Thank you. An interesting case and I
24 look forward to delving into this. I will take it under
25 advisement and I will have my law clerk email you a

1 decision.

2 MR. ARNOLD: Okay, thank you very much.

3 MS. BOZEMAN: Thank you.

4 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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1 CERTIFICATE OF REPORTER
2
34 State Of South Carolina)
5 County of Newberry)
6
78 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Greenville, South
14 Carolina on the 19th day of May, 2021.15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17
18

19 September 23, 2021

20 *Joy E. Holston*
21 _____

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2021-000766
Civil Action No. 2020-CP-23-04832

Debra Lynn B. Peele, as Personal Representative of the Estate of Iola Aileen
Bagwell, ...Respondent,

v.

Greenville Retirement Properties, LLC d/b/a Pendleton Manor Assisted Living,
Reatha Connelly, Regency Hospice of Georgia, LLC, d/b/a Regency
Southerncare, Defendants,

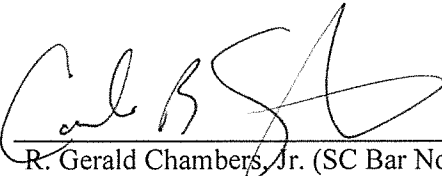
Of whom Greenville Retirement Properties, LLC d/b/a Pendleton Manor
Assisted Living and Reatha Connelly are Appellants.

CERTIFICATE OF COUNSEL

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

(Signature page to follow.)

March 3, 2022

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